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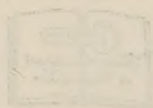
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PERRY v. AYERS. (Sac. 1,872.)

(Supreme Court of California. Feb. 24, 1911.

Rehearing Denied March 24, 1911.)

1. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.

Findings of fact on conflicting evidence are conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3983; Dec. Dig. § 1011.*]

2. SALES (§ 62*)—ENTIRE CONTRACT—CONSIDERATION.

Where one contracted to pay \$10,000 for a part interest in a mine, and 25,000 shares of stock of another mining company, the price not being apportioned to the various items, the contract was an entire one, and where the buyer received the shares of stock, in the absence of a rescission and return of such stock, he could not compel a repayment of his money as paid without consideration, because the interest bought in the other mine was worthless.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 171-179; Dec. Dig. § 62.*]

3. FRAUD (§ 58*)—FRAUDULENT REPRESENTATIONS—ACTIONS—DAMAGES.

In an action for deceit by one who purchased stock in one mine and an interest in another on fraudulent representations as to the value of the mine in which the interest was bought, such interest being alleged to be worthless, mere proof that plaintiff had paid the amount alleged, and that the interest in the mine which was part of the consideration to be received by him was valueless, would not justify a recovery without evidence as to what the interest in the mine would have been worth if the facts had been in accord with the seller's representations, and it being impossible to determine what price he paid for the item alleged to have been misrepresented, the contract of sale being an entire one.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. § 58.*]

4. APPEAL AND ERROR (§ 1078*)—BREACH—WAIVER OF POINTS NOT ARGUED.

Alleged errors in the admission or exclusion of evidence not argued by appellant in his brief, but merely covered by the statement, "we think the court erred," cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Department 1. Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by H. G. Perry against C. W. Ayers. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Affirmed.

H. G. Perry, in pro. per., and Rowan Hardin, for appellant. Street & Street, for respondent.

SLOSS, J. The action is one to recover damages for deceit. The complaint alleges that in April, 1907, the defendant owned a

one-fourth interest in an agreement under which he and others had a right to purchase certain mining property known as the Crystalline Mine, and that the defendant was in charge of the development of said mine. It is alleged that on the 29th day of April, 1907, the defendant represented to the plaintiff that a large and valuable vein of ore over 10 feet in thickness and carrying average values of \$5 or \$6 a ton in gold had been discovered and opened up in said mine, and that said vein would produce enough money to pay the purchase price of the property, and that the defendant and his associates would acquire said mine by paying the purchase price named in the agreement which they held. The complaint sets forth further representations that the property was of the value of \$150,000, and that defendant was contemplating and arranging for the incorporation of a company to take over the mine under said agreement of sale. The defendant, it is alleged, agreed to sell to plaintiff one-half of the interest which he would have in said corporation, which would be one-quarter of the capital stock, for the sum of \$5,000, and further agreed that upon the incorporation of said company stock would be issued to plaintiff for his interest so purchased. The complaint alleges that plaintiff, believing said representations and relying wholly thereon, paid over to defendant the sum of \$3,000 on account thereof on said 29th day of April, 1907. It is then alleged that each of these representations was false and was made by defendant with knowledge of its falsity and with the intent to deceive and defraud the plaintiff; that shortly thereafter the mine was closed down and the contract for the purchase of the property forfeited; that no company was ever incorporated to take over said mine, and no stock was ever issued to plaintiff; and that no consideration of any nature has been received by plaintiff for the money so paid.

The answer admits the allegations concerning the nature of defendant's interest in the mine; admits the making of some of the representations alleged and denies the making of others; alleges that all of said representations were true to the best of defendant's judgment and belief; denies that any representations made by defendant to plaintiff were false when made, or that they were known to defendant to be false, or were made with any intent to deceive plaintiff. It admits that the mine was abandoned, and that no corporation was formed, and alleges that the reason for this was that the development work proved that said mine could not be made to pay. The answer denies that the plaintiff received no consideration of any nature for his money, and alleges that he received full and adequate consideration for all money paid by him. There is an affirmative defense averring that on January 26, 1909, all claims and demands of plaintiff against defendant were settled by the pay-

ment of the sum of \$1,802 to plaintiff by defendant. In addition to what has been stated, the answer denies that the agreement between the parties was as averred in the complaint, and alleges that their real agreement was for a sale by defendant to plaintiff of 25,000 shares of the capital stock of the Mother Lode & Table Mountain Gold Mining Company and a one-half interest in defendant's share of said Crystalline mine for the sum of \$10,000. It is alleged that, on account of this agreement, the plaintiff paid to the defendant the sum of \$4,000 on or about March 21, 1907; that he paid to said Mother Lode & Table Mountain Gold Mining Company the sum of \$4,000 on or about April 29, 1907; that on the 5th day of May, 1908, he paid the defendant the sum of \$1,800; and that said 25,000 shares of stock were delivered to plaintiff prior to July 1, 1907. It is denied that the sum of \$3,000 was paid by plaintiff to defendant on account of said Crystalline mining transaction.

The findings are, in the main, in support of the denials and averments of the answer, and judgment in favor of the defendant followed.

Much of the discussion in appellant's brief is devoted to the questions whether certain findings are sustained by the evidence, whether some of the findings on material issues are not contradictory of the admissions of the pleadings, and whether or not the court erred in finding as a fact that the representations made by defendant to plaintiff were statements of opinion merely. In particular it is earnestly contended that the finding of a settlement is unsupported by the evidence. It will not be necessary to examine the legal propositions relied on in this behalf. The findings in favor of the defensive matter last mentioned in the foregoing summary of the answer are fully supported by the evidence, and these findings are of such a nature as to compel the affirmance of the judgment, regardless of any view that might be taken with regard to other questions argued by the appellant.

The plaintiff alleges that he made a contract whereby he was to receive one-half of the stock to be issued to defendant for his interest in the agreement to purchase the Crystalline mine. He alleges that in reliance upon false representations he paid \$3,000 upon this agreement, and that he received nothing therefor. Upon these facts, he bases his claim of a right to recover the sum paid, either as damages for the fraud practiced upon him or upon the ground that the consideration for the money so paid has totally failed. But the answer denies that the agreement was as claimed, and alleges that, in fact, the moneys paid by plaintiff to defendant were paid as a part of the sum of \$10,000 which plaintiff agreed to pay, not for a part interest in the Crystalline mine, but in consideration of such part interest, together with 25,000 shares of the stock of the

Mother Lode & Table Mountain Gold Mining Company, which stock he, in fact, received. That the agreement was as averred in the answer is found by the court, and this finding finds ample warrant in the record. Testimony supporting such finding was given by the defendant and by his wife. The testimony of the plaintiff was, to be sure, to the contrary, but the conflict so raised presented a question to be answered by the trial court. That court was vested with the power to determine whether the weight of the evidence was in support of one or the other version of the transaction and its conclusion is binding upon us.

If the agreement was as claimed by defendant and found by the court, it was clearly an entire contract for the sale of various items of property for a lump sum of \$10,000. The purchase price was not apportioned to the various items of property, and there is no basis upon which this court can divide the purchase price, and say that any specific part of it was applicable to the stock of the Mother Lode Company and any other part to the interest in the Crystalline mine. See *Norris v. Harris*, 15 Cal. 226, 256. If there was an entire contract, it cannot be said that the plaintiff received no consideration for his payments. He did receive the 25,000 shares of stock and, in the absence of a rescission and a return of this stock, he certainly can have no claim for the repayment of his money as money paid without consideration. Nor (under the assumption that the contract was as found by the court) did plaintiff furnish any foundation, either in his pleadings or his proof, for a judgment for damages for the fraud practiced upon him. All that he showed was the fact that he had paid certain money and that a part of the consideration to be received by him for this money was not received or was valueless. But this does not show what his damage was. The measure of damages for a fraud inducing the plaintiff to purchase property is the difference between the actual value of what he received and the value which it would have had if the fraudulent representations had been true. *Spreckels v. Gorrill*, 152 Cal. 383, 389, 390, 391, 92 Pac. 1011. Some cases adopt, as the proper measure, the difference between the price paid and the actual value. But the plaintiff did not prove facts from which his damage could be ascertained under either of these rules. He showed that the interest in the Crystalline mine was valueless, but he did not show what it would have been worth if the facts had been in accord with the defendant's representations. And he failed to establish a right to recover the difference between the actual value (i. e., nothing) and the price paid, because, as has been said, it cannot be determined what price he paid for this item

of the property which he was to receive under his contract covering both the Crystalline and the Mother Lode ventures. To permit him to recover what he paid under this entire contract would be to say that because of a fraud going to a part of the consideration the party defrauded may recover all that he has paid and still retain the consideration which he has received, a proposition which is so obviously untenable that it is not necessary to cite authority to disprove it.

The findings upon the issue we have been discussing are not affected by any of the errors relied on by the appellant. The motion for new trial was based in part upon newly discovered evidence, but the affidavits setting forth that evidence do not, we think, touch this issue in any material point. In any event, the counter affidavits contradicted those of plaintiff to such an extent that the trial court was fully justified in refusing to grant a new trial upon this ground.

The alleged errors in the admission or exclusion of evidence are not argued by the appellant; his brief merely stating that "we think the court erred" in making the respective rulings. Points so presented will not be considered here. *Duncan v. Ramish*, 142 Cal. 689, 76 Pac. 661; *Bell v. S. P. R. Co.*, 144 Cal. 573, 77 Pac. 1124; *Pigeon v. Fuller*, 156 Cal. 691, 105 Pac. 976.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

14 Cal. App. 576

PEOPLE v. RUEF † (Cr. 1,655.)

(Supreme Court of California. Feb. 28, 1911.)

1. CRIMINAL LAW (§ 1020½*) — APPEAL — TRANSFER OF CAUSE TO SUPREME COURT—ORDER TIME.

Under Const. art. 6, § 4, providing that the Supreme Court may order that any cause pending before a District Court of Appeal be heard and determined by the Supreme Court, which order may be made before judgment has been pronounced by the District Court of Appeal or within 30 days after such judgment shall have become final therein, the expiration of 30 days after the judgment of the District Court of Appeal has become final without an order transferring the cause to the Supreme Court terminates the power of that court to transfer the cause, and renders the judgment of the District Court of Appeal final for all purposes.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2577; Dec. Dig. § 1020½.*]

2. CRIMINAL LAW (§ 1020½*)—APPEAL—REVIEW BY SUPREME COURT—ORDER—FILING.

The filing of an order by the Supreme Court transferring a cause pending in the District Court of Appeal to the Supreme Court for hearing is valid if otherwise regularly made by a majority of the court, though not filed in the clerk's office within the prescribed time, filing not being essential.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1020½.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied March 30, 1911.

3. CRIMINAL LAW (§ 1020½*) — APPEAL — TRANSFER OF CAUSE TO SUPREME COURT—ORDER—JUDICIAL FUNCTIONS.

The granting of an application for hearing in the Supreme Court of an Appeal after decision by a District Court of Appeal is the exercise of a purely judicial function.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1020½.*]

4. JUDGES (§ 30*) — POWERS — AUTHORITY TO ACT—PLACE—EXTRATERRITORIAL JURISDICTION.

A justice of the Supreme Court has no power to exercise his judicial functions outside the territorial limits of the state.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 143; Dec. Dig. § 30.*]

5. CRIMINAL LAW (§ 1020½*) — APPEAL — TRANSFER OF CAUSE TO SUPREME COURT—ORDER—TIME OF TAKING EFFECT.

Since an order transferring a criminal case to the Supreme Court for hearing requires the concurrence of four justices of the Supreme Court qualified and with power to act, such an order does not become effectual until signed by the fourth justice.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1020½.*]

6. CRIMINAL LAW (§ 1020½*) — APPEAL — TRANSFER TO SUPREME COURT—ORDER—VALIDITY.

A judgment of a District Court of Appeal affirming a conviction became final at the expiration of December 23, 1910. On January 3, 1911, a petition to transfer the cause to the Supreme Court was filed and an order drawn and left in the chambers of the chief justice to be subscribed by such of the judges as were in favor of granting the same. On January 10, 1911, one of the justices, being about to leave the state for an absence extending beyond the period within which the order might lawfully be made, and believing the application should be granted, subscribed his name and on the next day left the state, and continued without its limits until the authorized period expired. Three other justices thereafter signed the order within the period and three others declined to concur. *Held*, that since the order took effect from the date of the signature of the fourth justice only, and at that time the signature of the absent justice was ineffective because of his then absence, the order did not have the concurrence of a majority of the court, and was ineffectual.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1020½.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; W. P. Lawlor, Judge.

Abraham Ruef, having been convicted of offering a bribe to a member of the Board of Supervisors of the City and County of San Francisco, and such conviction having been affirmed by the District Court of Appeal, an order was entered transferring the case to the Supreme Court for hearing in bank, after which the Attorney General moved the court to set aside the same as having been improperly allowed. Motion granted.

At the opening of the argument Mr. Chief Justice BEATTY, for the court, made the following statement:

After consultation, the court has thought it proper to make the following statement, so that the legal discussion may proceed upon

an express and distinct understanding of the facts:

In the matter of judicial opinions and decisions. During the service upon this bench of every member of it, and, as we are informed, ever since the organization of the court, the uniform practice has been as follows: The Chief Justice assigns to the justices in regular order the causes pending in bank. Each justice to whom a case is assigned prepares his opinion with or without consultation with other justices as he elects. Having prepared and signed his opinion, it is passed on to his associates for consideration. If in due course it is signed by three or more of his associates, it then expresses the opinion and judgment of a majority of the court, and, when finally handed to the secretary and by him transmitted to and filed with the clerk of the court, it becomes the opinion and judgment of the court. The court never convenes as a court, nor in chambers, in consultation, to approve opinions so signed previous to their filing. When they bear a sufficient number of signatures, they are filed, usually at the instance of the author. Signatures are thus separately attached, frequently with intervals of weeks or months between the respective dates of signing—as one or another justice may defer action until he has completed his examination. When he has done so, he then passes the opinion on to the next associate. In so filing opinions and decisions, no account has ever been taken of the matter whether at the time of filing any justice whose signature the decision bears is or is not at the place where the court is held.

In the matter of applications for hearings before the court in bank after decision in department, for hearing before the court after decision by the Court of Appeals, and for rehearings by the court in bank after decision in bank, the uniform practice is and has been for the justices to meet in consultation for their consideration. It has been a not uncommon practice for a justice who believes a hearing or rehearing should be granted, and who, for any reason, will not be present at such consultation, to affix his signature to the order granting a hearing or rehearing in advance of such consultation. Such signatures attached to orders for hearings and rehearings have always been regarded by the court as valid, although at the time the order granting the hearing or rehearing takes effect the justice so signing may be absent from the place where the court is held. When signed by a sufficient number of justices, the original order is delivered to the secretary. In cases of petitions for hearing or rehearing of causes decided by this court, the original order, and in cases of petitions for a hearing after decision in the courts of appeal, a copy of the order is filed with the clerk of the court.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It has also been a matter of frequent occurrence for an opinion or decision, or for the order granting a hearing or rehearing to be sent or taken to an absent justice for his action thereon apart from any consultation and from the presence of his associates. It has happened several times that a member of the court has been absent from the state for a period of time, varying in length from two to eight weeks. In filing opinions and decisions and orders for hearing or rehearing, no question has ever been raised as to whether at the time of filing any justice whose signature the decision or order bears is or is not within the state. The court has not heretofore been called upon to consider the effect of the absence of a justice from the state at the time an order signed by him was made. This court has never considered that the presentation of an application for hearing or petition for hearing or rehearing is necessary or prerequisite to the exercise of its jurisdiction to consider and review for the correction of errors. It has always acted in the belief that it is vested with this constitutional power to be exercised of its own initiative in any appropriate case.

The Attorney General, we make sure, will join the court in saying that the facts contained in his affidavit on file herein were freely made known to him by the court, and he was advised by the court that it would welcome the motion here made and now to be considered.

C. W. Cross and W. H. H. Hart (*amicus curiæ*), for appellant. U. S. Webb, Atty. Gen., for respondent.

PER CURIAM. This is a motion made by the Attorney General of the state for an order vacating an order of this court, dated January 22, 1911, and filed in the office of the clerk of this court on January 23, 1911, assuming to grant the application of defendant in the above-entitled cause for a hearing of said cause in this court after decision by the District Court of Appeal for the First District. 114 Pac. 54. The motion is based on the ground that the said order is a nullity, and was inadvertently made and entered.

While several claims are urged in support of this motion, there is but one deemed by us to be of any importance, or as affording any ground for doubt as to the validity of the order in question. Upon the first point made by the Attorney General, which is, as we understand it, that no decision or order can be made by this court except when a sufficient number of justices are personally present at the place where court is held and there assembled as a court, and concur therein, we do not entertain any doubt whatever. The practice of this court in this behalf has been fully outlined in the unanimous statement of the court filed at the commencement of the argument on this motion. This statement will be published in our reports pre-

ceding this opinion. It is enough to say, in answer to the point, that the joint action or concurrence of four justices is the thing required to constitute the action of the court, and that, in contemplation of law, this joint action is taken when four justices have in writing declared their concurrence in a particular order or judgment, with intent to make it an order or judgment, and it is immaterial whether their respective signatures are appended when they are together, or whether they are made separately, at wide intervals of time and place, provided always, that at the time such order or judgment becomes effective such four justices are qualified to act in the particular matter.

The facts material to the consideration of the real question presented by this motion are not at all in dispute, and, so far as necessary, were furnished to the attorney-general by the members of this court. We will briefly recite them.

The appeal of the defendant from the superior court to the District Court of Appeal was decided by that court on November 23, 1910. The judgment of the superior court and its order denying defendant's motion for a new trial were affirmed. Under the provisions of section 4 of article 6 of the Constitution, the judgment of the District Court of Appeal became final in that court at the expiration of December 23, 1910. The Supreme Court was by said section empowered to order said cause to be heard and determined by the Supreme Court, provided, however, that such order was made "within thirty days after said judgment" became final in the District Court of Appeal. The language of the constitutional provision is: "The Supreme Court shall have power to order any cause pending * * * before a District Court of Appeal to be heard and determined by the Supreme Court. The order last mentioned may be made before judgment has been pronounced by a district court of appeal, or within thirty days after such judgment shall have become final therein." It is necessarily conceded that the expiration of said period of 30 days without the making of such an order by this court ends its power in that regard, and renders the judgment of the District Court of Appeal final for all purposes. See, as bearing on this question, *Adams v. Dohrmann*, 63 Cal. 420. The last day for action by this court in this cause was therefore January 22, 1911. A petition on behalf of the defendant invoking this action by this court was duly filed herein on January 3, 1911, and there was thereupon prepared by our secretary, in accordance with the usual custom, a form of order granting the application, which was as is usual in such cases left in the chambers of the Chief Justice to be subscribed by such of the justices as were in favor of such granting. On January 10, 1911, Justice Henshaw, being about to depart from the state for a brief absence extending beyond the period within

which the order might lawfully be made, and believing that the application should be granted, subscribed his name to said order so prepared. On January 11, 1911, he departed from the state, and thereafter continuously remained without its limits until the period expired within which said order might lawfully be made. On January 19, 1911, Justice Melvin, deeming that the application should be granted, subscribed his name to said prepared form of order. On January 21, 1911, the remaining five justices of this court namely, Chief Justice Beatty, and Justices Shaw, Angellotti, Lorigan, and Sloss, met in the chambers of the Chief Justice for consultation regarding said application, and Justice Lorigan, deeming that the application should be granted, subscribed his name to said order. Justices Shaw, Angellotti, and Sloss declined to concur in such order, and the Chief Justice reserved his decision in the matter until January 22, 1911, when he, having concluded that the application should be granted, subscribed his name to the order. The order was filed, by copy, in the office of the clerk of this court on January 23, 1911, the original order, in accordance with our uniform practice, being retained in the office of our secretaries.

We are entirely satisfied that the filing of the order in the clerk's office within the prescribed time was not essential to its validity, if it was otherwise regularly made by a majority of the court. See *Niles v. Edwards*, 95 Cal. 41, 43, 47, 30 Pac. 134. It is clear that to make such an order there must under the constitutional provision already set forth be a concurrence therein of a majority of the members of the court, namely, four justices. As only three justices concurred in this order, if Justice Henshaw be excluded from consideration, the real question presented by this motion is the effect of his absence from the state commencing prior to any action on the part of the other three justices in the matter and continuing until after the time expired within which such order might legally be made.

It cannot be doubted that the granting of an application for a hearing in this court after decision by a District Court of Appeal is the exercise of a purely judicial function. It is admitted by learned counsel for defendant that a justice of this court can exercise no judicial function while absent from the state of California. The authorities agree upon the proposition that a judicial officer must exercise his judicial power within the territorial limits of his jurisdiction, and that any attempted exercise thereof while without such territorial limits is in the absence of express provision of law authorizing the same a nullity. In the Matter of Steele (D. C.) 156 Fed. 853, Hundley, J., says: "I fail to find a single case or authority wherein the judge is held to be the court, or a part of the court, while absent from the territory, prescribed by law within which the court is re-

quired to be held." An examination of such authorities as we have been able to find, including all that have been cited in the argument, shows nothing to impugn the accuracy of this statement. In the opinion of Justice Anderson in *People v. Wells*, 2 Cal. 219, we find an interesting discussion of the distinction between the vested right of tenure in the term of a justice of the Supreme Court and the functions of that office. He says: "The vested right of tenure for the term carries with it the privilege of enjoying certain emoluments. This vests solely that personal right, which only determines the power of exercising the functions of the office, under particular qualifications of time and place." While a justice continues within the state, the vested right in the tenure of the office is determinative of the functions, and they attach by reason of that vested right. "But the moment the judge passes beyond the territorial line they cease to exist. Anywhere within the state he has certain prescribed functions. * * * But, when he absents himself from the state, his vested right of tenure in the term of the office is distinct from that, and is not parted from by him, but attaches to his person. It goes with him, and keeps with him. The functions of the office are left behind, and cannot be taken out of the state. They become temporarily vacant." While this discussion was contained in the opinion of only one of the three justices of the court, there is nothing in the other opinions that is at all inconsistent therewith, and, while it cannot be taken as having the force of a decision on the question, it appears to us to be a correct statement of the law. In *Lynde v. County*, 83 U. S. 6, 21 L. Ed. 272, the Supreme Court of the United States made a distinction between the exercise of judicial power and the performance of ministerial acts by one occupying a judicial office and clothed by law with authority to perform such ministerial acts, saying: "Judicial power is necessarily local in its nature, and its exercise, to be valid, must be local also." In *Phillips v. Thralls*, 26 Kan. 780, the Supreme Court of Kansas, speaking through the late Justice Brewer, then a member of that court, said: "Unquestionably a judicial officer must exercise his jurisdiction within the territorial limits of that jurisdiction. This, as a general proposition, will not be questioned by any one. * * * Every act of jurisdiction exercised by a judge without his territory * * * is null." In the later Kansas case of *Dunn v. Travis*, 45 Kan. 541, 26 Pac. 247, a judge of a district court of Kansas, while in the state of Illinois, made an order extending the time within which a case for the Supreme Court on appeal from his court could be served, settled, and signed. The order was held to be a nullity; the court saying: "The order extending the time is therefore a nullity as it will not be seriously contended that he could make judicial orders

while absent from his district." In *Buchanan v. Jones*, 12 Ga. 612, a judge of the superior court granted a writ of certiorari while out of the state. This was dismissed on the ground that judges of the superior court of that state have no authority to do any official act required by the laws thereof beyond its jurisdiction. The court said: "His official acts derive all their force and authority from the Constitution and laws of this state, which are only coextensive with the territory thereof. * * * When a judicial officer of this state goes beyond the operation of the laws by virtue of which all his official acts derive their binding force and authority, he cannot be considered as acting there, in obedience to the mandate of the sovereign will of the state, for the simple reason that that mandate of the sovereign will of the state has no extraterritorial operation." In *Price v. Bayless*, 131 Ind. 437, 31 N. E. 88, a temporary restraining order was made by an Indiana judge while in the state of Michigan, and the Indiana Supreme Court said: "This action was unquestionably erroneous. His authority as judge was conferred alone by the Constitution and laws of this state. Our laws have no extraterritorial operation. When the judge passed the boundaries of the state, the power to exercise judicial functions did not follow him. He could not, as judge, sit in chambers in the state of Michigan and issue a valid restraining order."

In view of what has been said, it is clear that the concurrence of a justice in an order granting an application for a hearing in this court after decision and judgment by a District Court of Appeal cannot lawfully be given while such justice is not within the state, and, as we understand the argument of learned counsel for defendant, it is not claimed that Justice Henshaw could have assisted or participated in any way in making the order effectual as an order of this court while he was absent from the state, had he not indicated his assent before leaving the state by subscribing his name thereto. This brings us to what is, in fact, the only real question presented by this motion, viz.: The effect, during his absence from the state, of Justice Henshaw's signature to this order, such signature having been attached thereto prior to his departure from the state. We have seen that the concurrence of four justices is essential to the validity of an order of the character here under consideration. This necessarily implies a concurrence of four justices, qualified and with power to act, at the very moment of action as a court, or, to put it in the language of the New York Court of Appeals in the *Matter of Kings County, etc., Co.*, 78 N. Y. 383, "when the decision is actually made." In that case the court was composed of three justices, any two of whom had power to render judgment. A motion to confirm a report of commissioners had been argued before three justices,

and one of them had departed for Europe before any decision was reached. While absent from the state, he communicated his decision to the Chief Justice. The two justices remaining in the state, one of whom was the Chief Justice, then attempted to decide the case, one being for confirmation, the other opposed, upon the theory that the communication from the absent justice was sufficient to make a concurrence of two, and sufficient therefore to render a judgment, and an order was entered accordingly, one of the two justices present dissenting. The order so made was held to be a nullity; the court saying: "That the absent judge has previously indicated his conclusion is not enough, for he must participate or take part when the decision is actually made, to render it lawful." It is not necessary here to determine just when an order granting such hearing is actually made, whether when, at any time prior to the expiration of the 30-day period, four justices have assented thereto and have subscribed their names to the order as a decision of the court, or when, the order not having as yet been filed, but bearing the signatures of four justices, the time expires within which such action may lawfully be had. Such order certainly is not made until four justices have concurred therein.

The word "concurrence," as used in this connection, means agreement or union in action and design. There must be such agreement or union on the part of at least four justices qualified to act to make such an order effectual as an order of this court, and the uniting therein on the part of each justice is an exercise by him of a judicial function. When Justice Henshaw left the state, no other justice had joined with him in assenting to such order, and the assent theretofore given by him amounted to nothing more than an indication by him to his associates of his then willingness to concur with three or more of them in such proposed order. If he had thenceforth remained within the state, and three other justices had within the time allowed by law also indicated their assent by signing the order, the consent of Justice Henshaw, indicated by his signature, if the same had not been withdrawn by him, would have shown a concurrence of four qualified justices in the order, his previously indicated consent continuing to the time of such concurrence. It is undoubtedly true, and is the settled practice of this court, that any justice may withdraw his previously indicated assent to either decision or order at any time before the decision or order is actually made. It is likewise true that such previously indicated assent on the part of any justice to either decision or order is ineffectual for any purpose, if, pending the actual making of the decision or order, such justice dies, or, for any reason, ceases to be a member of this court. The reason that this is true is that his previous-

ly indicated assent becomes ineffectual for any purpose the moment that he is no longer able to exercise judicial functions (*Broder v. Conklin*, 98 Cal. 360, 33 Pac. 211), and that an assent, to be in any way effectual to the making of a decision or order must be operative at the moment of the making of the decision or order. There is no difference material to the motion under consideration between the facts in the case at bar and the case of a justice who has died, or who has otherwise ceased to be a member of the court. The moment Justice Henshaw left the state, in view of the authorities already referred to, he became unable to exercise any judicial function as a justice of the Supreme Court, in this state or out of it, and this disability continued during the whole period of his absence. During that time his situation was the same as if he had absolutely ceased to be a member of this court. It is true that there was a suspension only of his judicial power, instead of a final abrogation thereof, but the suspension, while it continued, was as absolute in its effect on his judicial power as would have been a complete vacancy in his office. Assent to or concurrence in a decision or order of the court being the exercise of a purely judicial function, his previous proposal to concur in a proposed order, one that had not yet been made and one that had not yet received the assent of other justices making it an accomplished decision, temporarily ceased to be effectual for any purpose, and so continued ineffectual for any purpose during the whole period of his absence. Such previously indicated willingness to concur could not accomplish that which the absent justice himself could not accomplish. The time having expired before he returned, it follows that he never concurred with even a single other justice in the purported order. Admittedly this order, if it ever did become effectual, did not become so until January 22, 1911, when the fourth justice appended his name. At that time, however, Justice Henshaw could not effectually join therein, because of his absence from the state, and his previously indicated willingness to join therein could have no legal effect. The result is that only three justices of this court concurred in the purported order, and, as such order could be made only by the concurrence of four justices, it was ineffectual for any purpose and void.

As was said in our written statement filed at the commencement of the argument on this motion, the question of the effect of the absence of a justice from the state at the time a decision or order signed by him is made has never heretofore been raised in this court, and it was taken for granted by all the justices, including Justice Henshaw, that the absence of such justice would not preclude him from participating in such decisions and orders as he had signed prior to

his departure from the state. The mere suggestion of the point made in support of the pending motion and discussed in this opinion was sufficient to raise in our minds the gravest doubt as to the correctness of this conclusion, and our subsequent consideration of the question has left us entirely satisfied that the point is well made.

It therefore follows that the purported order must be held to be void for want of concurrence therein of the necessary number of justices. Without such concurrence there could be no valid order, and it becomes the duty of the court to strike the void order from its records. The order being void, jurisdiction of the case is still in the District Court of Appeal for the First District for action under its final judgment, from which court it has never, in truth, been removed, and it will be the duty of our clerk, upon the purported order being vacated, to return the original record to the clerk of such District Court of Appeal.

The order of January 22, 1911, filed January 23, 1911, assuming to grant the application of the defendant in the above-entitled cause, for a hearing in this court after decision in the District Court of Appeal for the first district, is vacated.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.; SHAW, J.; SLOSS, J.

14 Cal. App. 572

REGAN v. SUPERIOR COURT OF MARIN COUNTY. (S. F. 5,767.)

(Supreme Court of California. Feb. 28, 1911.)
CRIMINAL LAW (§ 1020½*)—APPEAL—TRANSFER OF CAUSE TO SUPREME COURT.

Where only four of the justices of the Supreme Court concurred in the removal of a cause to the Supreme Court for determination after final judgment in the District Court of Appeal, and one of the judges concurring was out of the state at the time and from thence continuously until after the time for making the order had expired, the order of transfer was inoperative.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1020½.*]

In Bank. Appeal from Superior Court, Marin County; Thos. J. Lennon, Judge.

Petition by Henry Regan for writ of review against the Superior Court of Marin County. An order granting the writ and annulling the superior court's proceedings having been granted by the District Court of Appeal, an order was entered transferring the case to the Supreme Court. Annulled.

George H. Harlam, for petitioner. Wal J. Tuska, for respondent.

PER CURIAM. An order having been filed herein on January 16, 1911, purporting to transfer this cause to the Supreme Court for hearing and determination, after final

judgment thereof in the District Court of Appeal of the First District, 114 Pac. 72, which order was concurred in by only four justices, namely, BEATTY, C. J., HENSHAW, J., SHAW, J., and LORIGAN, J., and Justice HENSHAW being at that time, and from thence continuously until after the time for making such order had expired, out of the state of California, the court is of the opinion that said purported order was and is, by reason of such absence, inoperative and void. See *People v. Ruef*, 114 Pac. 48, this day decided. Wherefore it is ordered by the court that said order be vacated and annulled, and that the papers in said cause be returned to the said District Court of Appeal.

14 Cal. App. 651

BROWN v. NORTHERN CALIFORNIA POWER CO. (Sac. 1,798.)

(Supreme Court of California. Feb. 28, 1911.)

CRIMINAL LAW (§ 1020½*)—APPEAL—TRANSFER OF CAUSE TO SUPREME COURT.

Where only four of the judges of the Supreme Court concurred in the removal of a cause to the Supreme Court for determination after final judgment in the District Court of Appeal, and one of the judges concurring was out of the state at the time the fourth justice signed the order, and from thence continuously until after the time for making the order had expired, it was inoperative.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1020½.*]

In Bank. Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Thomas Brown against the Northern California Power Company. Judgment for defendant, and plaintiff appeals. After judgment in the District Court of Appeal for the Third District, the case was transferred to the Supreme Court. Remanded.

Charles L. Donohoe and Frank Freeman, for appellant. Reid & Dozier, for respondent.

PER CURIAM. An order having been filed herein on January 16, 1911, purporting to transfer this cause to the Supreme Court for hearing and determination, after final judgment thereof in the District Court of Appeal of the Third District (114 Pac. 74), which order was concurred in by only four justices, namely, BEATTY, C. J., HENSHAW, J., SHAW, J., and LORIGAN, J., and Justice HENSHAW being at that time, and from thence continuously until after the time for making such order had expired, out of the state of California, the court is of the opinion that said purported order was and is, by reason of such absence, inoperative and void. See *People v. Ruef*, 114 Pac. 48, this day decided. Wherefore it is ordered by the court that said order be vacated and

annulled, and that the papers in said cause be returned to the said District Court of Appeal.

14 Cal. App. 576

PEOPLE v. RUEF. (Cr. 278.)

(Court of Appeal, First District, California. Nov. 23, 1910. On Petition for Rehearing, Dec. 23, 1910.)

1. BRIBERY (§ 11*)—EVIDENCE—WEIGHT.

Evidence held to sustain a verdict convicting defendant of bribing one of the supervisors of a city and county to influence his official action.

[Ed. Note.—For other cases, see *Bribery*, Dec. Dig. § 11.*]

2. CRIMINAL LAW (§ 1186*)—APPEAL—REVIEW.

Under Pen. Code, § 1258, requiring the court to give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties, a conviction will be affirmed unless it appears that defendant has not been accorded a fair trial according to law.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. § 1186.*]

3. CRIMINAL LAW (§ 1152*)—MATTERS OF DISCRETION—COMPETENCY OF JURORS—OPINION—STATEMENTS IN PUBLIC JOURNALS—PUBLIC RUMOR.

Pen. Code, § 1076, provides that a juror shall not be disqualified by reason of an opinion founded on public rumor, statements in public journals, or common notoriety, provided it appears to the court that he can and will act impartially notwithstanding such opinion. Held that, where a juror's opinion was founded on public rumor, statements in public journals, and common notoriety, a finding by the court in the exercise of discretion that the juror could and would notwithstanding his opinion impartially and fairly act on the matters submitted to him would not be interfered with on appeal except in case of palpable abuse of discretion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3056; Dec. Dig. § 1152.*]

4. JURY (§ 103*)—QUALIFICATION OF JURORS—OPINION—EVIDENCE BEFORE A GRAND JURY.

Pen. Code, § 1076, provides that an opinion acquired by a venireman from public rumor, statements in public journals, and common notoriety will not disqualify him if it appears to the court from his declaration, under oath or otherwise, that he can and will act impartially, etc. Held, that the publication in a newspaper of the evidence given before the grand jury in more or less detail by question and answer from which a venireman formed an opinion was not more than "statements in a public journal," and did not disqualify him, where the court found that the juror could and would act impartially notwithstanding such opinion.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 461-479, 497; Dec. Dig. § 103.*]

5. JURY (§ 133*)—ACTS OF DISTRICT ATTORNEY—UNFAIR TRIAL.

While it is improper for a district attorney to willfully endeavor to pack a jury or endeavor to get thereon men who are biased against the defendant to such an extent as to make them unfair jurors under the law, he is still the attorney for the people, and may properly use legal means to secure a conviction, and in a legitimate way ascertain the character, standing, and integrity of jurors before they are sworn.

[Ed. Note.—For other cases, see *Jury*, Dec. Dig. § 133.*]

6. JURY (§ 133*)—CHALLENGE—REPORT CONCERNING JURORS.

Where during the examination of a juror on his voir dire the defendant called the assistant district attorney to the stand, and inquired whether he had not in his possession a report made by an agent or employé of the district attorney's office as to an alleged interview with the juror or concerning the juror's state of mind or opinion concerning the case, the court did not err in refusing over the district attorney's objection to compel him to produce such report or to divulge its contents.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 133.*]

7. JURY (§ 133*)—CHALLENGE—QUALIFICATION OF JURORS—ANTECEDENT REPORTS.

Where, during the examination of a juror on his voir dire, it appeared that an employé of the district attorney's office had interviewed the prospective juror with reference to his qualifications, and as to whether he had formed an opinion as to defendant's guilt or innocence, and had made a report concerning the same to the district attorney's office, such employé might be called and examined with reference to such interview, during which the court might require the production of the report in aid of eliciting the whole truth from the witness.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 133.*]

8. CRIMINAL LAW (§ 656*)—TRIAL—CONDUCT OF JUDGE.

During the examination of a witness defendant's counsel, claiming that the witness hesitated, asked why he testified on direct examination without qualification or hesitation and on cross-examination always waited from five to ten seconds before he answered. The court sustained an objection, stating that, if the witness was engaged in an effort to collect his thoughts and render a proper answer, his hesitation was proper, and that every man had temperamental qualities rendering it possible for some to make immediate response and requiring others to hesitate. The court thereupon laid down a rule that counsel should propound a question, and must wait until the witness answered, and after answer, if there was anything about the witness' hesitancy in answering, that matter might be taken up as a special subject of inquiry. The court also stated to counsel that he should not assume a harsh demeanor toward the witness and had no right to use insulting language, nor to detain the witness longer than the interests of justice seemed to require. *Held*, that the court's remarks did not constitute misconduct, nor were they objectionable as indicating the court's opinion that the witness was credible.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 656.*]

9. CRIMINAL LAW (§§ 655, 656*)—TRIAL—COMMENTS OF TRIAL JUDGE.

It is improper for a trial judge to make any comments on the credibility of a witness, or in excuse of his manner of testifying, or in disparagement of counsel because of his manner of examination.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1520-1535; Dec. Dig. §§ 655, 656.*]

10. CRIMINAL LAW (§ 372*)—EVIDENCE—OTHER OFFENSES.

Where, in a prosecution for offering a bribe through G. to a supervisor to influence his official action with reference to a street railroad franchise, defendant pleaded not guilty, denied that he offered to bribe such supervisor, and claimed that the testimony of G. was not corroborated by other evidence tending to connect defendant with the commission of the offense,

evidence of a general plan through which defendant was claimed to be in control of the board of supervisors, and had been in the habit of paying them money through G., as his confidential agent, to influence their action, and that, in pursuance of such plan, defendant had paid various sums to the supervisors to influence their action on other matters that had come before them, was admissible under the rule that where several crimes are connected as part of one scheme or plan, all of the same general character tending to the same common end, they may be proved to show the process or motive and design leading up to the particular crime for which the accused is being tried, directly tending to show that the crime in question was part of such common scheme.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 833, 834; Dec. Dig. § 372.*]

11. CRIMINAL LAW (§§ 396, 673*)—EVIDENCE—RECORDS.

Where, during the cross-examination of a witness, his attention was called to an affidavit which he had made and which was introduced in evidence to impeach him by showing that he had sworn that he had never committed any felony nor been guilty of any crime, the state was properly permitted to introduce the complaint in the action in which the affidavit was made as a part of the same transaction and without which the affidavit could not be fully understood, and the court properly limited the jury's consideration of the complaint to explain the transaction referred to in the affidavit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 861, 862, 1597, 1872-1876; Dec. Dig. §§ 396, 673.*]

12. CRIMINAL LAW (§ 930*)—NEW TRIAL—GROUNDS.

During the trial of accused, the assistant district attorney was shot while in the courtroom, and badly wounded, by one having an alleged or imaginary grievance against him, while the jury were temporarily in the hallway. The jurors had just started to enter the courtroom, two of them having passed the door when the shooting occurred. The deputy sheriff immediately pressed the jurors back into the jury room, and closed the door, and defendant was afterwards, but not in the presence of the jury, placed in custody and guarded by a policeman on his trips to and from the courtroom. Public meetings were held and defendant denounced, and insinuations made by leading citizens against the courts. It did not appear that the jurors knew of such meetings or of threats against accused, nor did it appear that the assailant of the assistant district attorney had any connection with the case, or with accused, and the court directed the jury not to consider the transaction in any manner in their determination of the case. *Held*, that the court's refusal to discharge the jury and grant a new trial was not an abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 930.*]

13. JURY (§ 131*)—CHALLENGE—RE-EXAMINATION.

Where during the trial of accused the assistant district attorney was shot and seriously wounded, though not in the immediate presence of the jury, the court did not err in refusing to permit defendant's counsel to re-examine the jurors as to any bias or prejudice resulting therefrom.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 131.*]

14. CRIMINAL LAW (§ 956*)—NEW TRIAL—AFFIDAVIT.

Where, during the trial of accused, the assistant district attorney, while in the courtroom,

was shot by a third person, and in support of a motion for a new trial defendant filed an affidavit setting forth expressions used by a juror as to his bias and prejudice against defendant while the trial was in progress after the shooting, and also alleged that another juror after the shooting went to the judge and informed him that he did not think he could fairly and impartially try the case and requested the judge to discharge him from further duty, and that such request was refused and the juror directed to keep his feelings to himself, and that in due time he would be instructed as to his duties as a juror, there being nothing to show how defendant acquired knowledge of such matters, they were hearsay, and insufficient to impeach a conviction.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 956.*]

15. CRIMINAL LAW (§ 1172*)—APPEAL—PREJUDICE—FAILURE OF ACCUSED TO TESTIFY—INSTRUCTIONS.

The court charged that it was the jury's duty to carefully and conscientiously abstain from indulging in every inference, presumption, or consideration in the least unfavorable to defendant from his failure to testify, that there was nothing in that circumstance for the jury to consider in arriving at a verdict, that the law required them to give no consideration at all and to attribute no significance whatever to that fact, and under no circumstances to permit it to influence their minds, but that the defendant entered on his trial with a presumption that he was innocent, and was not bound to prove himself innocent, it being the jury's duty to act on the presumption of innocence and lack of intent during their entire consideration of the evidence, and until that had been overcome by evidence of guilt so strong, ample, and conclusive as to convince their minds, and the mind of each of them, to a moral certainty, and beyond a reasonable doubt, that defendant was guilty of the crime charged. *Held*, that accused, not having elected to testify, was not prejudiced by the fact that the court read to the jury Pen. Code, § 1323, providing that accused cannot be compelled to be a witness against himself, but, if he offers himself as a witness, he may be cross-examined as to all matters concerning which he was examined in chief, but his neglect or refusal to be a witness could not in any manner prejudice him or be used against him on the trial of the proceedings.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1172.*]

16. CRIMINAL LAW (§ 787*)—FAILURE OF ACCUSED TO TESTIFY—INSTRUCTIONS.

Where accused has not testified as a witness in his own behalf, it is not proper practice for the court to charge the language of Pen. Code, § 1323, providing that he is a competent witness in his own behalf, but shall not be required to testify, and that no presumption against him shall be indulged in case of his failure so to do.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1902, 1903; Dec. Dig. § 787.*]

17. CRIMINAL LAW (§ 1137*)—APPEAL—ESTOPPEL TO ALLEGE ERROR.

Where accused by his requests to charge invoked certain of the presumptions specified in Code Civ. Proc. §§ 1963, 2061, he could not complain on appeal that it was not a proper occasion for giving other instructions on the same subject.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.*]

18. CRIMINAL LAW (§ 1172*)—APPEAL—INSTRUCTIONS—PREJUDICE.

Where, in a prosecution for offering a bribe, defendant did not testify, he was not prejudiced by instructions with reference to presumptions created by Code Civ. Proc. § 2061, subd. 6, that evidence is to be estimated, not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and subdivision 7 that, if weaker and less satisfactory evidence is offered when stronger and more satisfactory evidence is within the power of the party to produce, the evidence offered must be viewed with distrust, and section 1963, subds. 5, 6, that evidence willfully suppressed would be adverse if produced, and that higher evidence not produced would be adverse from inferior evidence produced, since it would not be presumed that the jury improperly applied such abstract propositions in the face of a positive instruction that no inference or presumption unfavorable to accused could be indulged by reason of his failure to testify.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1172.*]

19. CRIMINAL LAW (§ 507*)—BRIBERY—"ACCOMPLICE."

The word "accomplice," as used in a statute providing that a person may not be convicted of a crime on the uncorroborated testimony of an accomplice, means an accomplice in the commission of the offense charged and under investigation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082-1098; Dec. Dig. § 507.*]

For other definitions, see Words and Phrases, vol. 1, pp. 75-79; vol. 8, p. 7561.]

20. CRIMINAL LAW (§ 507*)—ACCOMPLICES—INSTRUCTIONS.

In a prosecution for offering a bribe to a member of the board of supervisors to influence his official action, the court properly instructed that one who offers a bribe is not for that reason alone an accomplice of the one to whom it is offered, and that one to whom a bribe is offered or who asks or agrees to receive a bribe is not, for that reason alone, an accomplice of one who offers the bribe.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 507.*]

21. CRIMINAL LAW (§ 507*)—OFFER TO BRIBE—ACCOMPLICES.

Where defendant was indicted for offering to bribe F., a supervisor, to influence his official action through G., and there was no evidence that F. entered into a combination or agreement with the defendant and the other supervisors to offer a bribe to himself, the fact that F. invited bribes did not authorize the granting of a request to charge that, if defendant and the other supervisors together with F. entered into a general scheme to obtain money from all persons for permits and franchises, then F. was an accomplice, etc.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 507.*]

22. CRIMINAL LAW (§ 507*)—ACCOMPLICES—TESTIMONY.

In a prosecution for offering a bribe to a supervisor to influence his official action with reference to an application for a particular franchise pending before the board of which he was a member, he was not rendered an accomplice because of an agreement between himself and accused and other supervisors to get money from other third persons not named in the indictment.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 507.*]

23. CRIMINAL LAW (§ 721½*)—ARGUMENT OF DISTRICT ATTORNEY—CODEFENDANT—FAILURE TO TESTIFY.

It is not error for the district attorney in argument to refer to the fact that a codefendant had not been called as a witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1673; Dec. Dig. § 721½.*]

24. CRIMINAL LAW (§ 730*)—MISCONDUCT OF ATTORNEY—CURING ERROR.

In response to objection to argument of the district attorney, the court instructed the jury to disregard any statement made by counsel which was in excess of the testimony, and again directed counsel to refrain from personal allusions to the counsel on the other side, and to refrain from anything that was not justified by something said by counsel during the trial of the case. *Held*, that the argument, in so far as it was not within the record, was cured by the court's rulings.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

25. CRIMINAL LAW (§ 1171*) — APPEAL — HARMLESS ERROR—ARGUMENT OF DISTRICT ATTORNEY.

Remarks of the district attorney in argument, in order to constitute reversible error, must be willful, not supported by the record, must contain a statement of something as a fact, either directly or by innuendo, and must have been objected to or the court's attention called to the same at the time.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Abraham Ruef was convicted of offering a bribe, and he appeals. Affirmed.

Henry Ach, Thos. B. Dozier, and Frank J. Murphy, for appellant. Attorney General Webb, John O'Gara, F. J. Heney, and W. H. Langdon, for the People.

COOPER, P. J. The defendant was indicted by the grand jury for the crime of offering a bribe, to wit, \$4,000 to John J. Furey, a supervisor of the city and county of San Francisco, with the corrupt intent to influence the official action of said supervisor in the matter of granting a franchise to the United Railroads of San Francisco, a corporation, to operate and maintain its street cars by means of an overhead trolley electric system, instead of the underground cable which it had been using. No question is raised as to the sufficiency of the indictment. The trial commenced August 27, 1908, and continued thereafter until December 10, 1908, at which time the jury returned a verdict finding the defendant guilty as charged. He made a motion for a new trial and also a motion in arrest of judgment, both of which motions were denied, and he was thereafter sentenced to a term of fourteen years in the state prison at San Quentin. This appeal is prosecuted from the judgment and from the order so made. Counsel have seen fit to bring up the whole record, in-

cluding the testimony in full by question and answer, together with the arguments of counsel on questions of law during the trial, and the rulings thereon, the full and complete examination of the jurors in the impanelment of the jury, and even the argument of counsel as made to the jury. The record consists of 24 bound volumes, containing over 12,000 printed pages, and there are 10 volumes of briefs, aggregating some 2,800 printed pages. We have never before known of such a record being presented to an appellate court. The examination of the record and of the many points raised has been a Herculean task, and such as the law never contemplated being imposed upon an appellate court, whose function is to pass upon questions of law. We have, however, performed the task as fully as our strength, time, and endurance would permit, and have passed upon apparently the most plausible and material points urged by the appellant to the best of our ability. If we were to discuss minutely every point raised, this opinion would fill a volume in the Reports and be protracted to an unreasonable length.

1. It is claimed that the evidence is insufficient to support the verdict. In the discussion of this question, it must be borne in mind that we have the power only as a matter of law to say as to whether or not there is sufficient evidence, conceding every syllable of it to be true, to support the ultimate finding of the jury. The jury is the sole judge of all questions of fact, and its finding, based upon evidence, upon any controverted question, is conclusive on this court. It has the right to believe or to disbelieve any witness, and draw all reasonable inferences from the facts proven. The question, and the sole question, for the jury in this case, was as to whether or not the defendant offered a bribe to Furey as charged in the indictment. All the testimony offered at the long and protracted trial was for the sole purpose of solving this one question. The direct evidence of the offer was that of Gallagher, Wilson, and Furey, each of whom were supervisors at the time the offer is said to have been made.

Gallagher testified that he made the offer to Furey, and that he was authorized by the defendant to make such offer. It is urged that in cross-examination Gallagher destroyed the effect of his testimony by admitting that the statement as to the offer to Furey was "his best recollection"; but upon a careful reading of this testimony we conclude that, while his evidence may have been weakened by the qualifications as to his best recollection, yet it was not destroyed to such an extent that we can say that the jury had no right to believe it. In fact, the qualification as to the best recollection of the witness appears in his cross-examination. Gal-

lagher testified in direct examination: "The next matter that Ruef spoke to me about was the matter of the permit for the United Railroads to use electricity on its lines of railroad in this city and county. No one was present. It was perhaps a week before the fire of April 18, 1906. He said the United Railroads wanted to get a permit to use electricity on their lines, asked me to speak to the members of the board about it, and let him know whether it could be done, whether it could go through the board, and what amount of money it would take. I told him that I would do so, but I had not spoken to any of the members previous to the fire. Q. With whom did you speak? A. I spoke to Wilson, Coleman, Boston, Davis, Mamlock, and Furey. I spoke to other members, but I don't recall which other ones at this time. * * * Q. When and where did your conversation with Furey take place, and who, if any one, was present? A. There was no one present. The conversation took place within a few days after my conversation with Ruef. I cannot fix the place any more definitely than that it was upon the streets of this city and county. Q. State what was said by each of you upon that occasion upon that subject. A. I said to him that the United Railroads wanted to secure a permit to use electricity on their lines, and asked him if he would stand favorable. He said he would. Q. Did you have any further conversation with Ruef on that subject after the conversations which you have just related with these supervisors? A. I saw Ruef and had a conversation with him. I said to Ruef that I thought the proposition could be put through, or words to that effect. Ruef said he would allow the sum of \$4,000 to each of the supervisors on that trolley matter proposition in the United Railroads permit matter. He asked me to see the members about it, see if that would be satisfactory, and I told him I would do so. That is the substance of the conversation. * * * Q. When and where did your conversation with Furey on that subject take place, and who, if any one, was present? A. My conversation with Furey took place at the meeting rooms of the board according to my remembrance, my best recollection. There was no one else present. It was within a few days after my conversation with Ruef. Q. State what was said by each of you on that occasion? A. I stated to him there would be \$4,000 in the United Railroads trolley matter. He said it would be all right. That is the substance of the conversation."

In cross-examination, after he had been several days on the witness stand, and after having been asked and having answered hundreds of questions, he was asked by counsel for the defendant and answered as follows: "Q. You are absolutely positive you spoke to Furey, are you not? A. My best recollection is that I spoke to Furey, but I would not

be willing to say that there could not be a mistake about it. * * * Q. How much of a qualification is there now in your statement as to John J. Furey when you say that it is according to your best recollection, that you cannot be positive about it? A. My remembrance is that I spoke to Furey about it, but I would not be willing to say that there is no possibility of my being in error about it. Q. You are positive now, are you? A. I would not say I am so positive as to say there could not possibly be any question about it."

It will be noticed that Gallagher nowhere and at no place expressed any doubt, or any best recollection, as to the fact that he was authorized by defendant to make the offer, and that he did talk with various members of the board of supervisors as to the offer and as to the amount to be paid to each supervisor. His testimony in this respect is direct and unequivocal, and it is only when questioned in cross-examination about the particular supervisor, Furey, that he uses the words "according to my best recollection." In view of the testimony of Furey the qualification by Gallagher of his testimony in chief does not appear to be essentially material. Furey testified without any hesitation on the subject. His testimony is as follows: "Q. Do you remember, Mr. Furey, of the passage of the overhead trolley ordinance in the board of supervisors in the month of May, 1906? A. I do. Q. Were you present when the matter first came up in board on May 14, 1906? A. I believe I was; yes. Q. Now, Mr. Furey, before that matter came up in board, had you any conversation with any person in relation to the passage of that ordinance by the board at which anything was said about the action of the board? A. Yes, sir. Q. With whom had you any such conversation? A. James L. Gallagher. Q. How many such conversations did you have? A. My best recollection is I had three. Q. Where did those conversations take place? A. In Mowry's Hall. Q. Did these conversations take place after the fire? A. Yes, sir. * * * Q. Now, Mr. Furey, about how long before the matter was brought up in board did Mr. Gallagher first speak to you about that trolley matter? A. About a week or ten days, something like that. * * * Q. What did he say to you at this first conversation? A. He told me that the program was that the trolley be granted, that the trolley franchise be granted to the Market Street Railway Company as a trolley line. That is the substance of it. That is possibly not the exact words. Q. What, if anything, did you say to him at that time in that conversation? A. I said 'All right. I will stand for it.' * * * Q. How long afterwards did you have your next conversation with Mr. Gallagher on that matter? A. I am not positive as to the time. Some little time afterwards. Q. Well, give the best recollec-

tion that you have as to the time. How many days? A. It possibly might have been a week. Q. At that second conversation what, if anything, was said by James L. Gallagher to you, and by you to him, in relation to the trolley matter? A. He told me there was \$8,000 or \$10,000 in it. Q. What, if anything, did you say to him? A. I said, 'All right. I would stand program.' Q. At your third conversation with James L. Gallagher what, if anything, did he say to you, and what, if anything, did you say to him? A. He said it was brought down to \$4,000. Q. Can you give his exact words as he spoke them in that conversation? A. No; I cannot give his exact words. Q. Well, give the substance of his statement, if you please. A. As I remember it he said, 'Furey, the trolley was brought down to \$4,000.' Q. What, if anything, did you say in reply to James L. Gallagher then? A. I said 'All right.'

Wilson corroborated the testimony of Furey on the same point. He was asked: "Q. Do you now recall the conversation which you had with Furey before the vote on the passage to print of the trolley permit ordinance? A. Yes, sir. Q. How long before the actual passage to print did that conversation take place? A. Before the board went into session, about 2 o'clock in the afternoon. Q. About 2 o'clock in the afternoon? A. Yes, sir. Q. Of what day? A. May 14th. * * * Q. State whether or not Mr. Ruef was present at the board rooms that day before the passage to print of that ordinance. A. Yes, sir. Q. Now, what did Furey tell you on that day before the passage to print of the ordinance, in relation to the trolley ordinance? A. He said that Gallagher had told him that there was \$4,000 in it. 'Is that right?' I told him that I hadn't had a talk with Mr. Gallagher yet; I would see; I would let him know. Q. And did you see him? A. I had a talk with Mr. Gallagher, and then I told him that the trolley matter was all right. Q. How long after you had the talk with Furey did you have the talk with Gallagher? A. About an hour."

There is other evidence in corroboration of the testimony of the three supervisors tending to connect the defendant with the commission of the offense. There is evidence that \$200,000 was placed at the United States mint in the city and county of San Francisco to the credit of the president of the United Railroads; that Cole, the cashier of the mint, at the request of the attorney for the United Railroads, exchanged the gold to the extent of \$50,000 for that amount of currency from the relief fund, of which Cole was also treasurer; that all this sum was paid to the defendant in currency, and that afterwards \$150,000 more, making a total of \$200,000, was paid to defendant, also in currency; that defendant paid or handed over to Gallagher \$85,000 of this sum, also in currency, of which Gallagher paid Wilson \$10,-

000, and the other supervisors \$4,000 each, and retained \$15,000 himself for his special services in negotiating with the other supervisors; that while the ordinance granting the permit was pending defendant said, in speaking of the matter, in the presence of W. W. Sanderson and others, that "this thing will go through on Monday. It is all settled;" that on the same day the money was received from the mint by the officers of the United Railroads, defendant hired a new safe deposit box of large dimensions at the vaults of the Western National Bank, where he already had two such boxes; that he was driven back and forth from the offices of the United Railroads to the Western National Bank about the time and while the money was being transferred to him, and that Wilson deposited \$5,000 of the money received by him with the California Safe Deposit & Trust Company, as shown by a deposit tag produced from the files of said bank, on the day he received the money; that the money taken from the mint, the \$200,000, did not appear of record in the books of the United Railroads; that caucuses were held before each regular meeting of the board of supervisors at which defendant was always present; that various other matters had been put through and passed by the board of supervisors at defendant's dictation, for which various sums in each case were paid to the supervisors—among these being the prize fight ordinance, the Parkside franchise, the order fixing gas rates, the franchise for the Home Telephone Company; that defendant, upon hearing that some of the supervisors had been paid for their votes by an agent of the Pacific States Telephone Company without his knowledge, said to one Poheim, a physician, "They tried to take my supervisors away from me, but I fixed them. I would like to see one of them get away from me;" that after these matters were attracting great public attention, and Langdon, the district attorney, was procuring evidence and preparing to prosecute the offenders, defendant had Gallagher, who was then acting mayor of San Francisco, make an order purporting to remove Langdon from the office of district attorney, and appointing himself as such district attorney, which order was afterwards held void by the courts.

There are many other facts and circumstances in evidence, but the above is sufficient to show that the supervisors were corroborated in regard to defendant's connection with the crime. These corroborating facts and circumstances all stand out as clear as the midday sun, with nothing to explain them or in any manner to free defendant from his connection therewith. While it is true that no one save Gallagher testified as to defendant's authorizing him to offer the bribe, there is evidence that defendant received \$200,000, that he had it converted into currency, that he had the ordinance passed,

and that Furey was one of the supervisors who voted for the ordinance. No one could reasonably draw any other inference from these facts than the one that Gallagher was the agent and mouthpiece of defendant. In our opinion the evidence not only supports the verdict of the jury, but no other verdict could reasonably be justified.

We will now pass to the discussion of other questions, bearing in mind that where defendant has been found guilty upon a valid indictment, and the evidence supports the verdict, the court "must give judgment without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties." Pen. Code, § 1258; *People v. Stokes*, 5 Cal. App. 205, 89 Pac. 997; *People v. Hutchings*, 8 Cal. App. 550, 97 Pac. 325. Of course, the defendant was entitled to a fair trial according to the law, and, if anything occurred which deprived him of such fair trial, we would not hesitate to reverse the judgment.

2. It is claimed that the court erred in denying defendant's challenge of several jurors. The volume of defendant's brief devoted to this subject is volume 7, and contains 410 printed pages. The proceedings on the impanelment of the jury take up 6,600 pages of the printed transcript; hence it is apparent that we cannot discuss the several challenges in detail. The first, and a sample of all, is the challenge to the juror Arthur. Arthur testified on his voir dire that he had heard a great deal about the "graft" cases; that he had read the newspapers; that he had a general opinion that graft had been going on in San Francisco, and that money had been paid to the supervisors, but that the opinion was not so fixed and positive that he would act upon it, and that such opinion was founded upon newspaper accounts and upon public rumor; that he knew nothing personally of the facts of the case, nor had he talked with any witness in regard to it. In cross-examination the juror was asked and answered questions as follows: "Q. Do you recall anybody ever reading to you from a newspaper or from anything else a verbatim report of what purported to be the testimony taken before the grand jury by question and answer? A. Well, I could not say that I have, though I might have. I could not say that I ever heard anybody read it. Q. At the present time you have no recollection of having heard any one read it? A. No. Q. You have no recollection of ever having read it yourself in that form? A. No; I have not. Q. Now, then, have you any information upon the subject of the trolley matter itself in any way to form any opinion in your mind other than the newspaper reading and general notoriety, common notoriety, and general rumor? A. No, sir. * * * Q. Did you ever talk with any person about it who claimed to have any personal knowledge of the facts or any of the facts in relation to the trolley

matter? A. No; I have not. Q. Did you say you had an opinion or impression in regard to the trolley matter? A. I could not say you would call it an opinion or not. I suppose it must be an opinion. Q. Whatever it may be, whatever you may term it, if you were accepted as a juror, could you set it to one side by will power alone, and prevent it from interfering in any way or influencing you in any way in your consideration of the testimony or your consideration of the case or reaching a conclusion in the case? A. I certainly could. Q. You don't feel that it is strong enough to give you any trouble to set it aside, or that it would put you to any trouble in trying this case solely on the sworn testimony produced here under the instructions of the court? A. No, sir; it would not be any trouble to set it aside. * * *

Q. Have you any business interests that you know of that might in any way influence you to lean even ever so slightly either one way or the other in this case? A. No, sir. I don't allow anything of that kind, even if there was. Q. You have no personal feeling against Mr. Ruef? A. No, sir; I don't know the man. * * *

Q. If you were selected as a juror in this case, the court will probably tell you that this defendant, Mr. Ruef, notwithstanding the fact that he is indicted, is presumed to be innocent of this offense, the offense charged being that he made an offer to John J. Furey of \$4,000 in the trolley matter, and that the jury when selected are to presume him absolutely innocent of that crime, and that presumption is not a mere fiction or matter of form, but it is a substantial right, if the court so instructs you, and you are taken as a juror, do you think that you could start in and give Mr. Ruef, notwithstanding your present opinion, the full benefit of that presumption in its enlarged sense? A. I could. Q. And would you? A. I would. * * *

Q. The mere fact that after hearing the testimony of any witness or any witnesses in this case that you did not believe what they said, or that their testimony coincided with your opinion, would that govern you at all in reaching a conclusion as to whether you believed the witness or not? A. If I were selected as a juror I would not have any opinion. * * *

Q. In that event you would not believe the testimony of the witness simply because your opinion might come back to you, and his statements be in accordance with your opinion, would you? A. I would not allow my opinion to come back to me. Q. You would shut it out completely, I understand? A. I certainly would. * * *

Q. And you could do so, notwithstanding that the testimony of the accomplices was in line with what your opinion had formerly been, you could still view that testimony with distrust, could you? A. If I were selected as a juror the opinion I might have would not have anything to do with it. Q. I see. Because of that fact, notwithstanding the possibility

that the testimony of the accomplices, if there be any such, should concur with the opinion that you did have, you could still view the testimony of the accomplices with distrust if the court instructed you that you should do so or ought to do so? A. I could."

Our Penal Code provides (section 1076) that "no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury founded upon public rumor, statements in public journals or common notoriety, provided it appear to the court, from his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him." The opinion of the juror was beyond question founded upon public rumor, statements in public journals, and common notoriety; and in such case it is the province of the trial court to pass upon and examine the question as to whether or not a juror can and will, notwithstanding such opinion, act impartially and fairly upon the matter to be submitted to him; and, where the trial court has heard the evidence and observed the juror as he gave his answers, every presumption is in favor of the finding of the court. It is only in cases of palpable abuse of discretion that this court will interfere. The finding of the trial court is like the finding upon any question of fact within its function. It was said by the Supreme Court in *People v. Fredericks*, 106 Cal. 559, 39 Pac. 945: "This court is only allowed to review an order denying a challenge to the juror on the ground of actual bias when the evidence upon the examination of the juror is so opposed to the decision of the trial court that the question becomes one of law; for it is only upon questions of law that this court has appellate jurisdiction in criminal cases." To the same effect are *People v. Scott*, 123 Cal. 434, 56 Pac. 102; *People v. Sowell*, 145 Cal. 300, 78 Pac. 717; *People v. Ryan*, 152 Cal. 371, 92 Pac. 853.

Much stress is laid upon the fact that the juror stated that he had read in the papers statements purporting to be the testimony of witnesses before the grand jury, and perhaps in the form of questions and answers in some cases. We are asked to hold that in such case the publication of the evidence is more than a statement in a public journal; but, if we should so hold, it would be in effect to make that a disqualification of a juror which is not made so by the statute. In these days of modern journalism the newspapers publish everything, particularly in regard to criminal cases of great notoriety or involving some private scandal that will furnish food for the eager multitude. To hold that the publication of the evidence of witnesses, given before a grand jury or a committing magistrate, by question and answer, by an enterprising public journal,

would disqualify a juror who had formed or expressed some kind of an opinion upon it, notwithstanding it was clearly made to appear that he could and would, notwithstanding such opinion, act impartially and fairly, would in many cases make it almost impossible to procure a jury. All intelligent people read public journals, at least to some extent; and no intelligent man can read the statements concerning the commission of a crime of great notoriety, or even hear the general public talk about such crime, without forming, and in many cases also expressing, an opinion about it. But in most cases jurors are honest in their intentions to do what is right; and, if they are intelligent and fit to be jurors, they will discard any opinion that they may have as to the merits of the case when such opinion is not based upon knowledge of some fact, or where their minds are not so biased by the facts as to disqualify them. Of course, the trial court in such case should use the utmost caution to see that no juror, who has such an opinion or prejudice that he cannot act impartially and fairly, should sit upon the jury; but no reasonable thinking man can help having to some extent formed an opinion. Even the judge himself has such opinion, and often a very positive one, but he is not for this reason disqualified to sit in the case. If the trial judge is from the examination of the juror, or other evidence, doubtful as to whether or not the juror can and will discard his opinion, and fairly and impartially try the case, he should resolve such doubt against the juror and excuse him. This is the safe rule; and, if followed, would save much trouble and grave questions before the Courts of Appeal. But we hold that the mere reading of what purports to be the evidence, even by question and answer, as published in some public journal, does not of itself disqualify a juror, and it has been so held. *People v. Irwin*, 77 Cal. 494, 20 Pac. 56; *Hopt v. Utah*, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708. In the latter case it was said by Judge Field: "We think that evidence or what purports to be evidence printed in a newspaper are statements in a public journal within the meaning of the statute, and that the judgment of the court upon the opinion of the juror in such cases is conclusive."

Defendant relies upon *People v. Helm*, 152 Cal. 532, 93 Pac. 99, in support of his contention that the juror is disqualified. We have no fault to find with that case. In fact, it was considered by this court and cited with approval in *People v. Schmitz*, 7 Cal. App. 350, 94 Pac. 407, 419, 15 L. R. A. (N. S.) 717, and it is not in conflict with what we have said in this case. The court there simply held that the opinion of the juror must be based upon one or all of the matters enumerated in section 1076 of the Penal Code, or he would be disqualified. A sam-

ple of the evidence of the jurors who were disqualified and passed by the trial court in that case is that of the juror Neely, who testified: "I do not believe I could act as fairly and impartially in this case if selected as a jurymen as I could in a case where I have never heard anything about. The little impression that I have would bob up until all the evidence was in. I think that opinion or impression that I have would crop up in my consideration of the case." And we might add that of the juror Winters, who testified: "If selected as a jurymen, I would possibly require the prosecution to convince me beyond a reasonable doubt of the guilt of the defendant. In my present state of mind, it would not require as much evidence to convince me of the guilt of this defendant in this case as it would where I had never heard anything about the facts and circumstances. It might require more evidence on the part of the defense to prove the young man innocent than it would be in a case that I had never heard anything about." What we have said in regard to the ruling on the challenge to the juror Arthur applies to rulings of the same character as to the other jurors. Under the rule as we understand it, we cannot disturb the finding of the trial court as to the qualifications of any one of them.

3. During the examination of the juror Arthur, the attorney for the defendant asked permission to and did call Assistant District Attorney Heney to the witness stand for the purpose of eliciting information concerning said juror. Heney was asked as to whether or not he had in his possession a report made by an agent or employé of the district attorney's office as to an alleged interview with the juror, or concerning the state of mind or opinion of the juror regarding the case. It appeared by the answer of the witness that he had a report as to the juror Arthur as to his qualifications as such juror. The court, upon objection being made by the assistant district attorney, refused to compel him to show the report to the attorney for the defendant or to divulge its contents. Such ruling is now claimed to be erroneous. There is nothing in the record in any manner showing the contents of the report or who it was made by. It was at most hearsay, and the attempt to get at its contents was in the nature of a "fishing" expedition, as it does not appear that the defendant's attorney had any knowledge of its contents, nor is it clear as to the object of counsel in endeavoring to get a view of it. The district attorney is an officer of the court, and in the prosecution of a defendant charged with crime he should be fair, and only seek a conviction by legal means and through a fair and impartial jury. A district attorney who would willfully endeavor to pack a jury, or endeavor to get upon it men who are biased against the defendant to such an extent as to make them unfair jurors under the law,

should not be permitted to conduct the case, and, in fact, should not be entitled to practice in a court of justice. But in this case we must presume in favor of the officer as performing his official duty. While the district attorney should always be fair, and use only legal means to secure a conviction, yet he is the attorney for the people. We know of no law or principle which requires him to divulge to his adversary the private information he has, either in the way of evidence or information concerning jurors. It is the province of the district attorney, and also of the attorney for the defendant, in a criminal case to find out all he can in a legitimate way as to the character, standing, and integrity of the several jurors. Of course, after a juror has been summoned, and is in contemplation of law at least in attendance upon the court, no interview of a juror or tampering with him outside of the courtroom should for a moment be tolerated, no matter which side attempts it. The examination of the juror and all questions put to him should be in open court in the presence of all parties and of the judge. In this case the information, if any, in the possession of the district attorney may have been of a confidential nature, and such as it was entirely proper for him to have. It may have contained a statement that the juror was and always had been an upright law-abiding citizen, and that he would do his duty fearlessly. It may have contained information as to whether or not the district attorney intended to peremptorily challenge the juror, and thus have been of much advantage to the defendant. While a defendant in a criminal case is guaranteed a fair trial by an impartial jury, and while he is given the right to peremptorily challenge twice as many jurors as the prosecution, we have never heard of that right being extended so as to give him access to the district attorney's memorandums, papers, or documents until they are legally produced in court. In any event, we cannot hold that it was reversible error for the court to refuse to compel the district attorney to show to the attorney for the defendant a paper the contents of which, so far as the record is concerned, is a matter of mere conjecture. Defendant's counsel did not attempt to find the name of the person who had made the report, or to bring such person into court for examination. If this had been done, or if it had transpired in the course of the examination of the witness, that such witness had made a report or statement in writing concerning the same matter, the court, if it appeared necessary, no doubt would have compelled the production of the writing in aid of getting the entire truth from the witness. But such is not this case. It was merely an attempt to get a paper from the possession of the district attorney, the contents of which the defendant's attorney knew nothing about.

4. Counsel for the defendant have devoted

volume 2 of their brief, containing 541 pages, to the subject of alleged misconduct of the judge during the course of the trial, claiming that the judge was not only biased and prejudiced against the defendant, but that he had made certain injurious remarks during the course of the trial as to the credibility of witnesses, and in disparagement of defendant's counsel.

One of the most objectionable matters in the opinion of counsel is certain remarks made while defendant's counsel was cross-examining the witness Gallagher. The direct examination of Gallagher occupied about 3½ days, and his cross-examination twice as long. The most minute details as to other transactions, evidence in other cases, and evidence given before the grand jury, were subjects which occupied not only hours, but days, in cross-examination. It is evident in such case that the patience of the jurors and of the trial judge must have been put to a severe test. After counsel for the defendant had asked Gallagher many questions as to why he answered promptly and positively on direct examination, and as to why it was that upon cross-examination on several occasions he hesitated and said "according to my best recollection," and after controversies in which the counsel on each side and the judge took part, counsel for defendant said: "The question is this—let me get away from these things—I asked a question of the witness concerning a subject-matter he has testified to upon direct examination without qualification at all, and we will say, without hesitation, I asked the question and waited five or ten seconds, and he does not answer. Haven't I a right to ask the question why he hesitates? The Court: I don't think you have, if the witness is apparently engaged in an effort to collect his thoughts and render a proper answer. Every man has temperamental qualities. You have yours, and the witness has his. It may be possible for you to make a quick, satisfactory response to every question propounded to you. Another witness may not be so gifted, or his mind may be so filled with a recollection of events that he owes it to himself and to the interests of truth to answer prudently and carefully."

After exception taken by counsel to this remark, the court said:

"I will lay down a rule for you in that regard so you will know exactly where you stand. When you propound a question to the witness, you must wait until he answers. When he has answered, if there is anything about his hesitancy in answering it, you may take that up as a special subject of inquiry."

"Mr. Ach: I will adopt that course."

* * * If the court gets the idea I am insulting the witness, or attempting to insult the witness, the court can fine or imprison me for contempt.

"Mr. Heney: Your honor stopped me a

number of times on Mr. Ach's suggestion because my tone of voice was a little loud.

"Mr. Ach. No, your honor."

"The Court: We will perhaps advance with more celerity if there is less of this side discussion. I think I understand the prerogatives of the court in dealing with witnesses and kindred matters. No counsel has any right to assume a harsh demeanor towards any witness. The statute law of this state expressly protects or seeks to protect a witness in that behalf. He has no right to use insulting language. He has no right—neither the court nor counsel have any right—to detain a witness on the stand longer than the interests of justice seem to require. A witness has rights, and they must be respected. I shall see that the rights of every witness produced here are respected."

The court, during another controversy while this witness was being cross-examined, remarked that the frequent interruptions and exceptions to the remarks of the court were "well calculated to undermine the administration of justice." The above remarks were evidently addressed to counsel during the progress of the trial; and, while parts of them might well have been omitted and are not to be commended, we do not think that they were injurious to defendant. The remark by the court that every man has temperamental qualities is a common-place and self-evident proposition. It was known to every juror before it was uttered by the court. And so of the statement that the witness owed it to himself and the interests of truth to answer prudently and carefully. We do not think that by the remarks the judge expressed his opinion to the effect that Gallagher was a credible witness. The language complained of was addressed to counsel, and not to the jury, and was merely intended to explain the reasons why the judge made the rulings. In such case the remarks were not a charge to the jury with respect to matters of fact. *People v. McLean*, 84 Cal. 483, 24 Pac. 32; *Reed v. Clark*, 47 Cal. 200. In the latter case it was said: "It is not unusual or improper for the judge in passing upon such a question to announce for the guidance and benefit of counsel the reasons which control him in the admission or rejection of proffered evidence. This necessarily involves an expression of opinion upon the evidence already introduced; but this expression is not addressed to the jury nor intended for their guidance, as is an instruction given at the request of counsel or by the court upon its own motion, and which it is the duty of the jury to follow strictly and without questioning." The court in this case instructed the jury: "The court charges you that you are not to use in the consideration or determination of any fact in the case any reference to or comment on the evidence which may have been made by the court in connection with the admission of testimony

or otherwise. The determination of the facts of the case is solely within your province, and you are not to be assisted or influenced in any way by anything which the court may state or do, in that behalf except as to matters of law applicable thereto." Under our system, the trial judge should be careful to refrain from making any comment upon the credibility of a witness, or in excuse of his manner of testifying, or in disparagement of counsel; but, as we have said before, this court would not be justified in reversing a case for light or trivial reasons, but should examine the whole record in determining as to whether or not the defendant has been injured. Taking this view of the matter, we cannot say that it appears that the judge willfully attempted to credit or discredit any witness, or that he willfully cast discredit upon counsel. As the remarks were made to counsel at the time the rulings were made, and the court expressly instructed the jury they were not to consider any reference to or comment made by the court in connection with the admission of the testimony or otherwise, we do not think, upon the application of the practical principles which govern Courts of Appeal, that we would be justified in holding them to have been prejudicial to defendant.

5. It is insisted that the court erred in the admission of evidence as to other and independent crimes committed by defendant. The various assignments of error in this regard may all be considered under the one general head. The evidence was, in substance, that after the election of the board of supervisors which went into office in January, 1906, defendant had control of them; that he called Gallagher into his confidence, telling him in effect that there would be "deals" coming up; and that he desired Gallagher to act as his representative with the other members of the board; that in pursuance of this plan the prize fight ordinance was put through, for which the defendant paid \$500 to each of the supervisors, the gas rate ordinance, for which he paid each supervisor \$750, and the Home Telephone Company ordinance, for which he paid the board \$62,500, which was distributed in different amounts among the board according to his view of their respective merits or demerits. In each of these matters the money came directly from defendant and was paid to Gallagher. In each case the "deal" was with the same board of supervisors, which was controlled by defendant. In each case the defendant attended the caucuses held by the board on Saturday night prior to the regular meeting. In each case the crime was the same as in this case, the paying of money to the same supervisors to influence their official action. In other words, to sum up, the evidence shows that the defendant was the "boss" in control of the board of supervisors; that no franchises or matters of importance could be put through the board except by "seeing defendant";

that the board of supervisors was referred to by defendant as "my supervisors."

Did this evidence logically tend to show that defendant, through the same channel, Gallagher, offered to bribe one of the same board of supervisors? Defendant, by his plea of "not guilty," had denied that he offered to bribe Furey. He claimed, and now claims, that the testimony of Gallagher is not corroborated by other evidence tending to connect him with the commission of the offense. Did not the fact that defendant was in control of the board of supervisors, that he had been in the habit, we might say, of paying them money through Gallagher, naturally and logically tend to corroborate Gallagher's statement that he was authorized by Ruef to make the offer to Furey? A general plan has been shown, and Gallagher was the confidential agent. The plan had been in operation and was being continued, and the authority of the agent had not been revoked. The general rule, which is founded upon reason and justice, forbids the introduction of evidence which will tend to show that the accused had committed any other crime wholly independent of that for which he is on trial; but the rule does not apply when the other offenses are not wholly independent of the crime for which the prisoner is on trial. The rule is that where several crimes are connected as part of one scheme or plan, all of the same general character, and tending to the same common end, they may be given in evidence to show the process or motive and design leading up to the particular crime for which the prisoner is being tried, and thus directly tending to show logically that the crime in question was a part of such common scheme. If the several crimes are part of a chain of cause and consequence so linked as to be necessarily connected with the system or general plan, they are admissible. In a case cited by Lord Ellenborough in *R. v. Whitley*, 2 Lea. 985, 1 New Rep. 92, where a man had committed three burglaries in one night, and stole a shirt at one place and left it at another, they were all so connected that the court heard testimony of all three burglaries, Lord Ellenborough remarked, "If crimes did so intermix, the court must go through the detail." In an indictment for obtaining goods by false pretenses, it is allowable to prove that the same pretenses were used to another. *Collins' Case*, 4 Rog. Rec. 143. So, on an indictment for obtaining money under false pretenses, evidence of obtaining money at other times from other parties by similar pretenses were held admissible. *Long v. State*, 56 Ind. 206. On the trial of a criminal prosecution, where the facts and circumstances offered in evidence amount to proof of a crime other than that charged, and there is ground to believe that the crime grew out of it, such facts and circumstances may be admitted to show the *quo animo* of the accused. *Commonwealth v. Ferrigan*, 44 Pa. 386.

In *People v. Cunningham*, 66 Cal. 669, 6 Pac. 701, where defendant, accused of larceny, had shown that he acquired certain cattle properly, it was held admissible for the prosecution to prove that another steer, belonging to a third person, was found in defendant's possession with the cattle of the complaining witness. In that case the remarks of Brockenborough, J., in *Walker v. Commonwealth*, 1 Leigh (Va.) 574, are quoted with approval: "It frequently happens that, as the evidence of circumstances must be resorted to for the purpose of proving the commission of the particular offense charged, the proof of those circumstances involves the proof of other acts, either criminal or apparently innocent. In such case it is proper that the chain of evidence should be unbroken. If one or more links of that chain consist of circumstances which tend to prove the prisoner has been guilty of other crimes than that charged, this is no reason why the court should exclude those circumstances. They are so intimately connected and blended with the main facts adduced in evidence that they cannot be departed from with propriety; and there is no reason why the criminality of such intimately connected circumstances should exclude them more than other facts apparently innocent." See, further, *People v. Rogers*, 71 Cal. 565, 12 Pac. 679; *People v. McGilver*, 67 Cal. 55, 7 Pac. 49; *People v. Ebanks*, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269; *Underhill on Criminal Evidence*, § 88; 1 *Roscoe's Criminal Evidence*, p. 93; *Guthrie v. State*, 16 Neb. 667, 21 N. W. 455. In the latter case the defendant was charged with the commission of bribery, and on appeal it was urged that the court committed error in permitting the state to prove other and distinct acts of bribery; but the court held the evidence competent, and in the opinion said: "It is clearly shown that the agreement was a continuing one, and contemplated a system of payments to be made in the future, and for which the same course was to be pursued by plaintiff in error as for the three hundred dollars. It was known by plaintiff in error when Branch received money, and no gambling house was molested after its share of the money had been paid. He was fully advised of what occurred in the workings of the plans and designs, not only at the time of the receipt of the \$300, but at all times so long as the system under which they were working continued. This system was fully developed and exposed by Branch in his testimony. It was properly admitted as a part of the transaction by which the \$300 was paid by Branch to the plaintiff in error. The fact of the carrying out of this system was proper evidence for the purpose of corroborating the testimony of Branch, and showing the purpose, understanding, and intent with which the money was received as alleged in the indictment, and for the purpose of showing the system under which the several transactions were

had. For these purposes, the testimony was competent. *State v. Bridgman*, 49 Vt. 202 [24 Am. Rep. 124]; *Thayer v. Thayer*, 101 Mass. 111 [100 Am. Dec. 110]; *Kramer v. Commonwealth*, 87 Pa. 289; *Rex v. Hough*, *Ross & R. Cr. Cas.* 120; *Rex v. Ball*, *Id.* 132; *Comm. v. Price*, 10 Gray [Mass.] 472 [71 Am. Dec. 668]; *Rex v. Francis*, 12 Cox's Crim. Cas. 612; *Regina v. Garner*, 4 Fost. & F. 346; *Whart. Cr. Ev.* § 38 et seq."

In *Moody v. Peirano*, 4 Cal. App. 411, 88 Pac. 380, it was held in an action upon a warranty of certain seed wheat as being "White Australian" that evidence of similar warranties to other parties at about the same time was admissible. This court there said, speaking through Mr. Justice Harrison: "The tendency of modern decisions is to admit any evidence which may have a tendency to illustrate or throw any light on the transaction in controversy, or give any weight in determining the issue, leaving the strength of such tendency or the amount of such weight to be determined by the jury. And in determining the relevancy of evidence that may be offered upon an issue of fact much depends upon the nature of the issue to sustain which or against which it is offered, and a wide discretion is left to the trial judge in determining whether it is admissible or not." Mr. Thayer, in the introduction to his "Cases on Evidence," says: "No precise or universal test of relevancy is furnished by the law. The question must be determined in each case according to the teachings of reason and judicial experience. * * * Probability is an element which addresses itself to the reason, and is frequently invoked in matters of human conduct and experience for determining the existence or nonexistence of a fact. In civil cases a jury is authorized to determine an issue of fact as its probability or improbability may appear to them from the evidence before them. Hence any evidence tending to show either of those conditions is relevant to the issue to be determined by them. If the evidence offered conduce in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury."

In that case the Supreme Court denied a petition for rehearing, and has since quoted the case with approval in *Bone v. Hayes*, 154 Cal. 767, 99 Pac. 172. The reasoning of that case in our mind is conclusive as to the admissibility of the evidence in this. Not only this, but the court, at defendant's request, instructed the jury that defendant was on trial only for the crime charged in the indictment; that, even if the evidence should show that the defendant had been guilty of other crimes, still they should not convict unless convinced of defendant's guilt from the evidence of the precise offense charged to a moral certainty and beyond a reasonable doubt.

6. There was no error in the admission of

the complaint which had been filed in the case of Langdon v. Gallagher et al., in the superior court, for the limited purpose for which it was admitted. During the cross-examination of Wilson counsel for defendant called his attention to an affidavit which the witness had made in said case, and introduced the affidavit in evidence for the evident purpose of impeaching the witness by showing that in the affidavit he had sworn that he had never committed any felony, or been guilty of any crime of any kind against the people of the state. The complaint referred to was in the action brought to enjoin defendant from taking possession of the office of district attorney, and to test the validity of the order made by Gallagher, as acting mayor of San Francisco, removing Langdon and appointing defendant district attorney instead. The complaint was admitted in evidence in response to the cross-examination, and as a part of the transaction referred to in the affidavit. The court, at the request of the district attorney, limited the purposes of the complaint to simply being used as a part of the same transaction, giving meaning to the affidavit which the defendant had introduced. Counsel for the defendant objected to the court making any order limiting the purposes for which the complaint was admitted, but the limitation was made notwithstanding that objection. The defendant's attorney in offering the complaint stated that he offered it for the limited purpose of characterizing and giving meaning to and showing the proper relation to the complaint of the affidavit which was offered in evidence by the defendant during such cross-examination, and for no other purpose. An examination of the affidavit shows that it was entitled the same as the complaint, and that it contained denials of most of the averments of the complaint. Among other things the affidavit stated: "That this affiant has never committed a felony of any kind or character, has never been a party thereto, and there is not and can be no evidence presented of or concerning any felony committed by the undersigned or threatened by the undersigned. That it is not true that said fact was known to this affiant, either at the time mentioned in the complaint or ever or at all; that it is not true that the undersigned have, prior to the commencement or formation of the grand jury mentioned in the complaint, or ever or at all, or at any time or at any place, committed any felony, either in the city and county of San Francisco or any other place, and it is not true that the undersigned has been guilty of crime against the people of the state of California, or the people of the city and county of San Francisco, at any time or at all."

We must presume the jury to have been men of ordinary intelligence, and that they understood and acted upon the evidence for the limited purpose for which it was admitted and for no other purpose. In fact, the

affidavit, in order to be understood, must be taken and read in connection with the complaint. The court also instructed the jury that evidence admitted for a limited purpose was to be considered by the jury for such purpose and none other.

7. It is claimed that the court erred in refusing to grant defendant's motion made on November 15th to discharge the jury and impanel another jury, which motion was based upon the ground that the jury had become biased by the shooting of Assistant District Attorney Heney during the progress of the trial, and by the circumstances in connection therewith. During the trial on November 13th Heney, the assistant district attorney, was shot in the courtroom and badly wounded by one Haas, on account of an alleged or imaginary grievance which Haas held against Heney. The shooting caused great excitement, but at the time it occurred most of the jurors were in a hallway adjoining the courtroom, and did not witness it, although they must have heard the shot and the loud noises and commotion caused by the shooting. The jurors had just started to enter the courtroom, two of them having passed the door when the shooting occurred. The deputy sheriff immediately pressed the jurors back into the jury room and closed the door. Defendant was afterwards, but not in the presence of the jury, placed in custody, and was guarded by five policemen in his trips to and from the courtroom. Public meetings were held, and the defendant denounced, and even insinuations were made by leading citizens against the courts. As the shooting took place during the trial, the public seemed to blame the defendant for such shooting. It does not appear that the jurors knew of these public meetings, or of the threats against defendant. The record and affidavits on the motion and the counter affidavits take up about 700 folios of the record. It is sufficient to say that in our opinion the court did not abuse its discretion in denying the motion. There was no showing that any fact had reached any juror of sufficient importance to disqualify him. After the shooting on the following day, the trial judge stated to the attorneys that in all probability the jury knew something concerning the transaction, and suggested that the attorneys agree on a statement of the facts to be given to the jury. The jurors had not been present and were not present when the motion of defendant was made. Counsel declined to agree upon a statement, or at least did not agree upon such statement, and upon the following day when court convened the judge addressed the jury, telling them that Mr. Heney had been shot by Haas, that his wound was not serious, and that there was every indication that he would recover. The court further said: "Now that transaction, as far as the court and the jury, the defendant at the bar, the people of the state of California, the counsel, and all others interested or in-

volved in this trial are concerned, is to stand as though it had not occurred. No person is to be charged with any responsibility for that transaction. It may be stated also to you that the assailant afterwards took his own life while he was confined in the county jail upon his arrest in connection with that transaction; and neither matter, I repeat, should find any place in your minds. It should not in any manner form anything in the nature of bias or prejudice concerning any one. This court would despair of having the law administered upon the charge at bar if the jurors did not in every manner comply with the admonition of the court to exclude that transaction from your minds." And in its instructions to the jury the court charged them that they were not to be influenced by any event which had occurred of which they had obtained knowledge since they were sworn to try the case. There was nothing to show in the remotest degree that the defendant was in any way connected with the shooting of Heney. There was nothing to show that any juror had become biased or prejudiced against defendant by reason of such shooting. The jurors were not at large, but were at all times kept in the charge of the sheriff.

It is insisted that the court should have allowed counsel to examine the several jurors under oath in order to ascertain if they had been biased or prejudiced by the shooting of Heney. In our opinion the court properly denied such permission. In a case of great importance, where weeks have been spent, and hundreds of jurors examined in the endeavor to get a fair and impartial jury, to allow either party to call a halt in the proceedings for the purpose of re-examining the jurors as to bias or prejudice that may have been caused by events which had occurred after the jurors were sworn, and with the sole purpose of endeavoring to find evidence of such bias or prejudice, would be a dangerous proceeding. If it could be granted to one side, it could be to the other. It would turn the trial into a farce. It would put it in the power of one juror near the close of a long trial to deliberately disqualify himself, and compel the trial to be commenced over again. In many cases it would result in defeating the very object contemplated by a jury trial.

The same reasoning applies to the order denying defendant's motion for a new trial as it was based upon substantially the same grounds. Considerable stress is placed upon the affidavit of defendant, used on his motion for a new trial, to the effect that he had endeavored to get the affidavits of each of the 12 jurors, naming them, but that they each had refused to give such affidavit. The affidavit of defendant then proceeds to state as follows: "Affiant will further show by the testimony of said persons that one or more of them, within a short time following the said shooting, and before the conclusion of the trial of affiant, stated to Hon. William

P. Lawlor that he, or they, were prejudiced against defendant on account of said shooting, and could not fairly and impartially try said cause, and requested of said Hon. William P. Lawlor that he or they be discharged from further duty as jurors herein; that said Hon. William P. Lawlor declined and refused to discharge said persons so applying to him, and directed them to continue to act as jurors in said cause." In a second affidavit the defendant sets forth expressions used by Juror Bond as to his bias and prejudice against defendant while the case was being tried and after the shooting of Heney. He also sets forth that Juror Murphy after the shooting went to the judge, and informed said judge that he did not think that he could fairly and impartially try the case, and requested the judge to discharge him from further duty, that his request was refused, and that the judge told said juror to keep his feelings to himself, and that he would in due time be properly instructed as to his duties as a juror. These statements in the second affidavit do not purport to have been made on information and belief, but they could have been based on nothing else. It does not appear how defendant knew the things he stated in his affidavits. The affidavits were therefore but hearsay, and were not sufficient to impeach the verdict of the jury. *People v. Findley*, 132 Cal. 301, 64 Pac. 472. Nor could the juror Murphy of his own volition and during the progress of the trial disqualify himself by going to the judge, and thus compel the trial to begin anew. He had qualified as a juror, and taken an oath to try the case according to the evidence, and, if he afterwards stated that he could not do so, his statement would be of little value.

8. The court in its instructions to the jury read section 1323 of the Penal Code, and it is claimed that error was committed in so doing within the rule laid down in *People v. Emmons*, 110 Pac. 151. The *Emmons* Case lends countenance to the defendant's contention, but the remarks there made as to reading section 1323 of the Penal Code must be construed in relation to the facts of that case and the circumstances under which the section was read. There the district attorney claimed that he was taken by surprise because the defendant had not taken the stand as a witness as he had done in a former trial, and asked permission to reopen the case in order to introduce material statements made by defendant on the former trial. The court permitted the case to be reopened, and admitted the statements or testimony given on the former trial. The defendant requested the court to give an instruction to the effect that the fact that defendant had not taken the stand and had not testified raised no presumption against him, and that the jury were not at liberty to draw any unfavorable inference against him for the reason that he had not taken the stand or

offered himself as a witness. The court refused to give the instruction, and in lieu thereof read the section. It was the action of the court both in refusing the requested instruction and in reading the section (1323) instead that was held to constitute error. It was there said, and properly said, that, where a defendant had not taken the stand as a witness, there could be no occasion for reading the section as it contained only an abstract proposition of law, but the court did not hold that merely reading the section would constitute error if the court had elsewhere fully instructed the jury as to the right of defendant to refrain from testifying as to the fact that no inference could be indulged in against him on account of such failure to testify. In this case the court fully instructed the jury: "It is your duty as jurors throughout your consideration and your determination of this case to carefully and conscientiously abstain from indulging any and every inference or presumption, or consideration, in the least unfavorable to defendant, founded upon or arising from his not testifying in this case. There is absolutely nothing in that circumstance for you to consider in arriving at a verdict. The law requires of you, and it is your duty, to give no consideration at all and to attribute no significance whatever to the fact that defendant had not testified in this case. Under no circumstances should you permit it to influence your minds, and you must not do so."

And, again, "The defendant, Abraham Ruef, enters upon his trial with the presumption that he is an innocent man, and he is not bound or required to prove himself to be innocent. * * * And you should act upon the presumption of innocence and lack of intent during your entire consideration of the evidence, and until that shall have been overcome by evidence of his guilt so strong, so ample, so conclusive, as to convince your minds and the mind of each of you to a moral certainty and beyond a reasonable doubt that the defendant is guilty of the crime with which he is charged." We do not believe that the defendant could under the circumstances have been injured by the mere reading of the section in the abstract where the rule in the concrete was so fully and fairly stated elsewhere. In the Emmons Case it was said: "The instruction as requested contained a correct statement of the law pertinent to the issue, and under the circumstances it was very material to the defendant that it should have been given. The court in effect, instead of telling the jury that the failure of the defendant to testify should not create a prejudice or unfavorable inference in the minds of the jury, told them that the defendant could not be compelled to be a witness against himself, but, if he offer himself as a witness, he may be cross-examined by the counsel for the people as

to all matters about which he has testified in chief."

We are referred to *People v. Ryan*, 120 App. Div. 275, 105 N. Y. Supp. 160. In that case the reversal was for the reason that the evidence was not sufficient to warrant a conviction. The instruction given was not excepted to, and the court, after discussing it, merely said that, if it had been excepted to, it would have constituted legal error. The section of the Procedure of New York (section 393) merely provides: "The defendant in all cases may testify in his own behalf, but his neglect or refusal to testify does not create any presumption against him." The court in that case, however, did more than merely read the section. It stated that: "Where a defendant takes the stand in his own behalf, he is and can be subjected to all the forms of cross-examination as could any other witness in the case." Not only this, but it does not appear in that case that any further or more explicit instruction was given. The court in instructing the jury read almost literally some 30 odd sections of the Penal Code and the Code of Civil Procedure as to direct and indirect evidence, presumptions, inferences, the various kinds of evidence, the knowledge of the court, the facts as to which a witness may testify, conspiracy, impeachment of witnesses, that the masculine gender includes the feminine, of what things courts take judicial notice, that the court must decide questions of law and the jury questions of fact, and finally the provision of the Constitution that judges must not charge juries with respect to matters of fact. We have no hesitation in saying that such practice is not to be commended. It can serve no useful purpose, and the many propositions of abstract law can find no lodgement in the minds of laymen from the mere reading of the sections. In fact, the court might as well have read the first volume of Greenleaf on Evidence. Cases may arise in which to read an abstract proposition of law to the jury with a wrong application, and with no definite instruction on the same subject, would constitute error; and, in fact, the courts have so held in some cases under the peculiar facts of the case; but we know of no case where it has been so held if the court elsewhere specifically instructed the jury upon the point covered by the abstract proposition. In this case many of the instructions so read are complained of as constituting error. We have not the time nor the space to discuss them separately. The most plausible one on which to predicate error, for instance, is the fact that the court read to the jury the portions of section 1963 of the Code of Civil Procedure, as follows: "The following presumptions and no other are deemed conclusive. * * * (5) That evidence willfully suppressed would be adverse if produced. (6) That higher evidence would be adverse

from inferior being produced. * * *

And also that part of section 2061 as follows: " * * * (6) That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and therefore, (7) that if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust." It will be seen that section 2061 of the Code of Civil Procedure provides that the jury are to be instructed "on all proper occasions" as provided in the various subdivisions of the section. The only question is as to whether or not this case presented a proper occasion for such instruction. It would have to appear clearly, not only that the occasion was not a proper one, but also that under the circumstances the instruction was misleading and injurious before we would be justified in holding it to be erroneous. It was claimed by defendant's counsel in his argument that the district attorney could and should have called as witnesses the ex-supervisors other than the three called. In fact, the defendant had asked the court to instruct the jury that if it was within the power of the prosecution to produce the other ex-supervisors, and that such ex-supervisors could have testified as to matters material to the case, "then I charge you that the law presumes that the testimony of such ex-supervisors not produced as witnesses herein, if offered, would have been adverse to the prosecution in this case. Section 2061, subds. 5, 6; section 1963, Code Civ. Proc."

The court refused to give the instruction as worded, evidently because it was argumentative and singled out certain witnesses, and was made to apply to the prosecution and not to the case generally; but in lieu of giving the instruction as requested the court read the portions of the section as herein stated. The defendant by his request, having invoked the principles of law stated in the sections, and cited the sections as authority, and asked the court to instruct in regard to them, cannot now complain because it was not a proper occasion for giving such instructions. The prosecution had offered evidence, and the defendant had offered none. The instruction therefore could only be applied to the prosecution. As the defendant had offered no evidence, there was no inferior evidence on his part to which the presumption that higher evidence would have been adverse if produced could apply. As he had offered no evidence, either inferior or otherwise, there was no evidence to be viewed with distrust except the evidence on behalf of the prosecution. As to the abstract proposition "that evidence willfully suppressed would be adverse if produced," there is nothing to show that defendant willfully suppressed any evidence unless it might be

claimed that he could have taken the stand himself; but such fact was not the suppression of evidence within the meaning of the statute, but was only the exercise of a right given to the defendant under the law, the jury having been fully instructed as to such right. We cannot presume that the jury thus applied an abstract proposition in the face of the direct and positive instruction that no inference or presumption unfavorable to defendant can be indulged in by the jury by reason of the defendant not testifying, and that "there is absolutely nothing in that circumstance for you to consider in arriving at a verdict."

In *People v. Cuff*, 122 Cal. 589, 55 Pac. 407, the court gave an instruction based upon section 2061; but, instead of reading the section (as in the case at bar), commenced by saying, "The court instructs you," etc. The instruction was held to be erroneous, but the case was reversed upon other grounds in addition to the giving of the instruction, and there is nothing in the case to show that the jury were instructed elsewhere upon the right of the defendant to remain silent. *People v. Charles*, 9 Cal. App. 339, 99 Pac. 384, merely follows the case of *People v. Cuff*, and the court in that case said: "The effect of the entire charge of the court was to specifically direct the erroneous instruction toward the defendant's case." Where the occasion is proper for the giving of an instruction, it cannot be given in a better form than as laid down in the Code. In *People v. Dobbins*, 138 Cal. 698, 72 Pac. 341, the court said: "But nowhere has it been decided, nor indeed could it with reason be held, that it is error for the court to instruct in the language of our written law. This is substantially what the court here did, and so, while the instruction cannot be commended as a full and clear exposition of the meaning of the section of the Code, still it cannot be said that it was error for the court in giving the law to have conformed to the language of the Code, and to have omitted what that Code itself omits." It has been many times held that, if other instructions were given which qualify and explain an objectionable instruction, the judgment will not be reversed. *People v. Morine*, 61 Cal. 369; *People v. Bruggy*, 93 Cal. 484, 29 Pac. 26. In the latter case it was also said: "The practical administration of justice should not be defeated by a too rigid adherence to a close and technical analysis of the instructions of the court. The instructions are for the enlightenment of the jury as to the law of the case, and the jury never enters into such a character of analysis in construing them."

We therefore conclude that as the court specifically instructed the jury upon the material questions before them, the reading of the Code sections did no harm.

10. The court instructed the jury that "one who offers a bribe is not for that rea-

son alone an accomplice of the one to whom it is offered; and one to whom a bribe is offered or who asks or agrees to receive a bribe is not, for that reason alone, an accomplice of one who offers a bribe," and the claim is made that the said instruction is erroneous. The court elsewhere instructed the jury, as contended by counsel, that both Gallagher and Wilson were accomplices, as appeared from their own testimony, and this instruction is not questioned. It was held in *People v. Coffey*,¹ that one who receives a bribe is not for that reason an accomplice of one who gives a bribe, and the reason there given need not be here repeated. It is insisted now—and was the theory of the defendant at the trial—that Furey had entered into a conspiracy with Gallagher, Wilson, the defendant, and other supervisors for the purpose of obtaining money by reason of the official action of said board of supervisors in all matters which might come before the board in which money could be obtained, as for franchises or permits, and that such combination continued up to the time the offer in this case was made to Furey. Defendant upon this theory of the case asked the court to instruct the jury to the effect that if they should find that defendant and the other supervisors, together with Furey, entered into such general plan and scheme to obtain money from all persons for permits and franchises, then Furey was an accomplice; and defendant also asked further and separate instructions by which the court was requested to instruct the jury that Furey was in fact an accomplice. The court properly refused such instructions. The word "accomplice" as used in the statute means an accomplice in the commission of the offense charged and which is under investigation. Here the offense charged was an offer by defendant to bribe Furey. There is no evidence that Furey entered into a combination or agreement with the defendant and other supervisors to offer a bribe to himself. If the crime of some party who had paid money under such combination or conspiracy had been the subject of investigation, or if the unlawful conspiracy had been the subject of the trial, then no doubt all parties to it would have been accomplices, but they would have been accomplices to a different crime than the one charged here. The witness Furey could not have been an accomplice in the offer to bribe himself. It might have been known to defendant that Furey was willing to accept bribes. In fact, Furey might by his conduct have invited bribes; but the offer to bribe in this particular case is the offense with which the defendant is charged and of which he was convicted. The court elsewhere fully and fairly instructed the jury in regard to the subject of accomplices, and left it to them to decide provided they should find the evidence to fit the instructions as given. They were instructed at the request of the de-

fendant. "Any person who aids and abets another in the commission of any crime, or advises and encourages its commission, is an accomplice of such other person. Where two or more persons are concerned in the commission of a crime, whether they or either of them directly commit the act constituting the offense or aid and abet in its commission, or not being present they advise and encourage its commission, each one of them is an accomplice of the other. The word 'accomplice' includes all persons who have been concerned in the commission of an offense; and the grade or degree of the guilt of such person is not important. * * * And in this connection you are instructed that if you have a reasonable doubt upon the question of whether a witness is or is not, was or was not, an accomplice, you must resolve that doubt in favor of the defendant; and, if you have a reasonable doubt as to whether there is or is not other evidence which, in itself independent of and without the aid of the testimony of the accomplice or accomplices, tends to connect the defendant with the commission of the offense charged, you must resolve the doubt in favor of the defendant and acquit him." The witness Furey did not testify to any direct guilty participation of defendant as to the offer made to him. He testified that the offer was made by Gallagher, and did not pretend to know defendant in the transaction. He did not even testify that defendant ever mentioned the matter to him. It was only Gallagher and Wilson, who, by their testimony, connected the defendant with the offer. It was the testimony of these two that showed the commission of the offense by defendant. The law required other testimony tending to connect defendant with the commission of the offense. As we said in *People v. Coffey*, "At common law the jury had the right to convict upon the uncorroborated testimony of an accomplice; and it is only by reason of the statute that it is not allowed here. The statute cannot be construed in a loose or popular sense, but must be interpreted and accepted as recognized by law writers and as it was evidently intended by the Legislature when it made the bribe taker and the bribe giver each guilty of a different crime."

We certainly do not deem it our duty in this case to hold that the court should have given instructions that would have had the effect of telling the jury that the witness Furey was an accomplice because of an agreement between himself and the defendant with other supervisors to get money from other third parties not named in this indictment.

11. It is claimed that the attorney for the people was guilty of such misconduct in his argument to the jury as to call for a reversal of the case. During such argument, he referred to the fact that the attorney for the United Railroads was not called as a

¹ Rerearing pending.

witness; that the attorney was the party who handled the money; that, if the transaction was honest and fair, he should have been placed upon the stand by the defendant to explain it. The attorneys for the defendant assigned the remarks as misconduct, and excepted to them. Then some discussion arose; the district attorney claiming that such comment had been held not to be error in *People v. Ye Foo*, 4 Cal. App. 730, 89 Pac. 450. The district attorney remarked that he did not desire to make any claim that he was not entitled to make, whereupon counsel for defendant said: "If there is any damage done, you have done it. Go on with the argument." After the above remark the court made no ruling as to the matter, and the district attorney was allowed to proceed. It would seem that the defendant's attorney, by the remark, waived a ruling upon the question; but it is sufficient to say that it was expressly held in the *Ye Foo* Case that it was not error for the district attorney to refer to the fact that a codefendant had not been called as a witness. The reasons for the rule, and the authorities in support of it, are there fully given, and it is useless to here repeat them.

The attorney for the prosecution in the heat of his argument referred to the disappearance of Lathan, an important witness for the prosecution, evidently intending to infer that it was the United Railroads or the defendant who had had him decamp, and continuing the argument used these words: "Away with suborners of perjury. Away with bribers of witnesses. Thank God some of them are on their way to state prison now, and some of them are being tried today—" Here counsel for defendant said: "We desire now to take an exception to the remarks of counsel about the bribers of juries, and that some of them are on their way to state prison, as being entirely outside the record, unwarranted, unjustified, plainly prejudicial, and ask the court to so instruct the jury, and to command counsel to desist." In response to this the court said: "The jury will disregard any statement made by counsel which is in excess of the testimony." Further in his argument, claiming that the defendant was not sincere, the attorney for the people said: "I listened to the remarks of the gentleman who just has been entering his exception. I listened to his dulcet tones throughout this trial. I listened as I thought to the ring of insincerity last night, and memory came back to me as I recalled another voice with the same ring, with the same insincerity in it, and I recalled that we had in our midst once before a man that had the same method and that same way, Mr. George Dozier Collins, who no longer is among us, but Mr. George Collins Dozier has returned to be with us. And so let it be." Here counsel for the defendant said: "Now I take an exception to that remark, and ask the court to direct the coun-

sel to desist as being unwarranted, unauthorized, insulting, and unnecessary misconduct upon the part of the district attorney." The court in reply said: "Counsel will refrain from personal allusions to counsel on the other side. You must refrain from anything that is not justified by something said by counsel during the trial of this case."

Again the counsel for the people said: "Again, they talk to you about the dreadful torture chamber, about the awful things that occurred on Fillmore street, and about the guards that surrounded this man, and how he was tortured. Why, don't you recall that at that time he was on trial, daily in court, attended by Attorney Ach and Shortridge and Murphy and Fairall—I don't know but others—every day in court—" Counsel for the defendant took exception to the remarks on the ground that there was no evidence that the defendant was ever on trial in any court, and claimed that the remarks were prejudicial misconduct on the part of the district attorney. After some discussion as to whether or not the record showed that defendant had been on trial, and had changed his plea, the court remarked: "The jury will be guided by what their recollection is upon the subject." There was some testimony in the record that the defendant was formerly in court upon a charge of extortion, and that he had changed his plea from "not guilty" to "guilty." The witness Sinsheimer related a conversation with the defendant after he had entered such plea as to his reasons for so doing, in which defendant stated to him, in substance, that on account of the circumstances a case might have been made out against him as to some of the charges, and on account of his aged father and mother he had concluded to enter a plea of "guilty." In fact, reference was made by defendant's attorney to such plea of "guilty" in the extortion case while examining jurors and at other times during the progress of the trial. The remarks of the district attorney were therefore based upon the record. Not only that, but it does not appear that the sentence of the attorney for the people was completed, so that the matter that he was going to recall to the attention of the jury was not placed before them.

The above are all the instances to which our attention has been called where the defendant excepted to the remarks of counsel. In our opinion the remarks, in so far as they might have been injurious, were cured by the rulings of the court, and there is nothing in the remarks of sufficient importance to call for a reversal of the case. In *People v. Ye Foo*, supra, it was held that remarks made during the argument of counsel to which objection was made, and no motion made to strike them out, were not errors upon which a case could be reversed. The court there said: "District attorneys in their zeal to obtain convictions often overstep the proper bounds, and by intimation, innuendo, or

statement get before the jury matters not in evidence. When such course has been willfully pursued, or where something is stated or represented as a fact, and the statement is damaging and not borne out by the record, the Courts of Appeal have not hesitated to reverse the case and grant a new trial. But in the argument of a case, where counsel has become zealous in his cause, and upon his own view of the case works his mind up to believe certain things, he is apt to exaggerate and draw upon his imagination. We apprehend that this is well known to juries, and for this reason it would have to be a clear case of misconduct on the part of the district attorney to justify a reversal"—and many cases were cited in support of the ruling. The court in that case further said: "The court was not asked to strike out the objectionable remark, nor does it appear that the court ruled upon the exception. It is but fair to require defendant's counsel, in the case of objectionable remarks by the district attorney, to call the court's attention to them then and there, and invoke the aid of the court to prevent the remarks from injuring the defendant, before he will be allowed to urge the matter as error in this court. In such case this court will not hold the remark error upon which to reverse the case." See, further, the authorities cited in *People v. Ye Foo*, supra, and *People v. Kramer*, 117 Cal. 647, 49 Pac. 842.

The rule requiring that the remarks of the district attorney must be willful, not supported by the record, and must contain a statement of something as a fact, either by direct statement or innuendo, and, further, that they must have been objected to or the court's attention called to them, or else they will not be held error sufficient to reverse a case, is founded upon principles of justice and fair dealing. While such remarks when not justified might in some cases be prejudicial error and injurious to defendant, in other cases such remarks might prejudice the district attorney in the eyes of the jury. Each case must be judged by its own particular circumstances, and in our opinion, taking the remarks in this case, with the corrections and statements by the court, they could not have worked any injury to the defendant.

Finally, we have examined the other alleged errors, but find nothing which is of sufficient importance to justify a reversal of the case. The defendant presented 185 written instructions, and necessarily many of them were repetitions or given elsewhere, and the court was justified in refusing them. Taking the instructions that were given, we think the jury were fully and fairly advised in regard to the law appertaining to every phase of the case.

It is somewhat of a reflection upon the mode of administering the laws that the

trial of a simple question as to whether or not the defendant offered a bribe to Furey, a supervisor, should take up the time of the court and of the jury for months, and create a record of such amazing proportions. There were only two or three witnesses as to the main fact. Most of the testimony was as to matters and things that have no bearing upon the case. It is evident that in such case where, through the machinery provided by law, a jury has finally passed upon the question of fact and found the defendant guilty, and the evidence is sufficient to support the verdict of the jury, it should not be set aside or disturbed for light or trivial reasons. This rule has always been adhered to by this court and by the Supreme Court of the state. The judgment and orders are affirmed.

We concur: HALL, J.; KERRIGAN, J.

On Petition for Rehearing.

PER CURIAM. On this petition for a rehearing the defendant claims for the first time that the indictment does not state facts sufficient to constitute a public offense, for the reason that it fails to allege that the board of supervisors of the city and county of San Francisco had jurisdiction to enact the ordinance granting a franchise to the United Railroads to operate an overhead trolley system.

The proposition contended for is that the defendant, after having offered a bribe to a member of the board of supervisors for the purpose of corruptly influencing the official action of said member, and after having succeeded in procuring the action of the board in his favor and as he desired, can now be allowed in a court of justice to question collaterally the power of the board to do the very thing which he offered to pay its members to do.

If we considered the contention as serious, it is sufficient to say that we will not now grant a rehearing to consider a question which was not even raised in the 10 volumes of briefs on file at the time we rendered our decision.

The petition for a rehearing is denied.

14 Cal. App. 572

REGAN v. SUPERIOR COURT OF MARIN COUNTY. (Civ. 888.)

(Court of Appeal, First District, California.
Nov. 22, 1910.)

1. JUSTICES OF THE PEACE (§ 159*)—APPEAL—REQUISITES — UNDERTAKING — FILING—TIME.

The filing of an undertaking is an integral part of an appeal to the superior court from a justice's judgment, and must be filed within 30 days after rendition of such judgment.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 558; Dec. Dig. § 159.*]

2. JUSTICES OF THE PEACE (§ 159*)—APPEAL—UNDERTAKING ON APPEAL—FILING—TIME—NOTICE.

Code Civ. Proc. § 978a, provides that the undertaking on appeal from a justice's judgment must be filed within five days after the filing of the notice of appeal, and that notice of the filing of the undertaking must be given to the respondent. *Held*, that such section only added a further condition to the perfecting of such an appeal, and that all the steps necessary to that end, including the filing of the bond, must be taken and completed within the 30 days prescribed by section 974.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 550, 558, 559; Dec. Dig. § 159.*]

Petition by Henry Regan against the Superior Court of Marin County for a writ of review. Granted.

George H. Harlan, for petitioner. Wal J. Tuska, for respondent.

KERRIGAN, J. This is an application for a writ of review to annul the action of the superior court of Marin county in holding that, under section 978a of the Code of Civil Procedure, an undertaking on appeal from a justice's court, filed after the lapse of 30 days from the rendition of the judgment, was in time to vest the superior court with jurisdiction of the appeal.

The facts of the case are as follows: An action was pending in the recorder's court of the town of Mill Valley in said county, wherein the Mill Valley Rochdale Company, a corporation, was plaintiff, and Henry Regan, the petitioner here, was defendant. On July 8, 1910, judgment for the defendant was rendered by the recorder. On August 3, 1910, the plaintiff therein served a notice on the defendant that it appealed to the superior court, which notice was filed August 5th. The undertaking on appeal, however, was not filed until August 10th, which was more than 30 days after the rendition of the judgment. Thereafter, in the superior court, the defendant moved to dismiss the appeal for want of jurisdiction. This motion was denied, and the court immediately proceeded to try the cause, and, after hearing, rendered judgment in favor of the plaintiff, whereupon this proceeding was instituted.

The petitioner contends that the filing of an undertaking is an integral part of an appeal to the superior court, and that it must be filed within 30 days after the rendition of judgment in the inferior court. Undoubtedly this is the law unless it was changed by the enactment of section 978a of the Code of Civil Procedure in the year 1909. *Coker v. Supt. Ct.*, 58 Cal. 177; *McCracken v. Superior Ct.*, 86 Cal. 74, 24 Pac. 845; *McKeen v. Naughton*, 88 Cal. 462, 26 Pac. 354. In those cases it was held that, in order to effectuate an appeal from a justice's court, it is necessary to file a notice of appeal with the justice, to serve a copy of such notice upon the adverse party, and also to file a

written undertaking, and that all of these things must be done within 30 days after the rendition of the judgment. Section 978a reads: "The undertaking on appeal must be filed within five days after the filing of the notice of appeal, and notice of the filing of the undertaking must be given to the respondent."

It is the contention of the respondent that, the undertaking having been filed within five days after the filing of the notice of appeal, it is in time, even though filed more than 30 days after the rendition of the judgment. We cannot agree with this contention. It is our opinion that the only effect of section 978a is to add a further condition to the perfecting of the appeal, and that all the steps necessary to that end, including the filing of the bond, must be taken now, as formerly, within the 30 days mentioned in section 974 of the Code of Civil Procedure.

Prior to the enactment of the section under consideration, the order in which the various steps were taken, namely, the filing of the notice of appeal, the service of the same, and the filing of the bond, was immaterial, provided they were all taken within 30 days. *Coker v. Superior Court*, supra. Hence an appellant could serve and file his notice of appeal on the day that judgment was rendered, and, as no notice of the filing of the undertaking was required, he could file it at any time up to the thirtieth day, and during all this time the respondent would have to watch the justice's records to protect his right to except to the sufficiency of the sureties. When this new section is considered in the light of the decisions just referred to, and of the abuse that grew up under the law as interpreted by them, it is obvious, we think, that the Legislature intended no extension of the rights of the appellant, but sought to protect the rights of the respondent by correcting an abuse that had heretofore existed. Section 974, Code Civ. Proc., reads now as it did when the cases above cited were decided, and so does that part of section 978 upon which those cases in part were based. According to those sections, as interpreted by the cases cited, an appeal is initiated by the notice of appeal, and it is in force 30 days after the rendition of the judgment, at which time it becomes ineffectual for any purpose unless a proper undertaking is filed. See, also, *Kelsey v. Campbell*, 38 Barb. 238; *Raymond v. Raymond*, 76 N. Y. 106; *Bonnell v. Van Cise*, 8 S. D. 592, 67 N. W. 685. And we think no intention of changing the law as thus interpreted by the Supreme Court of this state is disclosed by section 978a.

It is true that under our construction of this section, if the appellant waits until the thirtieth day before filing his notice of appeal, he will not be entitled to five days within which to file his bond. But any other

construction of the section would be in conflict with sections 974 and 978, and we think wholly unwarranted. The construction we have placed upon section 978a leaves undisturbed the law with reference to the time within which appeals from justices' courts must be taken and perfected, and at the same time prevents the mischief aimed at by the Legislature. The provisions of the Code of Civil Procedure and the California cases cited in this opinion speak of appeals from justices' courts, and make no mention of a recorder's court; but under the provisions of the municipal corporation bill, as amended March 15, 1907 (Stats. 1907, p. 272), appeals from a recorder's court may be taken in like manner and with like effect as appeals from justices' courts.

It follows that the superior court had no jurisdiction to proceed and try the cause, and its action must be annulled, and it is so ordered.

We concur: HALL, J.; COOPER, J

14 Cal. App. 651

**BROWN v. NORTHERN CALIFORNIA
POWER CO. (Civ. 738.)**

(Court of Appeal, Third District, California.
Nov. 23, 1910.)

**1. ELECTRICITY (§ 19*)—FIRES—CAUSE—EVI-
DENCE.**

In an action against an electric power company to recover damages for the burning of property, evidence held to sustain findings that, though the fire was caused by contact of a telephone line with defendant's power line, it was not caused by the placing of the power line in close proximity to the telephone line, or by reason of defendant's removing and displacing the fixtures of the telephone company, or tampering therewith.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 19.*]

**2. ELECTRICITY (§ 19*)—POWER LINE—CON-
STRUCTION—NEGLIGENCE PER SE.**

The fact that defendant power company maintained its line carrying 20,000 volts of electricity within three feet of a telephone line, carrying a much lower voltage, did not constitute negligence per se, but was a circumstance from which, when considered with other pertinent circumstances, negligence might be inferred.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 19.*]

**3. APPEAL AND ERROR (§ 979*)—REVIEW—
MATTERS OF DISCRETION—DENIAL OF NEW
TRIAL.**

Denial of a motion for a new trial for insufficiency of evidence will not be disturbed if there is evidence to support the verdict, and it does not appear that the discretion of the court was abused.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3871-3873; Dec. Dig. § 979.*]

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Thomas Brown against the Northern California Power Company. Judg-

ment for defendant, and plaintiff appeals. Affirmed.

Charles L. Donohoe and Frank Freeman, for appellant. Reid & Dozier, for respondent.

HART, J. This is an action for damages for the destruction of certain property by fire, caused, so the complaint alleges, by the negligent acts of the defendant. The property alleged to have been thus destroyed consisted of a building situated in the town of Orland, Glenn county, and the contents thereof. Said building was the point of terminus of a private telephone line, extending from the town of Germantown, in said Glenn county, to the said town of Orland, along the county road between those two points. The structure, which it is alleged was destroyed by fire through the negligent acts of defendant, appears to have been occupied at the time of the fire by several different parties as business offices. The complaint sets forth several different and distinct causes of action, alleging damage, by the fire, to the property of a corresponding number of individuals. The first cause of action stated is in favor of the plaintiff in his individual right and the remaining counts allege damage to the property of the others, who, it is alleged, assigned their rights of action or claims for damages to plaintiff. The total amount sued for was \$2,729.65. The cause was tried by the court; trial by jury having been waived by both sides. The findings and judgment are in favor of the defendant. This appeal is by the plaintiff from the order denying his motion for a new trial.

The only point made by appellant is that the findings, in so far as they are against the claim that the fire was occasioned by the negligent acts and conduct of the defendant, are unjustified and unsustained by the evidence. The brief of respondent contains the written opinion of the learned trial judge, stating the issues, briefly referring to the evidence, applying the law to the facts as he found them, and setting forth the reasons which led him to the conclusion crystallized into the judgment herein. We approve and here adopt that part of said opinion which reads as follows:

"The cause of action as stated by the plaintiff in the complaint may be summarized as follows:

"(1) On the 7th day of December, 1902, and for several years prior thereto, there existed and was in operation a private telephone line, extending from the town of Germantown to the town of Orland. The termination of the telephone line in the town of Orland was in the office of the plaintiff, in a building owned by one J. G. Bender.

"(2) That prior to the 7th day of December, 1902, and while said telephone line was

in existence, between Germantown and Orland, the defendant erected an electric power line for the purpose of conducting electricity from Shasta county to the town of Wilhows in Glenn county.

"(3) That defendant erected its power line along the same county road, along which the telephone line was then built between Germantown and Orland. That the portion of the said power line of defendant, between Orland and Germantown, was erected by the defendant in close proximity to the said telephone line. That in the erection of the said power line the defendant removed, displaced, weakened, destroyed, and otherwise tampered with the posts and wires of the telephone line, without the consent and against the wish of the owner thereof.

"(4) That by reason of the defendant placing said power line in close proximity to said telephone line, and by reason of the defendant removing, weakening, destroying, displacing, and otherwise tampering with the posts and wires of the telephone line, the said telephone line was left in such a condition by defendant that on the 7th day of December, 1902, said telephone line was blown over and came in contact with said power line of defendant between Germantown and Orland. That, owing to the larger current of electricity contained in said power line than in the telephone line, the current of electricity transmitted to said telephone line from said power line caused the office of plaintiff to take fire, and the said office and the contents thereof were wholly destroyed.

"(5) That said fire was entirely due to the negligence and wrongful act of the defendant in placing its power line in close proximity to said telephone line and in weakening, removing, displacing, destroying, and tampering with said telephone line.

"The above is the plaintiff's case, as made by the pleadings, and his right to recover must be limited to the charges of negligence made in and by the complaint. No recovery can be had on acts of negligence or upon negligent conduct not alleged, as a defendant in such an action is entitled to know by the pleadings just what he is called on to meet.

"I have carefully gone over all the evidence and the briefs presented by counsel for the respective parties, and will now endeavor to state my conclusions on the case as made by the pleadings and the evidence. I have no doubt whatever that the fire which destroyed plaintiff's property was caused by the telephone wire coming in contact with the wire of the power line, receiving therefrom a large current of electricity, and transmitting it to the building in Orland occupied by the plaintiff. It is also clear from the evidence that the wire of the telephone line came in contact with the wire of the power company by reason of the fact that one of the posts of the telephone line was blown over during a storm, carrying the telephone

wire against the wire of the power company. Does the evidence show that the contact of the two wires was the result of some one, or all of the negligent acts of the defendant, alleged in the complaint? The burden is upon the plaintiff to show that the contact of the two wires was caused by some negligent act or acts of the defendant, alleged in the complaint.

"The first claim made by the plaintiff is that it was negligence for the defendant to put its posts within three feet of the posts of the telephone line. The evidence shows that the defendant did so place its posts. Is it negligence for a power company to place its posts within three feet of a telephone company's line? There is no law declaring it to be negligence, and the evidence in the case does not make it appear to be a negligent act. There is some evidence in the case that after the power line was built the telephone line did not work as well as it did before, owing to the fact that there was an induced current of electricity from the power line to the telephone line. But this is immaterial to the discussion here, because it is not claimed that the fire was caused from an induced current of electricity.

"The question here is, Was it negligence to place these two lines so close together, when considered from the standpoint of liability to come in contact? Should a reasonably prudent man have anticipated that the two lines being well and strongly built were liable to come in contact, because placed so close together? No evidence has been introduced to show that this is so, and I shall hold that it was not negligence for the defendant to put its power line three feet from the telephone posts. The other acts alleged as negligence against the defendant are that in the erection of its power line it removed, displaced, weakened, destroyed, and otherwise tampered with the posts and wires of the telephone line without the consent and against the will of the owner thereof. It is not a question whether the defendant had the consent of the owner of the telephone line to move and tamper with his wires. That question might be important in an action between the respective owners; but the question here is: Did the defendant, after tampering with the telephone line, leave the power line in a good and safe condition, considering its relationship to surrounding objects, including the telephone poles and wires, or did it leave it, when viewed in relation to all its surroundings, in an unsafe and negligent condition? The evidence shows that the defendant, in constructing its power line did in some places interfere with the telephone line by removing some posts, causing others to lean towards the east, breaking some in two, and resetting a part, and by moving wires in some places, and I think it appears by a preponderance of the evidence, sufficiently to

justify the court in finding, that the defendant did tamper with and to some extent change the position of the posts of the telephone line at or near the point where the post blew over and the two wires came in contact.

"The witness Eggerstedt testifies that at the time the power line was being built he saw men working in his field, and afterwards he noticed that all the posts for the whole distance of his line were leaning to the east. The witness Brown testified that the posts along there (the Eggerstedt place) were leaning to the east after the power line went through. These witnesses did not know the names of the men who did the work or for whom they were working, but as no one else was building a power line there but the defendant, and as the posts were evidently leaned because they were in the way of the power line, and as no one else had any motive for moving them, the court is justified in holding that the defendant changed their positions. Conceding, then, that the defendant did tamper with, remove, and change the position of the telephone posts near to or at the Eggerstedt place, still there is no evidence that it did not leave them as strong and as securely set in the ground as they were before; no evidence that, when left by the defendant, they had not been well and safely and firmly set in the ground, in a good, careful and workmanlike manner. There is evidence, as stated, that after the power line had been built poles were leaning towards the east, but this is no evidence that they were not properly and firmly set in the ground nor that the defendant had not exercised good care. A pole standing in a slanting position may be as firmly and safely set as one standing perpendicular.

"It was incumbent upon the plaintiff to allege and prove that the defendant when it built its power line did not build it in a good, careful, workmanlike manner, and in a manner to make it safe as regards the persons and property of the public; that it did not use due diligence to make it safe, when its position and proximity to the telephone line was considered; that in moving and tampering with the telephone line it did not set and adjust the telephone poles it interfered with in a safe, good, and workmanlike manner, but reset them in a careless manner and left them in an unsafe condition, or that, having properly set them, it, by a neglect to inspect and repair them, suffered them to get into an unsafe and weakened condition. These things in my judgment the plaintiff has not made to appear. By proving that the defendant changed the telephone line and tampered with it, the plaintiff has not proved that the line was left in an unsafe or weakened condition. Nor is this a case where from the fact that a pole blew over in December we have a right to find that it was left in a weakened and unsafe condition in

the preceding spring (or whenever the power line was built).

"For these reasons, I am constrained to hold that the plaintiff has not proved that the fire was caused by the defendant's negligence, in the particulars alleged in the complaint."

We have examined the record here with great care, and we have thus been convinced that the findings of the learned trial judge are beyond disturbance by this court. The court found that the fire which destroyed the building and its contents was caused by the contact of the telephone line with the defendant's line, "but that said fire was not caused by reason of the placing of said power line in close proximity to said telephone line, or by reason of the said defendant removing and displacing the posts of the said telephone line, or by reason of the said defendant removing, weakening, destroying, displacing, or otherwise tampering with the posts of said telephone line, or by reason of the condition in which said telephone line was left by the defendant, or by reason of any negligent act of the said defendant; that the said fire was not due to any negligence or any wrongful acts of defendant in placing its power line in close proximity to the telephone line, or by any acts of the defendant."

There is, so far as we are able to determine the question from the bare record, no direct evidence disclosing negligence on the part of the defendant, unless it may correctly be held that the mere fact that the defendant moved the poles of the telephone line into a slanting position from its line in order, it would seem, to avoid or at least minimize the chance for contact between the two wires, and the further fact that defendant's wire was installed and maintained in rather close proximity to the telephone line, in and of themselves constituted negligence. The court having, as seen, found that the contact between the wires was the cause of the fire, and having further found that the evidence disclosed no negligence in the moving and "tampering with" the telephone poles, with which finding we observe no reason for interference, the question here is narrowed down to the single proposition whether the act of placing the power line at a distance of a little less than three feet from the telephone line constituted, as appellant contends, negligence per se. In other words, does the mere undisputed fact that the defendant constructed and maintained its line, which was of 20,000 volt power—a much higher voltage than that of the telephone line—within a distance of three feet from the telephone line, warrant the presumption of negligence on the part of the defendant? No such presumption of law arises upon the proof of that fact. It is obviously true that, had these two lines been erected and maintained at a distance from each other of several feet beyond the length of the longest poles of either

line, there would and could then have been no contact between the two wires through the falling of the pole or poles of one or the other, but we have been shown no reason for holding that, as a matter of law, there can be any more danger or probability of a telephone or power pole falling merely because situated within three feet of another line of wire transmitting electricity than there would be if the two lines were located five hundred yards or a mile apart, nor, if a pole does fall, that it will fall in the direction of or across or on the other line.

Of course, it will not be denied that the fact that a line of wire for transmitting electricity is located in such close proximity to another line of wire performing like service as were those concerned here would, where the pole of one has fallen on or across the other, the contact of the two wires causing damage, as here, constitute a circumstance which should be considered in the determination of the question whether the falling of the pole was due to the culpable fault or negligence of one or the other of the owners of the two lines, and it might, in a greater or less degree, according to circumstances, tend to prove negligence in the one or the other—that is, it is a circumstance from which, when considered with other pertinent circumstances, negligence might be inferred. But this would not be a presumption of law, but only an inference of one fact from another, and, of course, it is for the jury, or, as here, the judge trying the facts, to say how far such circumstance goes toward proving negligence, or whether, with other circumstances, the charge of negligence is sufficiently established. In other words, whether there is danger of damage resulting from the maintenance of a wire of the high voltage of the wire of defendant within a distance of three feet from an ordinary telephone line must depend, as is shown by the testimony of the experts introduced as witnesses, upon the proposition whether, from any cause, the wires come in contact with each other, and even then, so Wheeler, the defendant's expert, declared, under certain circumstances there would be no danger of resultant damage except at and in the immediate neighborhood of the point of contact. This witness testified: "If 20,000 volts started at the point of contact, where Dr. Tooley said (Dr. Tooley had testified that early on the morning of December 7, 1902, he saw bright flashes of light emitting from the wires at the point of contact between the towns of Germantown and Orland, and about ten miles from the latter place), on a 14 wire, 10 miles from the building, not over 300 or 400 volts would reach the building, as almost the entire original voltage would be lost. Three or four hundred volts would be highly dangerous, due to its kicking effect, but it couldn't set fire. Before it would set fire, the wire itself would be burned in two."

While the court found, as we have seen, that the fire was caused by the collision between the two wires, contrary to the theory advanced in the latter part of the quoted part of Wheeler's testimony, yet his testimony nevertheless supports the position we take here that, while it is very plain that contact between two wires would necessarily be a more probable event where, as here, they are maintained very near to each other than it would be were the wires maintained a considerable distance apart, in the former case, as well as in the latter, when such contact occurs, the question must necessarily arise as to the cause of such contact—whether it be due to an "irresistible, superhuman cause," or has been occasioned by negligence imputable to either one or the other of the owners of the two lines. Manifestly this question could only be determined upon evidence explaining how or in what manner the wires came together, and where, as here, it is charged that the damage flowing from such contact is due to the negligence of the owner of one of the lines, the burden of proving such negligence by a preponderance of the evidence is as the learned trial judge has said upon the accusing party. The court below has found that this burden has not been sustained by the party upon whom the law has placed it, and, as already indicated by the views which we have expressed with respect to the record before us, this court is compelled to accept that finding. In other words, we are not able to declare as a matter of law that the evidence as disclosed by the record is such as to have entitled the plaintiff to a verdict.

As stated in the opinion filed herein by the trial judge, there is no evidence that defendant, after moving or, as the complaint alleges, "tampering with" the telephone poles, left said poles in an unsafe condition, or did not reset them as firmly in the ground as they were before they were thus disturbed. It does appear from the evidence, as is stated in Judge Ellison's opinion, that the fire occurred several months after the telephone poles had been removed and placed in different positions, and that at the time the contact between the two wires occurred a heavy wind storm was prevailing, and that it was then that one of the posts of the telephone line fell over, causing a contact between the two wires.

That it is the settled rule that whether a motion for a new trial based upon the ground of the insufficiency of the evidence to support the verdict or findings shall be granted or refused rests in the sound discretion of the trial court is a proposition no one will dispute, and which is, in fact, conceded by counsel for the appellant as a matter of course, and, where the motion is denied and there is evidence which justifies the verdict or supports the findings, then it is clear that it cannot be said by a court of review that

such discretion has been abused or improperly exercised.

For the reasons stated in the foregoing, the order is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

15 Cal. App. 28

PEOPLE v. GEE GONG. (Cr. 262.)†

(Court of Appeal, First District, California. Dec. 13, 1910. Rehearing Denied by Supreme Court Feb. 10, 1911.)

1. INDICTMENT AND INFORMATION (§ 34*)—APPENDING NAMES OF WITNESSES—INTERPRETERS—"WITNESS."

One acting as an interpreter before the grand jury is not a "witness examined before" it within Pen. Code, § 995, requiring the setting aside of an indictment "when the names of the witnesses examined before the grand jury," are not appended at the foot of the indictment.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 34.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7511-7513.]

2. CRIMINAL LAW (§ 1088*)—APPEAL—REVIEW—RECORD.

Instructions claimed by defendant to have been offered by him and to have been refused cannot be considered, though the transcript contains instructions under the head "Defendant's proposed instructions," there being no indorsement on any of them, or any certificate or bill of exceptions, showing or tending to show whether it was given or refused, and there being in the transcript the certified charge given by the court, showing that both parties waived written instructions.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1088.*]

3. CRIMINAL LAW (§ 823*)—INSTRUCTIONS—CURING ERROR.

Any error in giving as an instruction a section of the Penal Code, which read by itself might mislead the jury, is cured by elsewhere fully instructing the jury so that it appears that they could not as reasonable men have been misled.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995; Dec. Dig. § 823.*]

4. HOMICIDE (§ 169*) — EVIDENCE — RELEVANCY.

The state on a prosecution for murder, having claimed that deceased was a laundryman, and been allowed to introduce testimony that the package containing a white coat and apron marked "Wee," found on the ground at the scene of the homicide, had been given to deceased to deliver to its owner, and that he was on such peaceful mission when attacked, defendant, who testified that the parcel was his own property, the articles therein having been given him by his uncle, "Wee," at a certain time and place, and that he had taken it with him while seeking employment, from which peaceful mission he was returning when he accidentally met deceased, in his encounter with whom he acted in self-defense—was entitled to show, as bearing on the truth of his assertion as to the ownership of the property, that other coats and aprons of the same texture and similarly marked were given him by his uncle at the same time.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 169.*]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Gee Gong was prosecuted for murder, and, from a judgment of conviction and an order denying a motion for new trial, he appeals. Reversed.

James Hanley and J. E. Alexander, for appellant. Attorney General Webb, C. M. Fickert, Dist. Atty., and Maxwell McNutt, Asst. Dist. Atty., for the People.

COOPER, P. J. The defendant was charged by the indictment with the crime of murder, for which crime he was tried, and found guilty of murder in the second degree. He prosecutes this appeal from the judgment and the order denying his motion for a new trial.

We have carefully examined the evidence, and find it sufficient to sustain the verdict. A motion was made to set aside the indictment upon the ground that the name of David Jones, who was sworn to act as an interpreter, was not appended at the foot of the indictment. The Penal Code (section 995) provides that an indictment must be set aside "when the names of the witnesses examined before the grand jury, or whose depositions have been read before them, are not inserted at the foot of the indictment or indorsed thereon." It is not claimed that Jones was a witness who was examined before the grand jury as to any fact, or that his testimony was taken before the grand jury. It is true that he was sworn to act as an interpreter, but this was in the nature of an officer or specialist selected and appointed to translate the questions from English into Chinese and the answers from Chinese into English; but the words "witnesses examined before the grand jury" show that a person sworn as an interpreter is not a witness in the sense in which the word is used in the statute. The purpose of the law is to furnish the people and the defendant with the names of the witnesses upon whose testimony the indictment is based. People v. Northey, 77 Cal. 629, 19 Pac. 865, 20 Pac. 129; People v. Quinn, 127 Cal. 542, 59 Pac. 987. The indictment is based upon the testimony of the witnesses examined before the grand jury, and the interpreter merely aids in getting the testimony in such language that the grand jury can understand it. Such interpreter may be present in the jury room, and, in fact, the grand jury have a right to require the attendance of an interpreter (Pen. Code, § 925); and, while he is in one sense a witness, he is not a "witness examined before the grand jury."

Appellant complains of the alleged refusal of the court to give his offered instructions numbered 13, 20, 25, and 35. Respondent contends that there is nothing in the record

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† For opinion on rehearing, see 114 Pac. 81.

to show that the instructions were either given or refused, and we must so hold. The transcript contains 40 separate typewritten instructions under the head "Defendant's proposed instructions," but there is no indorsement on any of them showing whether the instruction was given or refused, and there is nothing in the way of a certificate or bill of exceptions in any way showing or tending to show such fact. In the reporter's transcript the charge given by the court is certified, and it shows that both parties waived written instructions. We therefore cannot consider the question of the instructions which defendant claims he offered, and which he claims were also refused.

It is claimed that the court erred in giving the following instructions to the jury: "Upon a trial for murder, the commission of the homicide by the defendant being admitted or proved, the burden of proving circumstances of mitigation, or which justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed amounts to manslaughter, or that the defendant was justifiable or excusable." This instruction is literally a copy of section 1105 of the Penal Code, and evidently was read to the jury from the section, or copied in the instructions given by the court. It is claimed that giving the section of the Penal Code was error, for the reason that by it the jury were led to understand that the burden of proof was cast upon the defendant to show self-defense. While the reading of the section of the Code has been criticised, it has been held that if the court elsewhere fully instructed the jury as to the right of the defendant to the benefit of every reasonable doubt, and to have every fact proven beyond a reasonable doubt, the error in giving the instruction is cured. In other words, where the reading of a section of itself might mislead the jury, if the court elsewhere fully and sufficiently instructs the jury so that it appears that they could not as reasonable men have been misled by the instruction, the instruction will be held not to constitute error. *People v. Ruef* (filed Nov. 23, 1910) 114 Pac. 54; *People v. Anderson*, 105 Cal. 32, 38 Pac. 513; *People v. Hawes*, 98 Cal. 649, 33 Pac. 791.

The court instructed the jury: "Evidence of flight is received, not as a part of the things done in connection with the criminal act itself, but as indicative of a guilty mind; and, if you believe from the evidence in this case that a crime was committed in manner and form as charged in the indictment, and that immediately after its commission the defendant Gee Gong took flight, it is a circumstance to be weighed by you as tending in some degree to prove a consciousness of guilt. It is not sufficient of itself to establish the guilt of the defendant, but the weight to which that circumstance is entitled is a matter for you to determine in connection with all the other facts and circum-

stances called out in the case as presented." The part of the instruction given by the court, "Evidence of flight is received, not as a part of the things done in connection with the criminal act itself, but as indicative of a guilty mind," was error. It was equivalent to telling the jury that flight indicates a guilty mind, which is by no means true. It may indicate a guilty mind, but that is for the jury to find or infer from all the facts and circumstances in connection with the flight. Flight is not of itself evidence of guilt, nor does it raise a presumption of guilt. It is at most only a fact to be considered by the jury in connection with all the other facts and circumstances in the case from which it may draw an inference as to the guilt of the defendant. It has sometimes been said that it is a circumstance tending in some degree to prove a consciousness of guilt; but that is quite different from telling the jury that such evidence is received "as indicative of a guilty mind." There are many cases where the circumstances show that the flight is perfectly consistent with innocence, but it is always received upon the theory that the jury will give it such weight as it deserves, depending upon the particular circumstances of each case. *Ryan v. People*, 79 N. Y. 593; *Alberti v. U. S.*, 162 U. S. 499, 16 Sup. Ct. 864, 40 L. Ed. 1051. It is a circumstance to be considered by the jury, who might regard it as sufficient to show a consciousness of guilt. *People v. Ashmead*, 118 Cal. 509, 50 Pac. 681. The question of fact as to whether or not the defendant fled is for the jury. *People v. Choy Ah Sing*, 84 Cal. 276, 24 Pac. 379. It has been held error for the court to instruct the jury that flight raises a presumption of guilt. *People v. Wong Ah Ngow*, 54 Cal. 153, 35 Am. Rep. 69. We see no reason why the court should have instructed the jury that evidence of flight is received as indicative of a guilty mind. It was clearly a charge upon a question of fact.

It was claimed by the prosecution that the deceased was a laundryman, and that at the time of the homicide he was carrying for delivery a small parcel containing, among other things, a white coat and apron, which parcel was found on the street near where the body lay. The prosecution was allowed to introduce evidence, under defendant's objection, that the deceased was given the small parcel of laundry to be given to a customer of the laundry where deceased was employed. The witness Yee Quan Woo, after repeated objections by defendant's counsel, was allowed to testify that he instructed the deceased to take the parcel of laundry marked "Wee" to the owner. The articles were shown to the witness, and he identified them as being the coat and apron that he had given to the deceased to be delivered to a customer of the laundry on the day of the homicide. The defendant testified in his own behalf that the parcel containing the

coat and apron was his property, and that he had taken them with him upon the morning of the homicide on an unsuccessful mission to seek employment as a cook, and was returning peaceably with them in his possession when the trouble arose and the deceased met his death. In other words, while the prosecution had been allowed to prove the possession of the parcel by deceased for the purpose of showing that he was on a peaceful mission, doing his usual work, when he was unlawfully attacked and shot to death, the defendant desired, in aid of his contention that he did act in self-defense, to prove that he had been on a peaceful mission in search of work, with the parcel containing his coat and apron, and that the meeting with deceased was not premeditated, but that it occurred while defendant was returning from a peaceful mission. The defendant testified that he was returning with the coat and apron; that they were his property given to him by his uncle "Gee Wee" while he was working with his uncle at the Berkshire Hotel on Sutter and Jones streets in San Francisco; and that the coat and apron were marked "Wee." He was then asked, "Did your uncle give you any other aprons at or near the time he gave you this apron?" To this question the prosecution objected on the ground it was irrelevant, immaterial, and incompetent, and self-serving. The attorney for the defendant stated to the court that he claimed the right to show the ownership of these aprons, and further said: "We wish to show that at the time this apron was received not alone this apron, but other aprons, were received, and not alone marked in the way this is, but similar marks on the other aprons of the same texture and upon the same cloth; and we wish to show the other aprons as it was shown here by the prosecution that certain things marked 'Wee' went certain ways. We wish to show the 'Wee' mark here was the uncle's mark, and we will show those aprons which he received at the same time, and show that this is the property, and also show how he obtained possession of it." After some further discussion and objection by the prosecution the court remarked: "It seems to me that the whole matter is collateral anyhow, and can't throw any light upon the occurrence itself." Finally the attorney for the defendant again asked a question as follows: "On the 14th day of November, 1909, did you have belonging to you any aprons similar to these aprons and marked 'Wee' the same as this apron which has been given to you by your uncle?" This question was objected to, and the court remarked: "That is the same question. I will sustain the objection to that." The court erred in refusing to allow the offered evidence. It was a material question upon the investigation being held before the jury as to whether or not the defendant had told the truth as to the ownership of the

articles. He had stated the name of his uncle, and the place where his uncle gave him the coat and apron, and the mark "Wee" being the name of his uncle. He desired, and his counsel so stated, to prove that other coats and other aprons of the same texture and similar marks, were given to him at the same time, so as to show that the coat and apron in the package were a part of the articles given to him by his uncle. Upon the plainest principles of justice the evidence should have been allowed. Defendant was being tried for a crime that involved his liberty and perhaps his life. In regard to all questions addressed to the discretion of the court which would tend to throw light upon any material circumstance, the discretion of the court should have been exercised in favor of the admission of the testimony. If such testimony would logically tend to show justification or mitigation of the alleged crime, the court should have admitted it. Whether the defendant could have proven the matters which he offered to prove or not is not for us to say, but he should have been given the opportunity. Suppose he could have shown that his uncle had ordered a half dozen coats and a half dozen aprons made from a peculiar cloth, with the date of making and the maker's name on each garment, and further that each garment had a particular mark "Wee" placed upon it, and then presented such garments to the defendant, and suppose the defendant brought into court the particular five coats and aprons of similar texture and marks; would not such testimony tend—and strongly tend—to show the fact that the coat and apron in this package were his property? What reason was there for excluding the offered evidence? It certainly could not have taken very much time, and it bore directly on the question of the ownership of the package.

In *Moody v. Peirano*, 4 Cal. App. 411, 88 Pac. 380, where the question was as to whether or not the defendant had warranted certain seed wheat as "White Australian," it was held that evidence of similar warranties made by defendant to other purchasers about the same time was admissible. The court held that the offered evidence tended to illustrate and throw light on the transaction in controversy. If such be the correct rule in a civil case, how much more important in a criminal case where the liberty or life of the prisoner is involved. The evidence was just as material as though the question were the ownership of a pair of shoes, and the defendant had offered to prove that the shoes were a pair from several pairs that had been ordered and made of special leather and of a special design. In fact, there could have been no object in excluding the offered evidence except to keep from the jury the full facts in connection with the matter. As we have said before in many cases, the ends of justice would be better subserved, and con-

victions would be obtained in as many cases, if district attorneys and trial judges in case of a doubt as to the relevancy of testimony offered on behalf of defendant should admit it, giving the benefit of the doubt to the defendant. Not only would as many convictions be secured but a far greater number of cases would be affirmed in this court, and the court would not be compelled to hold that prejudicial error was committed in the exclusion of such testimony.

The judgment and order for these reasons must be reversed, and it is so ordered.

We concur: HALL, J.; KERRIGAN, J.

15 Cal. App. 28

PEOPLE v. GEE GONG. (Cr. 1,657.)

(Supreme Court of California. Feb. 11, 1911.)

CRIMINAL LAW (§§ 763, 764*)—INSTRUCTIONS—FLIGHT AS EVIDENCE OF GUILTY MIND.

An instruction, "Evidence of flight is received, not as part of the things done in connection with the criminal act itself, but as indicative of a guilty mind," and if the jury believe a crime was committed, and immediately thereafter defendant took flight, it is a circumstance to be weighed as tending in some degree to prove a consciousness of guilt, that it is not sufficient of itself to establish guilt of defendant, but its weight is for them to determine in connection with all the other facts in evidence, is not objectionable as equivalent to telling the jury that flight indicates a guilty mind, and as a charge on a question of fact.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. §§ 763, 764.*]

In Bank. On rehearing. Denied.

For opinion, see 114 Pac. 78.

PER CURIAM. The petition for rehearing is denied. We deem it proper to say, however, that we do not approve of the criticism by the District Court of Appeal of the instruction referred to in its opinion.

14 Cal. App. 733

CURRAN v. HUBBARD. (Civ. 850.)

(Court of Appeal, Second District, California. Dec. 2, 1910. Rehearing Denied by Supreme Court, Jan. 31, 1911.)

1. BROKERS (§ 43*)—COMPENSATION—CONTRACT OF EMPLOYMENT—"GET AN OFFER."

A memorandum signed by an owner and delivered to a broker, which states description and price of land and asks him to "get an offer," satisfies the requirements of Civ. Code, § 1624, as a written authority to sell or exchange land on commission.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. § 43;* Frauds, Statute of, Cent. Dig. § 131.]

2. BROKERS (§ 9*)—DURATION OF EMPLOYMENT—"GET AN OFFER."

An employment to "get an offer" for land is one to make a sale or exchange in a reasonable time, and not merely to procure a single offer.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 10; Dec. Dig. § 9.*]

3. APPEAL AND ERROR (§ 1071*)—HARMLESS ERROR.

Where the court found that plaintiff, a real estate broker employed by defendant, introduced one with whom defendant made an exchange of lands after rejecting an offer, the further finding that plaintiff procured a second offer was immaterial, and hence, if unsupported by the evidence, the error was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.*]

4. BROKERS (§ 88*)—ACTION FOR COMMISSIONS—FINDINGS.

A finding that plaintiff, a real estate broker claiming commissions, was employed under a memorandum signed by defendant, sufficiently negatives the defense that the action was barred by Civ. Code, § 1624, and Code Civ. Proc. § 1973, requiring such contracts of employment to be in writing.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 130; Dec. Dig. § 88.*]

5. APPEAL AND ERROR (§ 1140*)—DISPOSITION OF CAUSE—AFFIRMANCE.

Where the excessive part of a judgment is ascertainable, it will be affirmed provided the excess is remitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462-4478; Dec. Dig. § 1140.*]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by C. W. Curran against O. H. Hubbard. From a judgment for plaintiff, defendant appeals. Affirmed on conditions. Rehearing denied. See 114 Pac. 83.

Charles H. Mattingly, for appellant. Lucius M. Fall, Webster Davis, and T. E. Parke, for respondent.

SHAW, J. Action by plaintiff, a real estate broker, to recover a commission for services rendered to defendant in effecting an exchange of land. Plaintiff's authority to act in the matter consisted of a memorandum in writing subscribed by defendant and delivered to plaintiff, a copy of which, as set forth in the complaint, is as follows: "Ontario, December 6-08. My orange grove is lot 645, Ontario Colony. My price is \$12,000. Get me an offer. O. H. Hubbard, 3526 S. Figueroa St." The court found that plaintiff was a real estate broker, and that in December, 1908, defendant employed him as such agent and broker to find an offer for sale or exchange of the property in question, which said employment was evidenced by the memorandum in writing as alleged and set forth in the complaint; that plaintiff, acting on the authority of such memorandum, went to some expense in showing said property to one John Haasis, whom he introduced to defendant about January 16, 1909, and induced him to make an offer of property which he (Haasis) valued at \$12,000 in exchange for defendant's property; that defendant declined to accept this offer; but that thereafter, in February following,

Haasis made to defendant an offer of other real estate in exchange for said lot 645, Ontario Colony, which offer defendant accepted and exchanged said lot for the property of said John Haasis. As conclusions of law, the court found that plaintiff should have judgment against defendant for the sum of \$325, with interest and costs. Judgment went for plaintiff in accordance with the conclusions of law; whereupon defendant, as provided by section 663, Code of Civil Procedure, made a motion to have the judgment vacated and set aside, and in lieu thereof that a judgment be entered upon the findings in favor of defendant. This motion was denied, and defendant appeals from the judgment and order denying his motion.

The claim of appellant that the court erred in overruling his demurrer, and also in denying his motion to vacate and set aside the judgment, is based chiefly upon the contention that the memorandum in writing set forth in the complaint, and which the court found to have been made and signed by defendant, is insufficient, under the provisions of section 1624, Civil Code, to constitute an employment of plaintiff to make the exchange. Appellant further insists that, if such memorandum be construed as conferring any authority upon plaintiff, it should be limited merely to the getting of one single offer to purchase or exchange, and that, as the court found that defendant employed plaintiff as a real estate agent and broker to "find an offer for sale or exchange," and further found that the first offer made by Haasis was declined by defendant, the employment, without notice of revocation, terminated, and hence plaintiff was not entitled to recover for his services.

We cannot assent to either proposition. The memorandum should be considered as a whole, and thus considered it clearly appears therefrom that defendant described his property, stated the price upon the basis of which he would sell or exchange, and, by the words "get me an offer," used in the memorandum delivered to plaintiff, intended to and did authorize and employ him to find some one to whom a sale or satisfactory exchange could be made. Any other interpretation would be meaningless. In the case of *Kennedy v. Merickel*, 8 Cal. App. 378, 97 Pac. 81, this court said: "It is not requisite that it (the memorandum) shall be an instrument by the terms of which the agent is empowered to so bind the principal as to support an action for specific performance. It is sufficient if it shows that the broker is authorized by the principal to find a purchaser who is ready, willing, and able to exchange, or one with whom an exchange is actually made. As said in *Cody v. Dempsey*, 86 App. Div. (N. Y.) 335, 83 N. Y. Supp. 899, there is no definite requirement, except that the authority to act in the matter shall be evidenced by a writ-

ing. All the statute requires is written authority." To the same effect, see *Lindley v. Fay*, 119 Cal. 239, 51 Pac. 333; *Toomy v. Dunphy*, 86 Cal. 639, 25 Pac. 130. The memorandum was a sufficient compliance with the statute, and showed that plaintiff was employed by defendant to make a sale or satisfactory exchange of defendant's property, and not merely to procure a single offer of purchase or exchange. The words "employed plaintiff to find an offer," as used in the finding, are susceptible of no other interpretation than that plaintiff was employed to find a satisfactory offer—one which defendant was willing to or did accept.

It clearly appears that it was through and by means of plaintiff's efforts that the attention of Haasis was called to the fact that defendant desired to sell or exchange his orange grove; that he brought the parties together and initiated the negotiations which finally resulted in defendant exchanging his property for that offered by Haasis, and which, in the absence of anything to the contrary, he is presumed to have valued at the price fixed upon his own property. "It is sufficient if it (the memorandum) shows that the broker is authorized by the principal to find a purchaser who is ready, able, and willing to exchange," or "one with whom an exchange is actually made." *Clark v. Allen*, 125 Cal. 276, 57 Pac. 985; *Merriman v. Wickersham*, 141 Cal. 570, 75 Pac. 180; *Kennedy v. Merickel*, supra.

In the absence of anything in the memorandum limiting the period within which plaintiff should make the sale or exchange, he had a reasonable time so to do. *Niles v. Hancock*, 140 Cal. 161, 73 Pac. 840. It does not appear that there was any revocation of his authority. While the contract was in full force, he found a person who was ready, able, and willing to exchange, introduced him to defendant, and defendant made the exchange. The fact that the defendant rejected the first offer made by Haasis did not thereby free him from obligation to compensate plaintiff for the rendition of services in promoting such exchange.

Appellant attacks the finding of the court to the effect that plaintiff interviewed defendant and Haasis several times, induced Haasis to make a second offer, and showed the property to Haasis a second time; his claim being that such finding is not justified by the evidence. Under our view, the finding is wholly immaterial, and hence, if unsupported as claimed, the error is harmless (*Risdon v. Steyner*, 9 Cal. App. 344, 99 Pac. 377), for the reason that plaintiff's right to recover did not depend upon the facts embodied in such finding.

As a separate defense, defendant alleged that said action was barred by the provisions of section 1624, Civil Code, and section 1973, Code of Civil Procedure. He now complains

because the court failed to make findings upon such alleged issues. The finding that defendant did employ plaintiff by and under a memorandum in writing subscribed by defendant and delivered to plaintiff sufficiently negatives this allegation, if it be deemed material.

It was stipulated at the trial that if the proof established the fact that plaintiff was by defendant employed to sell or exchange the property, and did effect a sale or exchange, that the commission to which plaintiff would be entitled was $2\frac{1}{2}$ per cent. upon the amount of the consideration for such exchange. The court embodied this stipulation in a finding, but erroneously stated that the sum so agreed upon was 5 per cent. on the first \$1,000 and $2\frac{1}{2}$ per cent. on the balance. This resulted in the rendition of a judgment against the defendant in the sum of \$325, with interest from February 25, 1909, when it should have been for the sum of \$300 with such interest. Inasmuch, however, as that portion of the judgment predicated upon this erroneous finding is clearly ascertainable, and the proceedings as disclosed by the record are correct in other particulars, plaintiff should not be required to try the case again, provided such excess be remitted. *Clapp v. Vatcher*, 9 Cal. App. 462, 99 Pac. 549; *Salstrom v. Orleans, etc.*, Min. Co., 153 Cal. 551, 96 Pac. 292.

It is therefore ordered that if plaintiff, within 30 days from the filing hereof, file with the clerk of this court his written consent that the judgment of the superior court be modified by deducting \$25 therefrom, leaving the judgment to stand for \$300, and interest and costs as therein provided, said judgment shall be modified accordingly and the judgment and order denying defendant's motion affirmed. Otherwise, and in case plaintiff fails to file such consent in writing, the judgment and order shall be reversed. In any event, it is ordered that appellant recover his costs on this appeal.

We concur: ALLEN, P. J.; JAMES, J.

14 Cal. App. 733

CURRAN v. HUBBARD. (L. A. 2,853.)

(Supreme Court of California. Jan. 31, 1911.)

On petition for rehearing. Petition denied. For former opinion, see 114 Pac. 81.

PER CURIAM. Rehearing denied.

BEATTY, C. J. (dissenting). I think that the finding which the appellant challenges upon the ground that it is unsupported by the evidence, and which the District Court of Appeal treats as immaterial, was material and essential to the right of recovery.

15 Cal. App. 178

VANCE v. SUPREME LODGE OF FRATERNAL BROTHERHOOD. (Civ. 896.)

(Court of Appeal, Second District, California. Jan. 9, 1911. Rehearing Denied by Supreme Court March 10, 1911.)

1. ACCOUNT STATED (§ 4*)—WHAT CONSTITUTES.

Statements rendered monthly by a fraternal order to its organizer, showing the amount credited to him on the books of the order, are, when received and accepted by him as correct, accounts stated, and their correctness may only be questioned on the ground of fraud or mistake.

[Ed. Note.—For other cases, see *Account Stated*, Cent. Dig. §§ 14, 15; Dec. Dig. § 4.*]

2. ACCOUNT STATED (§ 1*)—DEFINITION.

An account stated is an agreed balance of accounts, and implies an admission that the account is correct and that the balance is due, and it establishes prima facie the accuracy of the items without other proof, and is a new contract on which an action lies.

[Ed. Note.—For other cases, see *Account Stated*, Cent. Dig. §§ 1-9; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 93-98; vol. 8, p. 7561.]

3. ACCOUNT STATED (§ 11*)—ACTS CONSTITUTING—MISREPRESENTATIONS.

The misrepresentation by a debtor of the amount due, where no relation of trust exists requiring a disclosure of the facts, is not ordinarily a fraud on the creditor which entitles him to a re-examination into the correctness of the account, which, by his acquiescence, has become stated, and in such a case a concealment or misrepresentation is not fraud justifying the reopening of the account.

[Ed. Note.—For other cases, see *Account Stated*, Cent. Dig. § 63; Dec. Dig. § 11.*]

4. ACCOUNT STATED (§ 11*)—MISREPRESENTATIONS—OPENING.

Where any relation of confidence and trust exists between the parties to an account stated, demanding that the information communicated by one to the other respecting the subject-matter of their dealings shall be full and complete, any concealment or misrepresentation amounts to a fraud sufficient to entitle the party injured to an action to open the account.

[Ed. Note.—For other cases, see *Account Stated*, Cent. Dig. § 63; Dec. Dig. § 11.*]

5. ACCOUNT STATED (§ 11*)—CONFIDENTIAL RELATION—OPENING ACCOUNT.

A contract employing one to organize lodges of a fraternal insurance order and to secure members thereof for a specified per cent. of the premiums paid by the members, to be paid monthly by the Supreme Secretary when received by him, etc., creates the relation of principal and agent, and the employé, as agent, must inform the order correctly as to the business contracted under the contract, and the order must correctly inform him of the money collected from members procured by the employé, and where the employé relies on representations made by the order he may attack the representations evidenced by statements of the money collected, though the agent received such statements as correct, and though he might have examined the books of the order.

[Ed. Note.—For other cases, see *Account Stated*, Cent. Dig. § 63; Dec. Dig. § 11.*]

6. FRAUD (§ 22*)—RELiance ON REPRESENTATIONS—DUTY TO INVESTIGATE.

Where no duty is imposed by law on one to make inquiry, and where under the circumstances a prudent man would not be put

on inquiry, the mere fact that means of knowledge are open to such person, and he has not availed himself of them, does not debar him from relief when thereafter making actual discovery.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 19-23; Dec. Dig. § 22.*]

7. LIMITATION OF ACTIONS (§ 104*)—FRAUD—EFFECT.

Where there is a fraudulent concealment of a cause of action existing in favor of one, limitations do not begin to run until he discovers the existence of the cause of action.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 511-513; Dec. Dig. § 104.*]

8. LIMITATION OF ACTIONS (§ 100*)—FRAUD—EFFECT.

Under Code Civ. Proc. § 338, subd. 4, providing that an action for fraud does not accrue until the discovery by the aggrieved party of the fraud, etc., the right of action of an agent of a fraternal order employed to organize lodges and secure members for a specified part of assessments paid by the members, resulting from misrepresentations made by the order of the moneys collected from members procured by him, accrues on his discovery of the misrepresentations, and an action brought within three years thereof is not barred.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 480-493; Dec. Dig. § 100.*]

9. ACCOUNT STATED (§ 11*)—OPENING—ESTOPPEL.

Where there was a dispute between an agent of a fraternal insurance order and the order as to his right to a percentage on assessments paid by members procured by him, the fact that the agent after an alleged statement of accounts received remittances for services subsequently rendered did not estop him from insisting on an opening of the account; the subsequent payments not being treated by either party as an expression of final settlement between them.

[Ed. Note.—For other cases, see *Account Stated*, Cent. Dig. §§ 61, 62; Dec. Dig. § 11.*]

Appeal from Superior Court, Los Angeles County; Frank F. Oster, Judge.

Action by C. R. Vance against the Supreme Lodge of the Fraternal Brotherhood. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

C. A. Post, R. W. Kemp, and Davis, Kemp & Post, for appellant. Frank James and Smith & Smith, for respondent.

JAMES, J. An appeal is taken from a judgment entered in favor of plaintiff for the principal sum of \$1,770, and from an order denying a motion made by defendant for a new trial.

Defendant is a fraternal insurance organization. In July, 1900, it employed plaintiff as a general organizer of the order. Among other duties, plaintiff under his contract was required to organize and institute lodges, secure members therefor, and instruct the officers thereof. The contract of employment was in writing and contained a clause providing for the compensation to be paid plaintiff as follows: "7. My compensation to

be certificate registration and charter fees of all members secured by me or persons working under me and 50% first twenty-four (24) assessments paid by said members; to be paid monthly by Supreme Secretary, when received by him." Plaintiff entered upon the employment under the terms of the agreement and continued therein until July, 1905. During the period of his service a statement was sent him each month from the office of the Supreme Secretary showing what moneys were due him at the several dates which the statements bore. On these statements, under a heading of "Suspended, died, or for whom commission is all paid," a list of names of persons who had been brought into the order through plaintiff's efforts would be appended. Under his contract plaintiff was entitled to have apportioned to him one-half of all assessments collected from members whom he had persuaded to join the order for the first 24 months of their membership. If such a member died or was suspended, no further credit was given to plaintiff on account of assessments, for in that case payment of assessments would cease upon the death or suspension of the member. So when plaintiff examined the monthly statements sent to him from the Supreme Secretary's office he would be informed that certain members had either been suspended, died, or that the full amount of commissions to which he was entitled on their account had been paid. The statements, however, would not apprise him as to what the exact case was; that is, whether the members named therein had been suspended, or whether they had died, or whether they belonged to the class on account of whom he had been paid his full commissions. Accompanying each of the monthly statements was a check for the balance shown to be due plaintiff. These checks were regularly accepted and cashed by the plaintiff. After June, 1902, defendant in rendering statements made allowances on account of commissions due on but 12 assessments collected from members procured by plaintiff, instead of 24 assessments, regardless of whether or not the member had continued in the order. The statements did not disclose this change in any other way than that there would appear under the heading mentioned the names of members whenever the 12 assessments had been collected and one-half the amount thereof credited to plaintiff's account. In April, 1906, plaintiff for the first time discovered that the statements rendered to him after June, 1902, were incorrect, and that a considerable sum of money by way of commissions on assessments which his contract provided should be paid to him had not been paid. After negotiating for a number of months with the defendant in the endeavor to secure an adjustment of the dispute, he brought

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

this action in February, 1908. In his complaint he set out the history of his employment with defendant and the manner of making settlements. He further alleged the facts respecting the furnishing to him of incorrect statements and of his failure to discover the same until April, 1906. Defendant in its answer alleged and sought to prove that the reason why no credits were given plaintiff after June, 1902, on account of more than 12 assessments collected from the members, was because the contract of employment between defendant and plaintiff was modified at that time, and that under such modified contract plaintiff was only entitled to credit for one-half of 12 assessments, instead of one-half of 24 assessments. The court found against the defendant on this issue, and that finding having been made on conflicting testimony its correctness cannot be here questioned.

The statements rendered by defendant to plaintiff each month, showing the amount credited to him on the books of defendant, when received and accepted as correct, constituted accounts stated between the parties, the correctness of which could afterwards be questioned only upon a sufficient showing of fraud or mistake. "An account stated is defined by Bouvier to be 'an agreed balance of accounts; an account which has been examined and accepted by the parties.' It implies an admission that the account is correct, and that the balance struck is due and owing from one party to the other. And its effect is to establish prima facie the accuracy of the items without other proof, and to constitute a new contract on which an action will lie. *Auzerais v. Naglee*, 74 Cal. 60, 15 Pac. 371, Judge Story says: 'If there has been any mistake, or omission, or accident, or fraud, or undue advantage, by which the account stated is in truth vitiated, and the balance is incorrectly fixed, a court of equity will not suffer it to be conclusive upon the parties, but will allow it to be opened and re-examined.' 1 Story's Eq. Jur. § 523; 1 Wait's Actions and Defenses, 195." *Green v. Thornton*, 96 Cal. 72, 30 Pac. 965.

The misrepresentation by a debtor to a creditor of the amount due, where no relation of trust or confidence exists requiring a full disclosure of facts to be made, is not ordinarily considered as a fraud upon the creditor which entitles him to a re-examination into the correctness of the account which, by his acquiescence, has become stated. Where both parties are dealing at arm's length, no duty rests upon the debtor to disclose facts which the creditor may obtain knowledge of by the exercise of due diligence. A concealment, or even misrepresentation, will not in such a case amount to a fraud which will entitle the creditor to have an account stated re-opened after settlement. It is very uniformly held, however, that, where any relation of confidence

and trust exists between the parties which demands that the information communicated respecting the subject of their dealings be full and complete, any concealment or misrepresentation will amount to fraud sufficient to entitle the party injured thereby to an action. The contract between plaintiff and defendant created here the relation of principal and agent. Upon the agent, because of the existence of such relation, there was the duty of informing his principal fully and correctly regarding all matters concerned in the business then being transacted under his contract of agency. The course of business by which the money collected from members whom plaintiff had brought into the defendant order required that remittances should come from the subordinate lodges to which such members were attached to the office of the Supreme Secretary. The books in the secretary's office, if properly kept, would furnish at all times the best source of information as to what moneys had actually been collected on account of assessments, etc. Necessarily, plaintiff was obliged to rely upon the records kept by defendant for his information as to what commissions he was entitled to on account of assessments collected. He might, it is true, as the evidence shows, have examined the books himself, but he was not required so to do, because the defendant proposed by its action in that regard taken to, and it did pretend to, furnish him statements of what its books showed, and these statements plaintiff undoubtedly had the right to assume correctly represented the facts. The case presented is not one where the parties are to be considered as dealing at arm's length, but one where because of the existence of a confidential relation, neither party could, without incurring liability therefor, misrepresent to the other any condition which it was important for the other party to be advised of. *Calmon v. Sarraile*, 142 Cal. 642, 76 Pac. 486. Plaintiff here can properly be denominated as coming within the rule declared in *Tarke v. Bingham*, 123 Cal. 166, 55 Pac. 760, where it is said: "Where no duty is imposed by law upon a person to make inquiry, and where under the circumstances 'a prudent man' would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery. The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission." It might have been possible for plaintiff to have ascertained himself, from the different lodges to which the members whom he had introduced into the order belonged, just how many and which ones had remained in the order and continued to pay assessments, but he was under no obligation so to do. The defendant would no doubt have insisted that no

commissions became payable at all until money collected on assessments had actually been returned to the home office. The contract of plaintiff, in fact, provided that his compensation was "to be paid monthly by Supreme Secretary, when received by him." The defendant, as before suggested, had the best means of information regarding these matters, and it made statements to the plaintiff which purported to set forth the truth. If they did not so state the facts, plaintiff would not be bound by the result of the error.

The plea of the statute of limitations was not well taken. Where there is a fraudulent concealment of a cause of action existing in favor of another, the statute is not set in motion until the party in whose favor such action has accrued discovers its existence. To quote from Cyc. vol. 25, pp. 1213, 1214; "The general statement of the rule as to the effect of a fraudulent concealment of a cause of action, where such rule is applicable, is that when a party against whom a cause of action exists in favor of another, by fraud or concealment prevents such other from obtaining knowledge thereof, the statute of limitations will commence to run only from the time the cause of action is discovered, or might have been discovered by the exercise of diligence." Here the plaintiff did not discover until April, 1906, that there had been concealed from him the knowledge of the collection of assessments for which no accounting was made to him for his proportion thereof. The only statute of limitations applicable, and which then commenced to run, is section 338, Code of Civil Procedure, which provides for a three-year limitation. Subdivision 4 of that section reads as follows: "(4) An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." By the express provisions of this section three years time is allowed after the discovery of the fraud within which to commence the action. Plaintiff could not be charged with laches if he brought his action at any time within the three-year period. It appeared that, subsequent to the discovery of the alleged misrepresentation respecting the amount of money due to plaintiff, he accepted several more statements and signed check vouchers therefor in receipt of the money shown by them to be to his credit. It is claimed that by accepting these subsequent statements and receiving and receipting for the remittances accompanying the same, plaintiff estopped himself from questioning any of the matters in any of the accounts made up at or preceding the date of the receipt of such statements and checks. The evidence shows that it was not the intention of the parties to make these latter

receipts binding as a settlement of the disputed accounts, for it appears that for a long period of time the question of the adjustment of plaintiff's claim against defendant had been the subject of consideration by the officers of the latter, and that after the expiration of a number of months a committee reported adversely to the allowance of the demand of plaintiff, and it was then finally rejected. The president of defendant testified that it was not his intention at the time the last statements and vouchers were sent to have them treated as an expression of final settlement between the defendant and plaintiff.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

15 Cal. App. 189

GERVAIS v. JOYCE et al. (Civ. 950.)
(Court of Appeal, Second District, California.
Jan. 20, 1911.)

APPEAL AND ERROR (§ 627*)—RECORD —TRAN-
SCRIPT—TIME FOR FILING—DISMISSAL OF
APPEAL FOR FAILURE TO FILE.

Where a transcript is not filed within the time prescribed by court rule 2, and is not on file at the time of notice to dismiss the appeal, and it appears that it was not filed on account of appellant's negligence and inadvertence, the appeal may be dismissed under court rule 5.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2744; Dec. Dig. § 627.*]

Action by Mrs. Alberta Gervais, executrix of the last will and testament of Lillian May Book, deceased, against T. F. Joyce and others. Judgment for plaintiff, and defendants appeal. Appeal dismissed.

Bernard Potter, for appellants. W. C. Batcheller, for respondent.

SHAW, J. Motion to dismiss appeal from the judgment and order denying a motion for a new trial. One of the grounds of the motion is that appellants failed to file the transcript within the time prescribed for so doing by rule 2 of this court. Rule 5 provides that a failure to file the transcript within the time so prescribed shall be ground for dismissing the appeal, unless the transcript shall be on file when notice of motion to dismiss is given, in which case such fact shall be sufficient answer to the motion.

The transcript was not filed within 40 days after the perfecting of the appeal, nor was it on file at the time when notice of the motion was given. It appears from an affidavit made by the attorney for appellants that the transcript was left with the attorney for respondent for examination before certifying to its correctness; that it was returned to his office within ample time for filing the same,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

but "affiant was unaware of the exact time that the same was signed, and through his inadvertence and neglect overlooked the time required within which to file same in the appellate court." Assuming that facts might exist which, if shown, would excuse the default, none are made to appear.

We think respondent is entitled to have the appeal dismissed, and it is so ordered. *Buckley v. Althorf*, 86 Cal. 643, 25 Pac. 134; *Tompkins v. Montgomery*, 116 Cal. 122, 47 Pac. 1006.

We concur: ALLEN, P. J.; JAMES, J.

15 Cal. App. 186

Ex parte HATCH. (Cr. 311.)

(Court of Appeal, First District, California.
Jan. 11, 1911.)

1. BAIL (§ 44*)—CRIMINAL PROSECUTIONS—DISCRETION OF COURT.

Admission to bail pending an appeal from a conviction for felony is, under Pen. Code, § 1272, a matter of discretion, to be exercised in favor of accused only when circumstances of an extraordinary character intervene.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. § 145; Dec. Dig. § 44.*]

2. HABEAS CORPUS (§ 107*)—BAIL—DISCRETION OF TRIAL COURT.

The determination of the trial court on an application for bail pending an appeal from conviction of a felony will not be disturbed on habeas corpus, except for manifest abuse of discretion.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 96; Dec. Dig. § 107.*]

3. HABEAS CORPUS (§ 107*)—BAIL—DISCRETION OF TRIAL COURT.

On habeas corpus to admit to bail after an order denying bail to accused pending an appeal from a conviction of a felony, on the ground that confinement in jail pending the appeal will result in danger to his health, copies of affidavits of physicians, which were received in evidence in support of the application, were made a part of the petition, but affidavits in opposition were not in the transcript nor made a part of the petition. *Held*, that the court must assume that such affidavits supported the conclusion of the trial court, and could not declare that the trial court abused its discretion.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 96; Dec. Dig. § 107.*]

Petition by Frank L. Hatch, on behalf of Jackson Hatch, for a writ of habeas corpus to procure an order admitting Jackson Hatch to bail pending an appeal from a judgment of conviction. Denied.

See, also, 9 Cal. App. 333, 99 Pac. 398.

Frank Freeman and H. I. Stafford, for petitioner. U. S. Webb, Atty. Gen., A. M. Free, Dist. Atty., and James P. Sex, Deputy Dist. Atty., for respondent.

LENNON, P. J. This is a petition by Frank L. Hatch, on behalf of Jackson Hatch, for a writ of habeas corpus. Petitioner invokes the writ for the purpose of procuring an order admitting said Jackson Hatch to bail pending an appeal to this court from a

judgment of conviction and a sentence of imprisonment for felony embezzlement, made and entered in the superior court of the county of Santa Clara.

Admission to bail pending an appeal from a judgment of conviction and a sentence of imprisonment for a felony is not a matter of right. Pen. Code, § 1272. It is a matter resting in and controlled by a sound legal discretion, which should be exercised in favor of a convicted person only when circumstances of an extraordinary character have intervened. *Ex parte Marks*, 49 Cal. 681; *Ex parte Smallman*, 54 Cal. 35; *Ex parte Brown*, 68 Cal. 177, 8 Pac. 829; *Ex parte Smith*, 89 Cal. 79, 26 Pac. 638; *Ex parte Turner*, 112 Cal. 627, 45 Pac. 571. The determination of an application to be admitted to bail pending an appeal from a judgment of conviction should, primarily, be left to the judgment of the trial court wherein the conviction was had, and such court's determination of the matter "should not be disturbed or ignored except in an instance of manifest abuse." *People v. Turner*, 112 Cal. 627, 45 Pac. 571.

In this case application for admission to bail pending appeal was made to the trial court by the defendant, upon the ground that "confinement in the county jail pending the hearing and determination of his said appeal would result in great danger to his health and his physical and mental condition." It appears from the petition presented here that a full hearing of this application was had before the trial court upon the affidavits of several physicians in support of and against the application. Attached to and made a part of the petition presented here are copies of the affidavits read and received in evidence in support of said application. These affidavits show about such a case as was made and presented in *Ex parte Turner*, supra, where the petition for a writ of habeas corpus, based upon a refusal to admit to bail pending appeal, was denied. In addition to these affidavits petitioner has attached to, and made a part of his petition here, the reporter's transcript of the proceedings had in the lower court upon the application there made for admission to bail. It affirmatively appears from this transcript that, upon the hearing of that application, the affidavits of several physicians in opposition to the application were offered and received in evidence. The contents of these affidavits are not set forth in the transcript nor made a part of the petition presented here. It is but fair to assume, however, that they fully supported the conclusion of the trial court, and therefore we cannot say, from the petition presented here, that the court abused its discretion in denying the application.

The petition is denied.

13 Cal. App. 768

PEOPLE v. HEIVNER. (Cr. 134.)

(Court of Appeal, Third District, California.
July 15, 1910.)1. INDICTMENT AND INFORMATION (§ 110*)—
SUFFICIENCY—LANGUAGE OF STATUTE—IN-
CEST.

An information against defendant for incest, alleging that the defendant "did willfully, unlawfully, and feloniously upon the person of one * * * a sister of" the defendant, substantially follows the language of the statute, and sufficiently informs the defendant that the person named is his sister.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.*]

2. INDICTMENT AND INFORMATION (§ 133*)—
DEMURRER—DESIGNATION OF PERSON IN-
JURED.

An allegation in an information for incest that is defective in its designation of the person injured can be attacked only by special demurrer.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 454-468; Dec. Dig. § 133.*]

3. CRIMINAL LAW (§ 519*)—EVIDENCE—CON-
FESSION—VOLUNTARY CHARACTER.

A confession made by the accused to the sheriff and the district attorney, without the use of any artifice, falsehood, or deception to obtain it, and with nothing approaching inducement or coercion, except the sheriff's admonition "to tell the truth," is a voluntary confession, and admissible in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1163-1174; Dec. Dig. § 519.*]

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

John G. Heivner was convicted of incest, and he appeals. Affirmed.

H. P. Andrews, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

BURNETT, J. This appeal invites but brief consideration, as the questions presented involve only familiar and elementary principles.

There is no merit in the contention that the information is insufficient. It follows substantially the language of the statute, and it is not obnoxious to just criticism. No demurrer was filed, and the only suggestion of infirmity is that there is no positive allegation in the information that the prosecutrix was the sister of defendant. The averment is that "the said John G. Heivner * * * did willfully, unlawfully, and feloniously upon the person of one Kate Curless, a sister of the said John G. Heivner," etc. It is clear that by this allegation the defendant was informed that Kate Curless is his sister, and it could not have been understood in any other way. Even if it were conceded that the allegation is defective, it could be attacked only by special demurrer.

Some claim is made that the confession received in evidence was not shown to be vol-

untary. But in this appellant is entirely mistaken. The sheriff and the district attorney both testified that no inducement was offered nor coercion used. They related all that occurred at the time, and from their testimony only an inference favorable to the ruling of the court can be drawn. The only thing suggesting an approach to coercion is found in the admonition of the sheriff, addressed to the defendant, to "tell the truth"; but this is not sufficient to avoid the confession. In *State v. Staley*, 14 Minn. 113 (Gil. 75), and cases therein cited, the rule is stated as follows: "The fact that the confession was made in answer to a question assuming the guilt of the person, or was obtained by artifice, falsehood, or deception, or preceded by a caution to the accused to tell the truth, if he said anything, does not render the confession inadmissible in evidence." It may be said here that there is no evidence that either the sheriff or the district attorney took any advantage of the defendant, or used any "artifice, falsehood, or deception" to obtain from him any statement; but their conduct seems to have been altogether decorous, and not violative of any right of appellant.

The court committed no error in giving or refusing instructions. Every principle of law applicable to the charge and evidence and necessary for the enlightenment of the jurors is found in the written directions of the trial judge to them, and there is nothing therein of which complaint can justly be made.

The positive testimony of the prosecutrix and the confession of defendant, together with some circumstantial evidence, afford ample support for the verdict, and we see no reason for interfering with the action of the jury.

The judgment and order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

13 Cal. App. 749

PEOPLE v. ARBERRY. (Cr. 251.)

(Court of Appeal, First District, California.
July 11, 1910. Rehearing Denied by
Supreme Court Sept. 8, 1910.)1. INDICTMENT AND INFORMATION (§ 122*)—
CONFORMITY TO COMPLAINT.

Pen. Code, § 872, provides that, if it appears from the examination by the committing magistrate that a public offense has been committed, and there is sufficient cause to believe accused guilty, the magistrate must indorse on the complaint an order: "It appearing to me that the offense in the within complaint mentioned (or any offense, according to the fact, stating generally the nature thereof) has been committed," and that there being sufficient cause to believe the person charged guilty, he orders that the person charged be held to answer. *Held*, that the information need not define or describe the offense in the exact language

of the complaint; it being sufficient if it charge generally the same offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 321-325; Dec. Dig. § 122.*]

2. INDICTMENT AND INFORMATION (§ 15*)—TIME OF FILING INFORMATION—NEW INFORMATION.

Under Pen. Code, § 1008, providing that the sustaining of a demurrer to an information bars another prosecution for the same offense, unless the court directs a new information to be filed, the district attorney has a reasonable time within which to file a new information, directed to be filed by the court upon sustaining a demurrer.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 83-88; Dec. Dig. § 15.*]

3. CRIMINAL LAW (§ 1166½*) — APPEAL — HARMLESS ERROR.

Since, under Pen. Code, § 1008, the district attorney has a reasonable time within which to file a new information after a demurrer is sustained to an information, if an order extending the time within which to file a new information did not unreasonably extend the time, the fact that such order was made in absence of accused, or his counsel, would be immaterial; the original order directing the filing of a new information having been made in accused's presence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3120; Dec. Dig. § 1166½.*]

4. CRIMINAL LAW (§ 636*)—PRESENCE OF ACCUSED—AMENDMENT OF INFORMATION.

Since the statute does not require that accused be present when the information is filed, he need not be present when an order is made, extending the time for filing a new information.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1470; Dec. Dig. § 636.*]

5. FALSE PRETENSES (§ 21*)—ATTEMPTS.

Accused falsely represented and pretended to M.'s aunt that M. had a serious disease of the heart, in that a valve of his heart was in a diseased condition, and that such disease endangered his life, and that he was apt to die therefrom at any time, and that it required immediate medical attention, and demanded a certain sum for such medical attention, and requested the aunt to pay it to him for the purpose of effecting a cure. *Held*, that accused was guilty of an attempt to obtain money by false pretenses.

[Ed. Note.—For other cases, see False Pretenses, Dec. Dig. § 21.*]

6. FALSE PRETENSES (§ 7*)—SUFFICIENCY OF PRETENSE—STATEMENT OF FACTS.

A voluntary statement by one claiming to be a physician, made to a country person ignorant of diseases, that her nephew was suffering from a valvular disease of the heart, in order to procure money from her for alleged treatment, was a statement of fact so as to constitute a false pretense.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 8; Dec. Dig. § 7.*]

7. FALSE PRETENSES (§ 14*)—PROSECUTION—DEFENSES.

The fact that one to whom statements constituting false pretenses were made, in an attempt to procure money from her, did not have any money, so that it would have been impossible for accused to have obtained any, would not constitute a defense to a prosecution for attempting to obtain money by false pretenses; it being sufficient that the means used were apparently adopted to obtaining the money.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 18; Dec. Dig. § 14.*]

8. FALSE PRETENSES (§ 43*)—PROSECUTION—ADMISSION OF EVIDENCE.

In a prosecution of accused for attempting to obtain money by false pretenses from a woman, by falsely representing that her nephew was suffering from heart disease, a letter which the evidence showed was written to the woman by accused under the name of "Dr. T. & Co.," after the nephew had obtained a sum from the woman and given it to accused, stating that the nephew had a serious complication and advising the woman to call at the offices of the medical company by which the letter purported to have been written, was admissible in evidence.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 57; Dec. Dig. § 43.*]

9. CRIMINAL LAW (§ 371*)—PROSECUTION—ADMISSION OF EVIDENCE—OTHER OFFENSES.

Accused, representing himself as the head of a medical company, told a young man who applied for advice that he was suffering from an abscess of the prostate gland, and the patient, at accused's suggestion, wrote to his aunt to procure the sum for which accused agreed to cure the disease, and a check was received from the aunt indorsed to accused, when he wrote a letter to the aunt on the letter head of the medical company, stating that her nephew was suffering from an abscess of the prostate gland, but was doing nicely "under our care," and on the next day accused wrote a letter to the aunt under the same letter head, stating that serious complications in the nephew's condition had been discovered, and advising her to call at the office of the medical company, and when she called accused stated that the nephew had a valvular disease of the heart which accused would cure for an additional sum. *Held*, in a prosecution for attempting to obtain money by false pretenses, by falsely representing that the nephew had valvular disease of the heart, that the letter written by accused to the aunt, stating that the nephew had an abscess of the prostate gland, was admissible in evidence to show accused's intent in making the representations as to the heart disease, not having been admitted to show another offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.*]

10. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—REQUESTS—CHARGES ALREADY GIVEN.

A requested instruction that, no matter how strong might be the probability of guilt, if it was nothing more than a probability, accused should be acquitted, was properly refused where the court charged that suspicion, however strong, would not justify a conviction, as the law did not permit a conviction upon suspicion, and also charged that mere probabilities were not sufficient to warrant a conviction; the charge requested being substantially covered by that given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

11. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS—REQUEST—INSTRUCTIONS ALREADY GIVEN.

A requested charge that it was not sufficient that the facts proved rendered guilt probable, but they must exclude beyond all reasonable doubt every other hypothesis than guilt, was substantially given by instructions that guilt must be proved beyond all reasonable doubt, and neither a mere preponderance nor any weight of preponderant evidence would be sufficient to authorize a conviction; and also that it was not sufficient that the circumstances proved account for and render probable accused's guilt, but they must exclude, beyond all reasonable doubt to a moral certainty, every other reasonable hypothesis than guilt, and the jury

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes!

should acquit if they failed to so establish accused's guilt in a single particular.

[Ed. Note—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

J. J. Arberry was convicted of attempting to obtain money by false pretenses, and he appeals from the judgment of conviction and order denying a new trial. Affirmed.

Carroll Cook, for appellant. Attorney General Webb, for the People.

COOPER, P. J. The defendant prosecutes this appeal from an order denying his motion for a new trial, and from a judgment convicting him of the crime of an attempt to obtain money by false pretenses. There is evidence which, if true (and we must so presume upon this appeal in view of the finding of the jury), shows the following facts: Ulysses Muscio, a young man about 21 years of age, resided at Edna in the county of San Luis Obispo. He had not been very well, and was troubled with pains in his back, and either needed or imagined that he needed the advice and aid of a physician. He had read in the San Francisco Examiner the advertisement of "Dr. Taylor & Co. at 721 Market street," which advertisement stated the ability and skill of the doctors in charge, and their undertaking specially to cure all diseases of men and youths. He came to San Francisco on July 18, 1909, and on the following day, with the advertisement in his hands, he went to "Dr. Taylor & Co., 721 Market street," and asked to see Dr. Taylor. The defendant appeared and stated to Muscio that he was Dr. Taylor, and at all times thereafter was addressed by Muscio as Dr. Taylor. Muscio was taken into a consultation room and examined by defendant, who by manipulation of the prostate gland obtained therefrom a milky fluid—an easy thing for a physician to do—which he showed to Muscio, and without any examination of it, microscopic or otherwise, informed him that it was pus from an abscess of the prostate gland, and demanded of Muscio \$300 to cure him. Muscio having only \$10 with him, defendant took that, and agreed that for \$200 more he would cure him. At defendant's suggestion and dictation Muscio wrote to his aunt, Mary Tomasini, a letter as follows: "Dear aunt,—I am sick and won't be home until the latter part of the week, and I need \$200. Please send it to me at once to this address." This letter was written on the letter head of "Dr. Taylor & Co." On July 22d a letter was received from the aunt, addressed to Muscio, care of "Dr. Taylor & Co.," which letter was opened by defendant and then handed back to Muscio. It contained a check for \$200, which Muscio indorsed and handed to defendant, and which was paid.

Defendant then handed Muscio a receipt for \$210, signed "Dr. Taylor & Co.," guaranteeing a cure of the alleged abscess of the prostate gland. On the same day a letter was mailed in San Francisco, on the letter head of "Dr. Taylor & Co.," addressed to the aunt, stating that in reply to her letter of July 22d Muscio was suffering from an abscess of the prostate gland, but that he was doing very nicely "under our care," and that he could return home in a few days. On the following day, and after the receipt of the \$210, upon the same letter head, signed in typewriting and dated July 23d, there was deposited in the United States mail at San Francisco, and received by the aunt, Mrs. Tomasini, the following letter: "Since writing you yesterday in regard to your nephew Ulysses Muscio, we have discovered a serious complication, and as he is very nervous we deem it best not to say anything to him, at least until we have seen you, and would advise you to come to San Francisco at once and call at this office before seeing him, as we desire to have a personal interview with you as soon as possible. You need not be alarmed, however, as there is no immediate danger, but trust you will call as advised." After receiving this letter the aunt came to San Francisco, and was met by a relative of hers, and together they immediately went, accompanied by Muscio, to consult Dr. Spencer, who, after an examination, stated that Muscio did not have and had not had an abscess of the prostate gland. Thereafter the aunt, in company with her relative, went to the office of "Dr. Taylor & Co." and asked for Dr. Taylor, and in response thereto they were presented to defendant as being Dr. Taylor, who informed them that he was Dr. Taylor. They then went into a private office, and in answer to questions the defendant said that he had written the letter in regard to the serious complications he had discovered in Muscio's case. Defendant then stated to the aunt, in the presence and hearing of Crespi, that Muscio had a valvular disease of the heart, that he might drop dead at any moment, but that he, defendant, could cure him, that he would have to have the care of Muscio for a week or 10 days and inject serum, which he said was very expensive, but that at the end of that time Muscio could go home to his aunt and take medicines which he would prescribe for him. Defendant stated that it was worth \$300 to cure Muscio of the valvular disease of the heart, but that he had been paid \$200 for curing the abscess of the prostate gland, and that he would cure him of the valvular disease of the heart for the additional sum of \$200. This sum was requested by the defendant from the aunt after his statement that Muscio had a valvular disease of the heart, and that he could cure him. The aunt and Crespi then left defendant's office under the pretense of getting

the money, but never returned. Muscio was afterwards examined by Dr. Spencer, Dr. Lartigan, and Dr. Schmall; and they found not only that he had never had an abscess of the prostate gland, but that his heart was normal, and that he had no valvular trouble of that organ. The testimony of these physicians, which is not contradicted, is that a valvular disease of the heart can be determined with absolute certainty.

This brings us to the discussion of the errors complained of by defendant and which he claims are sufficient to justify a reversal of the case. The defendant claims that the court erred in denying his motion to dismiss the information, which was made upon the ground that prior to the filing thereof the defendant had not been legally committed by a magistrate for the offense charged in the information. It is stated in his brief that, by taking the complaint filed before the committing magistrate and the commitment and reading them together, "it will be seen that the new information filed does not charge the defendant with the same crime for which he was held to answer by the committing magistrate." It is not stated in the brief as to the respects wherein the crime charged in the information differs from the crime for which defendant was held to answer, and upon the examination we have been able to give we can find none. The complaint before the committing magistrate charged the defendant with the crime of attempting to obtain money by false and fraudulent pretenses, by falsely and willfully representing to Mary Tomasini that Muscio "had an affection and disease of the heart of a serious nature, to wit, that said Ulysses Muscio had valvular disease of the heart, and that a valve of the heart of said Ulysses Muscio was in a diseased condition, and did further pretend and represent to the said Mary Tomasini that the said affection or disease of the heart of said Ulysses Muscio did endanger the life of said Ulysses Muscio, and that because of the said affection and disease of the heart of said Ulysses Muscio he, said Ulysses Muscio, was apt to drop dead at any time, and that the said affection or disease of the heart of said Ulysses Muscio required immediate medical attention, and that said affection or disease of the heart he, the said John J. Arberry (whose real name is unknown to this complainant) could and would cure for the price or sum of two hundred dollars, and no less." At the conclusion of the testimony taken before the committing magistrate he made and indorsed on the complaint the following order, to wit: "I find that the offense as charged in the complaint, felony, to wit, attempt to obtain money by false pretenses, has been committed, and that there is sufficient cause to believe the defendant, John J. Arberry, guilty thereof, and order that he be held to answer for the charge before the honorable superior court of the city and county of San Francisco."

The amended information charged the defendant with a felony, to wit, attempt to obtain money by false pretenses, by the defendant falsely representing and pretending that Muscio "had an affection and disease of the heart of a serious nature, to wit, that said Ulysses Muscio had valvular disease of the heart, that a valve of the heart of said Ulysses Muscio was in a diseased condition, and did further pretend and represent to the said Mary Tomasini that the said affection or disease of the heart of said Ulysses Muscio was of such nature and character that said disease did endanger the life of said Ulysses Muscio, and further that because of the said nature and character of said disease and affection of the heart of said Ulysses Muscio, he, the said Ulysses Muscio, was apt to drop dead at any time, and further that the said affection or disease of the heart of said Ulysses Muscio was of such a nature that the same required immediate medical attention, and did then and there demand for such medical attention the price or sum of \$200 in gold coin of the United States of America, and did then and there request the said Mary Tomasini to pay to him the said sum of \$200 in gold coin of the United States of America, for the purpose of effecting a cure of said alleged affection or disease of the heart of said Ulysses Muscio."

The committing magistrate held the defendant for the crime of attempting to obtain money by false pretenses, and the information charges the defendant with the same crime. This is a sufficient compliance with the statute. In our opinion it was never contemplated that the information should contain a statement of the crime in the exact language, or word for word the same as stated in the complaint filed before the committing magistrate. The Code provides (Pen. Code, § 872) that, if it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, he must make or indorse on the complaint an order to the effect: "It appearing to me that the offense in the within complaint mentioned (or any offense, according to the fact, stating generally the nature thereof) has been committed, and that there is sufficient cause to believe the within-named A. B. guilty thereof, I order that he be held to answer to the same." The order herein made stated generally the nature of the offense and sufficiently complied with the statute.

The demurrer of defendant was sustained to the first information. The Code (Pen. Code, § 1008) provides that when a demurrer is sustained to an indictment or information it is a bar to another prosecution for the same offense, "unless the court, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment or information, directs the cause to be submitted to another or the same grand

jury, or directs a new information to be filed." The court upon sustaining the demurrer, being of the opinion that the objection on which the demurrer was allowed could be avoided, directed that a new information be filed. The order made by the court, as shown by the reporter's notes, did not specify any time within which the new information should be filed; but the clerk's minutes show that the district attorney was given 10 days from the date of the order in which to file such information. It is now contended that the new information was not filed within the 10 days, but within 15 days, and that the court made an order, in the absence of defendant and his counsel, allowing the district attorney the additional five days; that such order was void, and hence the court lost jurisdiction.

The section last quoted is silent as to the time in which the new information is to be filed; and it would seem that under the law the district attorney would have a reasonable time within which to file such new information. It is not contended that it was not filed within a reasonable time. The court directed the district attorney to file it. Such order was made in the presence of the defendant, and the additional time was not material, unless the court had made an order extending the time beyond reasonable limits. However, counsel has failed to call our attention to any testimony or record showing that defendant was not present when the order was made extending the time. The clerk's minutes show that the defendant was present, accompanied by his counsel, and there is nothing that we have been able to find in the reporter's notes to the contrary. Not only this, but there is nothing in the statute requiring a defendant to be present when an information or indictment is filed. If the filing of an indictment against a defendant is not a proceeding during his absence, it is difficult to see how the giving of an order extending time to file it is such proceeding.

Nor did the court err in overruling the demurrer to the amended information. It states facts sufficient to constitute a public offense. The statement that defendant was suffering from a valvular disease of the heart was a statement of a fact. It was not given as an opinion, but it was a statement voluntarily made by defendant to a person from the country, ignorant of medicine and diseases, and who had the right to rely upon a physician's honor and integrity. It is not pretended that the statement is true, and it was made just at the time and contemporaneous with the attempt to get an additional \$200 from the aunt. It does not lie in the mouth of defendant to say that Mrs. Tomasini had no money, so that it would have been impossible for him to have accomplished the contemplated crime. He made the attempt to get the money. He made a false state-

ment as to an ailment that had no existence; and not only this, but stated that he could cure it. From his statement it was worth \$300 to cure an ailment that as a fact had no existence, and he agreed to cure such alleged ailment for \$200. A person who has attempted to pick the pocket of another would not be allowed to defend himself by proving that there was nothing in the pocket which he attempted to pick. So a robber, who holds up and attempts to rob the United States mail, would not be allowed to call post office officials or others to prove that there was nothing of value in the mail, and hence that no robbery could have been committed. It is sufficient that the means was apparently adapted to the end in view, although circumstances independent of the will of defendant left the crime uncommitted. The profession of medicine is an honorable and useful one, and the skillful, careful, honest physician who devotes his time—often his days and nights—to the relief of suffering humanity is a blessing to the community in which he resides. But while this is true, there is probably no profession or calling which affords greater opportunities for the dishonest quack to thrive and become wealthy off the ignorance and stupidity of his patients. There is little danger of an honorable, upright physician being held to criminal account for a mistaken diagnosis; but where a dishonest physician has made a willfully false statement as to a mortal disease, solely with the view of obtaining money from the victim, the law should deal severely with such physician. We do not mean to even intimate by what has been said that the law will hold a physician liable criminally for a statement honestly but mistakenly made as to his professional judgment in regard to a disease. But the fact that one is a licensed physician will not be allowed as a cloak to shield him from all responsibility for statements willfully made, with the sordid view of obtaining the money of the unwary.

The letters sent to Mrs. Tomasini, signed in typewriting "Dr. Taylor & Co.," were properly admitted in evidence. The evidence sufficiently connected the defendant with them and with the demands and statements therein made.

The court did not commit error in allowing evidence as to the prior statement that Muscio had an abscess of the prostate gland, and the fact that the defendant received \$200 to cure that. The transaction was with the same parties, from the same "Dr. Taylor & Co.," the defendant in each case representing himself to be Dr. Taylor, and each transaction was with the aunt of Muscio. It was admitted, not for the purpose of showing another and distinct crime, but to show the intent of the defendant in making the representations to the aunt that Muscio had valvular disease of the heart, and the question as to whether or not his statement was made

with the intent of procuring money and in violation of the law.

The defendant complains of the refusal of the court to give the following instruction: "You are instructed that, no matter how strong may be the probability in favor of the hypothesis of guilt, if it is nothing more than a probability, the prosecution fails and the defendant must be acquitted." The court elsewhere gave the substance of the instruction. In fact, the very next instruction given at defendant's request was the following: "You are instructed that suspicion, no matter how strong it may be, cannot justify you in convicting the defendant of the crime charged. The law does not permit a conviction of a crime upon suspicion, be it ever so strong." And the court elsewhere instructed the jury that: "Mere probabilities are not sufficient to warrant a conviction."

Complaint is further made that the court refused to give an instruction asked by the defendant to the effect that it is not sufficient that the facts proved coincide with, account for, and render probable, the hypothesis of guilt, but they must exclude to a moral certainty and beyond all reasonable doubt every other hypothesis but the single one of guilt. The instruction requested related to a statement of the law in connection with circumstantial evidence; and if it was material in the case we are of the opinion that it was substantially given elsewhere. The court in other instructions stated to the jury: "The guilt of the accused must be proved and established beyond all reasonable doubt," and: "Neither a mere preponderance or any weight of preponderant evidence is sufficient for the purpose of conviction"; and finally: "It is not sufficient that the circumstances proved coincide with, account for, and therefore render probable, the hypothesis sought to be established by the prosecution; but they must exclude beyond all reasonable doubt to a normal certainty every other reasonable hypothesis but the single one of guilt. Should they fail to so establish defendant's guilt in a single particular, it is the duty of the jury to render a verdict of not guilty."

Other errors are claimed in regard to the giving or the refusal to give instructions, but to discuss them in detail would prolong this opinion to an unnecessary length. It is sufficient to say that we have examined the instructions given and the instruction refused, and we find no substantial error in the giving of any instruction or the refusal to give any. The court fairly and fully stated the substance of the law applicable to the evidence and the issue to be determined by the jury. We find no error in the record that would justify us in reversing a case that appears to have been fairly tried.

The judgment and order are affirmed.

We concur: KERRIGAN, J.; HALL, J.

15 Cal. App. 195

PEOPLE v. T. WAH HING. (Cr. 132.)

(Court of Appeal, Third District, California.)

Jan. 24, 1911.)

1. CRIMINAL LAW (§ 823*) — INSTRUCTIONS — CURE OF ERRORS.

Because an instruction has been given that is favorable to a defendant, the court may not make a set-off to it by one prejudicial to him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1995; Dec. Dig. § 823.*]

2. CRIMINAL LAW (§ 822*) — INSTRUCTIONS — ENTIRETY OF.

Instructions must be considered in their entirety, and it is not necessary that each instruction should be a complete statement of all the rules by which the jury are to be guided.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991; Dec. Dig. § 822.*]

3. CRIMINAL LAW (§ 789*) — INSTRUCTIONS — REASONABLE DOUBT.

The governing principle of instructions upon reasonable doubt is that at all times during the deliberations of the jury until they have arrived at their verdict the presumption of innocence is in favor of the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846–1849, 1904–1922; Dec. Dig. § 789.*]

4. CRIMINAL LAW (§ 789*) — INSTRUCTIONS — REASONABLE DOUBT.

Under Pen. Code, § 1096, providing that accused is presumed to be innocent until the contrary is proved, and, in case of a reasonable doubt, he is entitled to acquittal, an instruction that after the jury has been once convinced beyond a reasonable doubt of defendant's guilt that conclusion must remain throughout their further deliberations, unless overcome by some view of the evidence or some process of reasoning which admits of no reasonable doubt of their first conclusion, is prejudicial, as the defendant is entitled to the presumption of innocence up to the final deliberations by the unprejudiced minds of the jury.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 789.*]

5. CRIMINAL LAW (§ 824*) — INSTRUCTIONS — REASONABLE DOUBT.

The court should give section 1096 of the Penal Code, providing that accused is presumed to be innocent, and is entitled to acquittal in case of a reasonable doubt, on its own motion, but it is not error to omit it when not asked for by the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996–2004; Dec. Dig. § 824.*]

6. CRIMINAL LAW (§ 823*) — INSTRUCTIONS — REASONABLE DOUBT—MORAL CERTAINTY.

Where the court instructed in the language of section 1826, Code Civ. Proc., that the law does not require such degree of proof as excludes the possibility of error, but moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind, and there were other instructions requiring proof beyond a reasonable doubt, they must be read in connection with such other instructions, and the jury could not have been in doubt as to how to apply the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1995; Dec. Dig. § 823.*]

7. ABORTION (§ 5*) — INDICTMENT — SUFFICIENCY.

Under the statute in regard to the crime of abortion, providing that whoever uses any instrument or other means with intent thereby to procure a miscarriage is punishable, etc., an indictment charging the use of instruments, de-

scribing them, upon the woman named, she being pregnant, with intent to procure her miscarriage, the same not being necessary to preserve her life, is sufficient, without stating how the instruments were used, as it will be presumed they were used upon her body.

[Ed. Note.—For other cases, see Abortion, Cent. Dig. §§ 8-14; Dec. Dig. § 5.*]

8. ABORTION (§ 9*)—WITNESSES (§ 330*)—EVIDENCE — CROSS-EXAMINATION — IMPEACHMENT.

In a prosecution for abortion, where the prosecuting witness testified that she had been married for about a month, and it appeared she had been pregnant about three months, a question on cross-examination as to who was the father of her child, or if any other than her husband was the father, was inadmissible, as the relevant issue was the pregnancy, and it was immaterial who was the father, and the question was inadmissible to degrade the witness.

[Ed. Note.—For other cases, see Abortion, Cent. Dig. §§ 17-20; Dec. Dig. § 9;* Witnesses, Cent. Dig. §§ 1106-1108; Dec. Dig. § 330.*]

9. CRIMINAL LAW (§ 1169*)—PREJUDICIAL ERROR — WITNESS' STATEMENT — PROSECUTING ATTORNEY'S ARGUMENTS.

Where a witness testified on cross-examination over defendant's objection that he was approached by a third person, not in presence of defendant or with his knowledge, to give perjured testimony, and that he refused, and such third person said, "Never mind, we have the jury fixed," and the prosecuting attorney referred to it in his argument, and the defendant was found guilty, it was prejudicial error not to strike out the statement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

10. ABORTION (§ 11*)—EVIDENCE—CORROBORATION.

Under Pen. Code, § 1108, providing that the defendant cannot be convicted upon the uncorroborated testimony of the woman upon whom the offense was committed, etc., in a prosecution for abortion, where the evidence of the mother and husband of the woman operated upon, pointed to a resort to some means which brought about a miscarriage, while slight corroboration, it was sufficient.

[Ed. Note.—For other cases, see Abortion, Cent. Dig. § 22; Dec. Dig. § 11.*]

11. ABORTION (§ 11*)—EVIDENCE—CORROBORATION.

Under Pen. Code, § 1108, providing that in a prosecution for abortion the defendant cannot be convicted on the uncorroborated testimony of the woman upon whom the offense was committed, it is not necessary that there should be a corroboration of the means alleged by which the abortion was produced. It is sufficient if there is corroboration as to the criminal intent, or as to the attempt to commit the crime by other means.

[Ed. Note.—For other cases, see Abortion, Cent. Dig. § 22; Dec. Dig. § 11.*]

12. CRIMINAL LAW (§ 1169*)—APPEAL—PREJUDICIAL ERROR—ADMISSION OF EVIDENCE.

In a prosecution for abortion, where a doctor testified as to subsequent treatment of the woman operated on, and a card was placed in his hands to fix the date, and it also contained the name of the woman, and that an abortion was performed by a person bearing defendant's name, but the court did not understand from the attorneys that such statement was on it, and, when he did, he directed the jury to disregard it, it was not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

T. Wah Hing was convicted of the crime of abortion, and he appeals. Reversed.

C. T. Jones, A. M. Seymour, and Archibald Yell, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, for the People.

CHIPMAN, P. J. Defendant was indicted for the crime of abortion under section 274 of the Penal Code. A demurrer for insufficiency of facts and for failure to conform to the requirements of sections 950, 951, and 952 of the Penal Code was overruled, and the defendant pleaded not guilty, and upon the trial the jury returned a verdict of guilty. Thereafter a motion was made by defendant in arrest of judgment, which being denied defendant moved for a new trial, which motion was denied. Defendant appeals from the orders denying his motions and from the judgment of conviction.

1. Appellant's first point is that the court erred in giving the following instruction: "If any one, or any number of you, after deliberating upon all the evidence in this case, shall be of the opinion that the defendant has not been proved to be guilty by the evidence adduced to a moral certainty and beyond a reasonable doubt, those entertaining that opinion should vote in favor of not guilty, and should so adhere to their opinion until convinced, beyond a reasonable doubt, that they are wrong. If, however, after a full and careful deliberation of all the evidence in the case, any one or more of you shall be of the opinion that the defendant has been proved to be guilty of the crime charged, to a moral certainty and beyond a reasonable doubt, those of you entertaining that opinion should vote in favor of guilty, and should adhere to your opinion until you are convinced beyond a reasonable doubt that you are wrong." The error assigned lies in the concluding clause of the instruction, the claim being that "each juror was told by the instruction that, if he believed the defendant had been proven guilty, he should so vote, but that he must not change his vote unless he was convinced beyond a reasonable doubt that the defendant was innocent." Respondent makes answer in two ways: First, that the opening paragraph of the instruction being in appellant's favor, the converse and compensating paragraph at the conclusion cannot be complained of; second, that the instructions upon the doctrine of reasonable doubt, elsewhere given, cured whatever of error there was in the instruction and renders it harmless. It certainly cannot be seriously contended that, because an instruction has been given which is favorable to the defendant, the court may make a set-off to it by one prejudicial to him. The second answer is based upon the

well-established rule that the instructions, as a body of directions to the jury, must be considered in their entirety, and that it is not necessary that each instruction should be a complete statement of all the rules by which the jury are to be guided. As was said in *People v. Besold*, 154 Cal. 369, 97 Pac. 874: "It is impossible to declare, in each instruction, the law governing every phase of the entire case. * * * To determine whether or not the law was properly declared for the guidance of the jury, we are to look, not to an isolated excerpt from the instructions, but to the charge as a whole." While this is true, it is also a rule that: "We must take the charge together and if, without straining any portion of the language, it harmonizes as a whole and fairly and correctly presents the law bearing on the issues tried, we will not disturb the judgment because a separate instruction does not contain all the conditions and limitations which are to be gathered from the entire text." *People v. Doyell*, 48 Cal. 85, 93; *People v. Clark*, 84 Cal. 573, 583, 24 Pac. 313.

The court gave the usual general instructions upon reasonable doubt. The governing principle of these general instructions upon that subject is that at all times during the deliberations of the jury and until they have arrived at a verdict the presumption of innocence operates in favor of the defendant. *People v. McNamara*, 94 Cal. 509, 514, 29 Pac. 953. It seems to us that the instruction complained of cannot be made to harmonize with the principle thus declared. Some one of the jury, before any final vote was taken or a verdict arrived at, and at a very early stage in the deliberations, may, "after full and careful deliberation of all the evidence in the case," have reached the opinion that the defendant had been proven guilty to a moral certainty and beyond a reasonable doubt, and yet, upon further discussion of the evidence, the presumption of innocence would, under the instruction, cease to operate, and this juror would be bound to adhere to his first opinion, unless convinced beyond a reasonable doubt that he was wrong. If a juror had once voted guilty, at that moment being convinced of defendant's guilt, he could not, if he followed this instruction, change his vote to not guilty, unless convinced beyond a reasonable doubt that the defendant was innocent, and this regardless of any substantial doubt which might, after further deliberation, arise in his mind. The jury are told that, after once having been convinced beyond a reasonable doubt of defendant's guilt, that conclusion must remain fixed and immovable throughout their further deliberations, unless that conclusion can be overcome by some view of the evidence or by some process of reasoning which admits of no reasonable doubt of the correctness of their first conclusion. Section 1096 of the Penal Code provides as follows: "A defendant in a criminal action is

presumed to be innocent until the contrary is proved, and in case of a reasonable doubt, whether his guilt is satisfactorily shown, he is entitled to an acquittal." We can see no way by which practical effect can be given to this provision of the law, if, at any time short of the final deliberations and the final vote, a juror may discard the presumption of innocence and rely upon an instruction that he is not convinced beyond a reasonable doubt of defendant's innocence, or that he was wrong in his belief first formed of defendant's guilt. See *People v. Maughs*, 149 Cal. 253, 262, 86 Pac. 187. It is the duty of the court to give this section of the Penal Code, on its own motion, though it is not error to omit it when not asked for by the defendant (*People v. Matthai*, 135 Cal. 442, 445, 67 Pac. 694), and the jury were substantially so instructed. But such instruction implies, and the law is, as we have seen, that this presumption attends the defendant until a final verdict is reached. How, then, can we reconcile the instruction complained of with an instruction as to the presumption of innocence, or with an instruction that the defendant must be proven guilty beyond a reasonable doubt? The court instructed the jury that they were "bound to accept the law as given by the court, and apply it to the facts of the case." It seems to us that, so long as the law clothes the defendant with the presumption of innocence, any substantial infraction of this right given him by statute should not be permitted. Presumption of innocence, under the law, can only be removed by evidence which produces conviction in an unprejudiced mind beyond reasonable doubt. That the instruction is prejudicial error we cannot doubt.

2. The court gave an instruction in the language of section 1826 of the Code of Civil Procedure, to the effect that the law does not require such degree of proof as excludes the possibility of error, but "moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind." Defendant cites *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175, and draws the conclusion, from a discussion of this section by Justices McFarland and Thornton, that it is error to give it in a criminal case; that the Legislature intended, by the expression last above quoted, "to express thereby that a mere preponderance of evidence is sufficient upon which to predicate a verdict. That is to say, the Legislature thereby attempted to state the difference generally between proof, strictly mathematical, and the degree of proof usually obtainable in judicial trials." In the case cited, Judge McFarland said: The Legislature "did not intend to use the words (moral certainty) in that relation as synonymous with proof beyond a reasonable doubt." See *In re Pepper's Estate*, 112 Pac. 62.

If it be conceded that the terms "moral

certainty" are not the equivalent of and do not convey the thought embraced in the terms "beyond reasonable doubt," the instruction must be read in connection with the other instructions requiring the proof to be other all reasonable doubt; and, when so read, the jury could not have been in doubt how to apply the evidence. The situation here is quite different from that presented under the first instruction, where the general instructions cannot be made to aid or harmonize with the one complained of.

3. It is contended that the demurrer to the indictment should have been sustained. The charging portion of the indictment is as follows: " * * * Did then and there willfully, unlawfully, and feloniously use and employ upon one Mrs. Lottie Phillips, who was then and there a pregnant woman, certain instruments, to wit, a long tongue-shaped instrument made of a hard and nonflexible substance, the exact length of which instrument and the character or substance of which the same was made being unknown to this grand jury, and a long, thin instrument made of a hard and nonflexible substance about fifteen inches in length and shaped like a common round lead pencil, and the character and substance of which the same was made being unknown to this grand jury, with intent then and there and thereby to procure the miscarriage of the said Mrs. Lottie Phillips, the same not being then or there necessary to preserve the life of the said Mrs. Lottie Phillips, contrary, * * * " etc. The point of objection made is that, although the indictment is in the words of the statute, it is insufficient because the manner in which the instruments were used upon the body of the prosecuting witness is not set forth, and hence the indictment is fatally defective. *Cochran v. People*, 175 Ill. 28, 51 N. E. 845, is cited in support of the contention, and it must be admitted that under a statute not much different from ours the court held it to be necessary to allege the manner in which the instruments were used. In that case the indictment said "did * * * administer and use on one Stella Roberts * * * a certain instrument." The second count averred "did * * * use on and administer to one Stella Roberts," etc. The court said: "No attempt whatever is made in either count to state how or in what manner the instrument was used 'or administered.' Whether it was done 'by forcing, thrusting, and inserting said instrument into the private parts,' or in some other manner, is wholly left to inference." It was held that it was not sufficient to charge the offense in the language of the statute for the reason that the language used does not describe the act or acts constituting the offense. To the same effect *Smartt v. State*, 112 Tenn. 539, 80 S. W. 586, and *Commonwealth v. Sinclair*, 195 Mass. 100, 80 N. E. 799, are cited.

On the other hand, respondent cites the

case of *State v. Bly*, 99 Minn. 74, 108 N. W. 834, where the charge was that defendant employed "in and on the body" of Hilda Rose, a pregnant woman, certain instruments and other means to the grand jury unknown, with intent, etc. The indictment was held sufficient. It is true that in the indictment before us the charge is that the instruments were used and employed "upon one Mrs. Lottie Phillips," and not upon her body, and it differs from the case last cited, in that it does not charge that the instruments were used on the prosecuting witness, nor does it state that the manner of use was unknown to the grand jury. Our statute provides that every person "who uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage," etc., is punishable, etc. The indictment would have been improved had it charged that the instruments were "used upon the body." Still, it seems to us that the omission of the words "the body of" raises no doubt as to what was meant, and what defendant might readily have understood to have been meant, by the language used. A miscarriage cannot well be produced except by some means applied to the body of the pregnant woman. In other respects it also seems to us that the indictment is sufficiently specific. It charges the employment of instruments, describing them, upon the woman named, she being then pregnant, with intent to procure her miscarriage, the same not being then necessary to preserve her life. We cannot see that, after a conviction under this indictment, the defendant would be in danger, through any indefiniteness in its averments, of a second conviction for the same offense, nor can we see that he was not sufficiently informed of the offense charged to enable him to prepare his defense.

4. The prosecuting witness had testified that she had been married for about a month, and it appeared that she had been pregnant for about three months. The defendant on cross-examination asked her who was the father of the child, and also to state whether or not any other man than her husband was the father of the child. The court sustained an objection to these questions, and we think rightly. The relevant issue in respect of her pregnancy was the fact of her being with child, and it was immaterial who was the father. If the questions were asked to degrade her, they would be equally inadmissible.

5. Witness O'Brien was called for the defense. He proved to be one of those witnesses, sometimes encountered, who make statements of important facts to counsel, and, when put upon the witness stand, conveniently fail to remember any of the facts so communicated. The court, under the circumstances, permitted counsel to cross-examine the witness and put questions with a view to his impeachment. Later, however, the court sustained an objection to his impeach-

ment on the ground that the matter was collateral, and that defendant could not impeach his own witness. After the defendant had failed to elicit any of the expected testimony from the witness, the prosecution, on cross-examination, asked him if he knew the defendant, and he said he did and also that he knew one Philip O'Neil slightly. He was then asked if he, the witness, had visited the defendant's office, and testified that he had, and that no attempt was then made to induce him to commit perjury. The following then appears in the record:

"Q. Was there any inducement made after that time or any place by any person to have you commit the crime of perjury in this case? A. Yes. Q. When and where? A. On the courthouse steps. Q. By whom? A. Philip O'Neil. Q. What did he say to you? A. He asked me what it would be worth for me to testify as he wanted me. Q. And what did you say? A. I told him 'No,' that he didn't have that kind of a man. Q. What else was said? A. And he walked out and stood around there for a few minutes, and then he came out and he says, 'You can go to hell.' He says, 'We don't need your testimony.' Q. Go ahead. Tell it all, Mr. O'Brien. A. He said, 'We have got'—

"Mr. Seymour: We object to this as irrelevant, immaterial, incompetent, and not cross-examination.

"Mr. Wachhorst: It is certainly cross-examination and on the line of questions that were asked this witness on direct.

"The Court: The objection is overruled.

"Mr. Wachhorst: What was that last?

"A. He came out on the steps, and he says, 'You can go to hell.' He says, 'We don't need your testimony. We have got the jury fixed.'

"Mr. Seymour: Now, we move to strike out the answer upon the grounds stated in the objection to the question.

"The Court: Denied.

"Mr. Seymour: Exception."

There was no evidence at this or at any time that O'Neil was authorized to make this statement, and it was not made in defendant's presence nor with his knowledge. It appeared subsequently that O'Neil had done some work in the case for defendant, but no relation was shown such as would justify the inference that O'Neil's statement was at all sanctioned by the defendant. It seems to us that the matter brought out was not proper on cross-examination, was inadmissible, and was subject to an objection before the objection was made. The witness should not have been permitted to complete his damaging answer over defendant's objection, and it should have been stricken out of the record on defendant's motion. The significance of the testimony may be seen in the use made of it by the assistant district attorney in his argument to the jury. We think the testimony, as well as the use made of it on the argument to the jury, could not

have failed to more or less influence their minds to defendant's prejudice.

Referring to this evidence, the assistant district attorney repeated it and, pointing to the witness then in court, who gave it, stated: "There is what confronts you, gentlemen of the jury, in considering this case. That is a thing that, as men of honor, as men of standing and reputation in this community, you should consider. It is a thing, sir, that you all resent, I believe, and you would not be a man, any one of you, if you did not resent it." How were the jury to resent the accusation that they had been "fixed" otherwise than by a verdict against the defendant, and, when appealed to by the prosecuting officer to resent the charge, how else were they to do than as demanded by him? If, in the opinion of the prosecuting officer and the court, evidence of this damaging character was not only relevant, but important, even though the statement came from a person having no license or authority from the defendant to make it, and though not made in his presence or hearing, is it not reasonable to conclude that the jury were similarly impressed?

6. When the prosecution rested, the defendant moved the court to advise the jury to acquit, upon the ground that there was no legal evidence sufficiently corroborating the testimony of Mrs. Phillips, upon whom the abortion is alleged to have been performed. The motion was denied, and the ruling is assigned as error. It is also claimed that at no time during the trial was there sufficient corroborating evidence. Section 1108 of the Penal Code provides that: "The defendant cannot be convicted upon the testimony of the woman upon whom or with whom the offense was committed, unless she is corroborated by other evidence."

Shortly after the alleged operation, Mrs. Phillips was treated by three physicians, one visiting her at her house, and two examining and treating her at the county hospital. These witnesses testified to there being present evidences of a miscarriage, but no one of them could testify how or by what means it was produced. Mrs. Phillips' mother went with her to some house on J street in Sacramento, between Seventh and Eighth, but which Mrs. Phillips testified was defendant's office, on the afternoon of the day of the alleged operation, but she did not know for what purpose her daughter went there, and did not then know of her pregnancy. Nor did she know the Chinaman she saw there. What took place between her daughter and this Chinaman she did not know; for it occurred in an adjoining room out of her hearing. She testified that in a few minutes she and her daughter went to some house on L street, which she could not locate, and was admitted by a woman and about 20 minutes thereafter the "Doctor," as she called him, came and he and her daughter went upstairs, the mother remaining on the first floor, and

that in about 20 minutes her daughter came back and the two then left the house. She testified that she saw a Chinaman come into the hallway of the house, call her daughter, pass along the hall and upstairs, followed by her daughter, but she did not know him and could not say that he was the same person she saw at the J street house, and she was unable to say that she had ever seen the defendant at any time before the trial.

Witness Phillips, husband of the prosecuting witness, was sent by his wife to get some pills in the evening of the day she testified to having been operated upon. He went to defendant's office on J street. "Q. Did you have any conversation with him? A. He called me in his office. Q. Well, just say yes or no. A. Yes, sir. Q. What did he say to you? A. He wanted to know what I wanted. Q. What did you say? A. I told him my wife sent me here after pills. Q. And what did he say? A. He said, 'Oh, yes', he remembered. Q. Then what? Go on with the conversation, Mr. Phillips. A. Well, then he went to get the pills. * * * Q. Before you got the pills, Mr. Phillips—go on and tell us about that—when he left you, or just before you got the pills? A. We were in the office at that time. Q. Well, go on and tell just what occurred. A. Then we went into his laboratory, and he started talking to me, wanted to know if I had the money. Q. What did he say? A. And I told him that I had \$5; that was all I had. Q. Then what did he say? A. He wanted to know when I could give him any more. I told him I could give him some next week. Q. Go ahead. A. So then he gave me the pills, and I gave him \$5. Q. Then what did you do? A. I went home." He also testified that, after the pills were given to him, "he [the doctor] took a little book from the counter and wrote down in it. Q. Did you see what he put on the book? A. No, sir; I couldn't tell. Q. Was that all the conversation you had with him at that time? A. Yes, sir. Q. Where did you go? A. Went home. Q. How many pills did he give you? A. Two. Q. What time did you get home that night? A. About 7 o'clock." He testified that defendant told him to tell his wife to take the pills, but did not say how or when to take them, and that she took one of them; that he found his wife in bed. He then testified that during the night, some time after midnight, his wife passed "a clot of blood about one inch thick and two inches long," which he said was "a miscarriage." About 7 o'clock the next night she was taken to the hospital. Upon cross-examination it appeared that the witness did not tell the defendant his name, nor did he tell defendant that the woman he had operated on that day sent him.

Defendant relies upon *People v. Josselyn*, 39 Cal. 393. In the opinion delivered by Mr. Justice Crockett for the court it was held as essential to conviction, where the abortion is alleged to have been performed

by the use of an instrument, that the use of an instrument "is the very gist of the offense; and, if every other fact testified to by her (the prosecuting witness) was true, the defendant was entitled to be acquitted, unless this also was true." Said the court: "On this vital point there is no corroboration whatever of the witness, Locke. It is proved that she was pregnant and had a miscarriage; but, aside from her testimony, there is no proof whatever that any attempt was made by any one to produce abortion, or that the miscarriage was the result of any such effort. It is not enough that the witness was corroborated in some particulars which involve no criminality in the defendant. She must also have been corroborated by circumstances, or otherwise, in at least some portion of her testimony which imputes to the defendant the commission of the crime alleged, to wit, the use of an instrument with intent to produce abortion. In this particular there was not the slightest corroboration of her testimony." Subsequently Judge Crockett rendered a "supplemental opinion of the court" in which Justice Wallace expressed no opinion. In this supplemental opinion it was said: "We do not intend to be understood as announcing that it is essential the witness should have been corroborated in respect to the particular method to which she testified as having been employed to produce an abortion, but it will be sufficient if she is corroborated by other testimony tending to show an attempt by the defendant to produce an abortion in any method. The crime consists in the attempt to produce abortion; and though the indictment in this case charges, and the witness testifies, that the defendant employed an instrument for that purpose, nevertheless, if it had been shown, for example, by other evidence, that the defendant had confessed to an attempt to produce the abortion, not by the use of instruments, but by administering a particular drug, this testimony would not only have been clearly competent, as tending to establish the criminal intent, but it would also have been a sufficient corroboration of the witness to bring the case within the requirements of the statute; for, although she would not have been corroborated in respect to the use of the instrument, she would have been corroborated as to the criminal intent, which is of the essence of the crime. The statute does not require that she should be corroborated in respect to every material fact, but only in respect to some of the material facts which constitute a necessary element of the crime alleged." Because the judgment of conviction was reversed, defendant seems to conclude that the supplemental opinion does not modify or weaken the force of the first opinion. As we interpret the decision, the case was reversed for the reason, as stated—"aside from her (prosecutrix's) testimony that there is no proof whatever that any attempt was made by any one to produce abor-

tion, or that the miscarriage was the result of any such effort." It is quite clear to our minds that the court did materially modify its first opinion by the supplemental opinion, for it there holds that it is not necessary that there should be corroboration of the means alleged in the indictment by which the abortion was produced, but that it is sufficient if there is corroboration as to the criminal intent, or as to the attempt to commit the crime by any means. The court distinctly recedes from its first position that the use of an instrument with intent to perform an abortion "is the very gist of the offense; and, if every other fact testified to by her was true, the defendant was entitled to be acquitted, unless this also was true."

We think the modified view taken in the case is the correct view, and we also think the corroboration, though slight and largely circumstantial, was sufficient. Mrs. Phillips had testified that when she and her mother went to defendant's office he examined her in a room adjoining the room where her mother was; that he inquired whether she was a married woman, and, being told that she was, asked her why she wanted to get rid of her child, which she explained by stating the condition of her breasts, which, it appeared otherwise than by her own statement, had been "burnt off"; that he told her she would have to go to a certain house on L street, which she did, with her mother; and that he soon after came there and performed the operation with instruments which she described. She became ill that same evening and took to her bed, and sent her husband to defendant after some medicine; that he went and later returned with pills which she took. It appeared from her testimony and that of her husband that her sickness increased and culminated in a miscarriage about 1 o'clock of that night; that her illness was serious, and the doctor who was called the next day advised taking her to the county hospital, which was done that evening. At the hospital two physicians examined her, administered ether, and treated the affected parts in a way to arrest further injurious effects from what the physicians diagnosed as a miscarriage. The jury had the right to consider the circumstance that the operation was not performed at defendant's office, but that Mrs. Phillips and her mother went to a more secluded place, where they were admitted by a woman without question, and where the operation was performed. The jury also had the right to consider the readiness shown by defendant in understanding the purpose of Mr. Phillips' coming for pills, without asking him any questions. It had appeared that defendant was to have been paid \$25 for his services. The fact of his asking if Phillips had the money, his paying \$5 for two pills and promising more the next week, pointed to a tacit understanding of the two men as to what had taken place between defendant and Mrs.

Phillips. It may not have pointed to the use of instruments, but it did point to a resort to some means which had brought on the sickness and miscarriage of Mrs. Phillips. These circumstances, it is true, are but slight corroboration, but it was for the jury to determine their weight.

7. Witness Dr. Harris testified for the prosecution concerning the treatment given Mrs. Phillips at the county hospital. In the course of his examination a card was placed in his hands such as was their custom to use in recording certain facts relating to the admission of patients. Apparently the primary object in seeking to introduce this card was to fix the date of Mrs. Phillips' going to the hospital. Objection was made to it by defendant because the date appeared to have been changed and this change was not accounted for. Counsel for defendant examined the card and knew what it contained; so also did the district attorney. The court also examined it, but, as it stated, did not notice the objectionable entry made on it. The card was admitted over defendant's objection and showed the following: "Name: Mrs. W. Phillips. Date of entry: June 26th, 1908. Previous history: Abortion done by T. Wah Hing, June 25th, 1908."

"Mr. Seymour: Does your honor rule that is admissible in evidence?"

"The Court: No; I didn't know that was on there. I admit I had not read it.

"Mr. Yell: I move to strike out that portion of it.

"The Court: I think that is proper. That will be stricken out, gentlemen of the jury. Disregard it. It is hearsay evidence and not admissible. I did not know that was on the card. I had not examined it myself. I understood from the gentlemen that such statements were on the other side of the card.

"Mr. Jones: That is the very thing I objected to.

"The Court: Disregard it, gentlemen of the jury."

The court then read that portion of the card deemed admissible. The matter objected to was obviously inadmissible, and was obviously prejudicial to defendant. But it appears to have been read to the jury through inadvertence. All the attorneys present knew it was on the card. The district attorney ought himself to have avoided reading or having it read, and defendant's attorneys should have been alert in seeing that it was not read. If we were satisfied that the district attorney purposely got the entry before the jury we should be inclined to treat it as prejudicial error. The court doubtless, had its attention been called to it, would have given direction not to read that part of the card. We cannot, under the circumstances, however prejudicial the statement was, find in it cause for a reversal of the judgment.

There are some other assignments of error of more or less importance, but they relate

to the admission of evidence which may not be again offered should there be a retrial of the case.

For the reasons already pointed out, the judgment and order are reversed.

BURNETT, J., concurs in the judgment.

HART, J. I concur in the judgment on the ground that the ruling of the court allowing in evidence the declaration of Philip O'Neil to the witness O'Brien was palpably erroneous and prejudicial to the defendant. It is very clear, as Justice CHIPMAN points out, that the declaration of O'Neil to the effect that the defendant had the jury "fixed," from which declaration the inevitable implication is that the jury had been corruptly influenced to find in favor of the defendant, regardless of the evidence, could not in any degree bind the defendant under any known rule of law, it not having been made in his presence or shown to have been made by his authority or with his knowledge or consent. Nothing could be more obvious than that the effect of such testimony was to greatly prejudice the rights of the accused, and that it was regarded as a fact of persuasive significance is evidenced by the stress laid upon it by the assistant district attorney in his address to the jury. The proposition may be safely laid down without the least apprehension of probable confutation that the average juror, having listened to testimony showing or tending to show that he had, while the case was still pending, entered into an agreement to return a certain verdict, would thus be influenced to decide the case in opposition to the result which it was charged he had agreed to bring about, whether the evidence justified such decision or not. In the case at bar the assistant district attorney vigorously insisted that the jury should resent the charge involved in O'Neil's alleged declaration, and, as the presiding justice clearly shows, there was no way by which such resentment could be manifested by the jury but by a verdict of guilty, for, manifestly, this was the only course that was open to the jury to demonstrate that they had not been "fixed." It is readily perceivable how jurors, under such circumstances, even if they honestly entertained a reasonable doubt of the guilt of the accused, might, as a protection to their own reputations, thus be led into voting against their honest convictions as to the guilt or innocence of the accused. Certainly the evidence complained of would quite naturally furnish a very strong motive for the return of a verdict of guilty, whether the evidence warranted such a verdict or not, and there is therefore no escape from the conclusion reached by the presiding justice that the ruling allowing said evidence was highly prejudicial.

But I cannot agree with the conclusion reached in the main opinion with respect to

the instruction therein declared to be prejudicially erroneous. A careful analysis of said instruction and a consideration of it in connection with the entire charge of the court will in my opinion compel the conclusion that it could not have damaged the defendant in the slightest degree. In other words, I do not think that the instruction could have had the effect of influencing the jury against the defendant or of contravening any of his substantial rights, and I am therefore of the opinion that but for the error involved in the ruling of the court admitting O'Neil's alleged declaration with regard to the attitude of the jury toward the defendant the judgment and order could be consistently upheld.

The instruction complained of is set out in full in the main opinion, and the part thereof which it is claimed told the jury in effect that the defendant's innocence must be proved beyond a reasonable doubt reads as follows: "If, however, after a full and careful deliberation of all the evidence in the case, any one or more of you shall be of the opinion that the defendant has been proved to be guilty of the crime charged, to a moral certainty and beyond a reasonable doubt, those of you entertaining that opinion should vote in favor of guilty, and *should adhere to your opinion until you are convinced beyond a reasonable doubt that you are wrong.*" (Italics mine.) Very clearly the italicized portion of the foregoing instruction should not have been given to the jury. If this language carried with it any meaning at all, it was plainly erroneous; but, in view of the verdict and considered in connection with the language immediately preceding it and with other instructions on the doctrine of reasonable doubt, the language criticised seems to me to be perfectly meaningless, and therefore as having conveyed nothing to the jury that could have militated against the substantial rights of the defendant. The proof required to justify the conviction of one charged with a crime must be such as to convince the jurors of his guilt beyond a reasonable doubt, and, of course, it will not be questioned that, where one or more of the jurors are so convinced by the evidence, it is their duty to adhere to that conclusion. It is difficult to imagine a case where a juror has been convinced from a consideration of all the evidence beyond a reasonable doubt of the guilt of the accused that such juror could have any occasion to change his mind or the conclusion at which he has arrived. When he has reached that state of mind as to the evidence, he has, so far as he is concerned as a component part of the jury, reached a verdict, and, where all the jurors have reached the same verdict, there is nothing remaining to be done but to return such verdict to the court. Obviously, when the jurors have properly reached a verdict of guilty in a criminal case, they are then not concerned

about how they may change their minds and arrive at an opposite conclusion, for, having found in the record the quantum of proof essential to a conviction, there would be neither necessity nor authority for trying to undo what they had already found that they were justified by the evidence in doing.

The fallacy of the position that the effect of the instruction or the part thereof animadverted upon was to prejudice the rights of the defendant lies in the assumption that a juror who has been convinced by the evidence beyond a reasonable doubt of the guilt of the defendant might not adhere to that conviction so long as other members of the jury have not reached the same state of mind with regard to the case. No such assumption is in my opinion allowable. It is, of course, the duty of the jury to deliberate upon their verdict—that is, to give the evidence full and fair consideration—and it is certainly no less the presumption that one juror, having reached the conclusion that the defendant is guilty under the evidence, has been thus persuaded only after proper deliberation upon his verdict than it is where all the jurors have arrived at a like conclusion. To assume that a juror is likely to be influenced by the attitude or arguments of his confrères is to assume that he has not been satisfied beyond a reasonable doubt of the guilt of the accused, and in that case the erroneous instruction would not apply to him. If a juror wavers in reaching a verdict, it is quite apparent that he has some doubt as to what his verdict should be, and clearly he has not then arrived at that state of mind with reference to the case which would make the instruction applicable to him and he then would or could not be concerned about it. But, as stated, there is no rule or principle or reason authorizing the assumption that a juror, having been satisfied by the evidence beyond a reasonable doubt of the guilt of the accused, will change his mind merely because his colleagues have been unable to come to the same conclusion, or because the other jurors may by argument or otherwise try to convince him that he is wrong. The presumption is, as stated, that he has formed his conclusion after due deliberation, and, having done so, it is not clear why it is not his duty to stick to such conclusion. And, having been satisfied beyond a reasonable doubt of the defendant's guilt, it is not reasonable to suppose that he would in the least be influenced by any declaration of the court, whether it involved a correct or incorrect statement of the law, as to the conditions on which he might disrobe his mind of the conviction that the accused has been proved to be guilty by the evidence beyond a reasonable doubt. The jury were repeatedly told by the court that they were not authorized to find the defendant guilty unless the evidence so convinced them beyond a rea-

sonable doubt. They were so told in the first part of the very instruction complained of here, and it must be assumed that they acted on that rule in reaching their verdict. Having thus arrived at a verdict, what possible effect could the criticised language of the instruction have on them one way or the other? The very moment they reached a verdict of guilty the language complained of became meaningless and absolutely without force. There was then no necessity for them to examine or consider or pay any attention to that part of the instruction. This would have been true if the criticised part of the instruction had been couched in proper language, for the verdict represented the crystallization of the final conclusion they had reached under the instructions that, to arrive at a verdict of guilty, they must necessarily be convinced thereof beyond a reasonable doubt.

Of course, if the instruction had said in so many words that the defendant must prove his innocence by evidence satisfying the jury beyond a reasonable doubt, a very much different question would obviously be submitted here. But the criticised language can only be made to have that effect by construction, and then, as I have tried to show, it was to take effect or apply only after the jury had by the evidence reached that state of mind with reference to the case which rendered it absolutely necessary for them to return their conclusion in the form of a verdict into court.

My conclusion is, as is manifest, that while, as stated, the instruction is to be condemned, it could not, in my judgment, have operated prejudicially against the defendant.

159 Cal. 441

McGREGOR v. BOARD OF TRUSTEES OF
TOWN OF BURLINGAME et al.

SAME v. BUCK, Judge.
(S. F. 5,636.)

(Supreme Court of California. March 8, 1911.)

1. ELECTIONS (§ 275*) — CONTEST — JURISDICTION.

Under Municipal Corporation Act (St. 1883, c. 49) § 860, providing that the board of trustees of a town shall judge of all election returns, and determine contested elections of all city officers, the board has jurisdiction to hear and determine a contest where there is a tie vote, and no result has been declared by the election officers.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 250-256; Dec. Dig. § 275.*]

2. STATUTES (§ 225¾*) — CONSTRUCTION — RE-ENACTMENT OF PRIOR STATUTE.

Where the phraseology of two enactments is essentially dissimilar, the rule that a statute embodying the terms of a prior statute must be read in the light of the interpretation given to such a prior statute does not apply.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 306; Dec. Dig. § 225¾.*]

3. CONSTITUTIONAL LAW (§ 80*) — EXECUTIVE POWERS — ENCROACHMENT ON JUDICIARY.

Municipal Corporation Act (St. 1883, c. 49) § 860, providing that the board of trustees of towns shall judge of the qualification of its members and of all election returns, and determine contested elections of all city officers, does not conflict with the constitutional declaration that the judicial power shall be vested in certain courts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 145; Dec. Dig. § 80.*]

4. ELECTIONS (§ 269*)—CONTEST—MODE OF PROCEDURE.

Since there is no statute prescribing any details of procedure to be followed by the trustees of a town in proceedings for contesting elections, that body may adopt any mode which preserves to the parties fundamental essentials of notice and hearing.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 245, 246; Dec. Dig. § 269.*]

5. ELECTIONS (§ 275*)—CONTEST—POSTPONEMENT OF HEARING—LOSS OF JURISDICTION.

In an election contest, that the board of trustees of a town indefinitely postponed the hearing of the contest did not destroy the jurisdiction, where it appeared that the action was properly taken in deference to the ruling of the superior court, which had held that it had exclusive power to determine the controversy.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 250-256; Dec. Dig. § 275.*]

6. ELECTIONS (§ 275*)—CONTEST—JURISDICTION—CONFLICTING JURISDICTIONS.

Municipal Corporation Act (St. 1883, c. 49) § 860, declares that the board of trustees shall judge of the qualifications of its members, and of all election returns, and determine election contests of all city officers. Code Civ. Proc. § 1124a, authorizes a contest in the superior court, where an election for an office of a county, city and county, city, or political subdivision of either has been declared by the canvassing body to have resulted in a tie. *Held*, that the jurisdiction of the trustees is not exclusive, so as to oust the jurisdiction of the district court once taken in such contest.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 250-256; Dec. Dig. § 275.*]

7. PROHIBITION (§ 3*)—OTHER REMEDY—CONFLICT OF JURISDICTION.

That the jurisdiction of town trustees was first obtained in an election contest, did not call for the issuance of a writ of prohibition to prevent the district court from entertaining jurisdiction of the same contest; the jurisdiction being concurrent, the proper procedure is to apply to the district court to stay the proceeding on the ground of another action pending.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4-19; Dec. Dig. § 3.*]

Angellotti, J., dissenting in part.

In Bank. Application for a writ of mandate by C. J. McGregor against the Board of Trustees of the Town of Burlingame and others, to compel the board to hear and determine an election contest, and for a writ of prohibition by the same against George H. Buck, Judge of the Superior Court of San Mateo County, to restrain the said court from proceeding with the trial of said contest. Writ of mandate to the Board of Trustees issued, and alternative writ of prohibition to the Superior Court dismissed.

Mastick & Partridge, for petitioner. Ross & Ross, for respondents.

SLOSS, J. The first of the above-entitled matters is an application for a writ of mandate to compel the board of trustees of the town of Burlingame to hear and determine an alleged contest of an election. The second is an application for a writ of prohibition to restrain the superior court of San

Mateo county from proceeding with the trial of a contest of the same election. Both proceedings were transferred to this court after judgment (denying the relief sought) in the District Court of Appeal for the First appellate district, to which court the applications had first been presented.

Burlingame is incorporated under the municipal corporation act as a town of the sixth class. At a municipal election held on April 11, 1910, in said town, for the election, among other officers, of five town trustees, the petitioner and one Sheehan were candidates for said office of town trustee. The election returns showed the receipt of an equal number of votes by McGregor and Sheehan, and the town trustees, canvassing the returns, declared the result to be a tie vote between said candidates. On April 18, 1910, McGregor filed with the town trustees his written and verified statement, contesting the election and alleging that votes had been illegally received and counted in favor of Sheehan, and that fewer legal votes had been cast for Sheehan than for the contestant. Thereupon the town trustees issued a citation to Sheehan, calling upon him to appear on the 2d day of May to answer the said contest. Subsequent to April 18th Sheehan filed with the county clerk of San Mateo county a contest likewise contesting said election, and the superior court caused a citation to be issued and served upon McGregor. On the return day McGregor appeared and objected to the jurisdiction of said court. The court held, however, that it had jurisdiction, and that the town trustees had none. The trustees, learning of this, declined to try the contest before them, and the present proceedings were instituted, as above stated, to compel the town trustees to hear the one contest and to restrain the superior court from hearing the other.

Under section 860 of the municipal corporation act (Stats. 1883, p. 269), "the board of trustees shall judge of the qualifications of its members and of all election returns and determine contested elections of all city officers." If the power to "determine contested elections" includes the authority to inquire and decide whether, notwithstanding a showing on the face of the returns of a tie vote, one or another of the candidates in fact received a plurality, this section clearly confers upon the board of trustees the jurisdiction to hear and determine the contest instituted by McGregor. It is argued by the respondents that the term "contested elections" means no more than a proceeding to question the correctness of a finding by the canvassing officer or board that one or another of the candidates was elected. Upon a tie vote, they say, there is no election, and hence nothing to contest.

That the casting of a plurality of the votes in favor of one candidate is essential to a

choice or election of that candidate is true. Const. art. 20, § 13; Pol. Code, §§ 1066, 1067. But it does not follow that because no candidate is *declared* elected, there has been no election. If one or the other has received a plurality of the legal votes, he is in fact elected, and should be so declared. We think the grant, in general terms, of power to determine "contested elections" or "election contests" may well be interpreted to cover the case of an attack upon the correctness of a finding that there was a tie vote, as well as that of a return that one candidate, rather than the other, has been elected. This construction, which tends to prevent the nullification of the legally expressed will of the voters through the error or misconduct of the officers charged with the conduct of the election or the canvass of the returns, finds support in a number of decisions. *Erdman v. Barrett*, 89 Pa. 321; *Nicholls v. Barrick*, 27 Colo. 432, 62 Pac. 202; *Bowler v. Eisenhower*, 1 S. D. 577, 48 N. W. 136, 12 L. R. A. 705; *People v. Robertson*, 27 Mich. 116; *Shepard v. Allen* (Ill.) 17 N. E. 756; *Imboden v. Cully*, 94 Ky. 45, 21 S. W. 339; *Webster v. Gilman*, 91 Ill. 324. The object of the proceeding, as is said in *Erdman v. Barrett*, *supra*, "is to determine who has received the highest number of votes legally cast. The court is to investigate the election, to correct alleged errors when they are shown to exist, and to determine the true result."

Respondents place great reliance upon the consideration that the sections of the Code of Civil Procedure (1111 et seq.) providing for the contesting of certain elections in the superior court did not, prior to the enactment of section 1124a in 1907, authorize a contest where the declared result of the election was a tie. *Lamb v. Webb*, 151 Cal. 451, 91 Pac. 102, 646. This limitation of the scope of the proceeding in the superior court resulted from the restricted language employed in the Code sections. The only privilege given by section 1111 is to "contest the right of any person declared elected to an office. * * *" This language necessarily excludes the idea of a contest where no person has been declared elected. See *Sweeney v. Adams*, 141 Cal. 558, 75 Pac. 182. But this reasoning has no application to the broad and general grant of power to "determine contested elections." No good reason appears for holding that the Legislature, in enacting the municipal corporation act, used the phrase "contested elections" in the narrow sense which must be attributed to the provisions of the Code of Civil Procedure. The phraseology of the two enactments being essentially dissimilar, there is no ground for applying the rule that a statute embodying the terms of a prior statute must be read in the light of the interpretation given to such prior statute.

This court has held in several instances that the Legislature may, by provisions similar to that of section 860 of the municipal corporation act, vest in a city council the

power of judging of the election of the city officers. Such provisions do not conflict with the constitutional declaration that the judicial power shall be vested in certain courts. *People v. Metzker*, 47 Cal. 524; *People v. Bingham*, 82 Cal. 238, 22 Pac. 1039; *Carter v. Superior Court*, 138 Cal. 150, 70 Pac. 1067. It would follow, therefore, from the views hereinabove expressed, that the writ of mandate should issue, requiring the trustees of Burlingame to exercise their jurisdiction by proceeding to hear and determine the contest instituted by McGregor.

The answer which purports to have been filed on behalf of two of the respondents does not, we think, raise any issue affecting the duty of the board to proceed. The averments of the answer go to the sufficiency of the verification of the contestant's statement, and to the form of the notice or citation served on Sheehan. But, since there is no statute prescribing any details of procedure to be followed by the council, that body may adopt any mode which preserves to the parties the fundamental essentials of notice and hearing. 10 Am. & Eng. Ency. of Law, 819. See *Norwood v. Kenfield*, 30 Cal. 393. The defects here relied upon were not such as should be held to deprive the board of the right to determine the questions raised by the statement of contest. The further fact alleged in the answer that, on May 2, 1910, the board indefinitely postponed the hearing of the contest did not destroy the jurisdiction. This action was properly taken in deference to the ruling of the superior court, which had held that it had exclusive power to determine the controversy. The board could not, if it would, deprive the contestant and the public of the right to have the contest decided in the manner provided by law. But, in fact, all that was done was to withhold action until the question of power should be finally determined.

There remains, however, the question whether the jurisdiction of the trustees is exclusive, so as to oust the superior court of the jurisdiction conferred upon it by section 1124a of the Code of Civil Procedure. That section, added to the Code in 1907, authorizes a contest in the superior court where an election for an office of a county, city and county, city, or political subdivision of either has been declared by the canvassing body to have resulted in a tie.

In *Carter v. Superior Court*, *supra*, we had occasion to consider the effect upon the jurisdiction of superior courts of provisions giving to city councils power to judge of the elections of officers. The court quoted and approved the views expressed by Judge Dillon in his work on *Municipal Corporations* (vol. 1, § 200) as follows: "The principle is that the jurisdiction of the court remains, unless it appears with unequivocal certainty that the Legislature intended to take it away." It is then stated that language, such as 'shall be the judges of the qualifications'

or 'of the qualifications and election of its own members,' and of those of the other officers of the corporation, will not ordinarily have that effect, but will be construed to afford a cumulative or primary tribunal only, not an exclusive one. A provision that no court should take cognizance of election cases by quo warranto, etc., would doubtless be sufficient to divest the jurisdiction of the judicial tribunals. And so, in general, of a provision that the council should have the sole or final power of deciding elections. 1 Dill. Mun. Corp. § 202. See, also, §§ 203, 204, 205."

Applying these rules, it was held in the Carter Case that a provision in the Santa Rosa charter that the decision of the city council in election contests should be "final and conclusive" plainly manifested an intent to confer exclusive jurisdiction on the council. Section 860 of the municipal corporation act does not, however, contain any language of like import. It merely declares that the trustees "shall judge of all election returns and determine contested elections of all city officers." It does not appear "with unequivocal certainty," or with any degree of certainty, that the Legislature intended to divest the superior court of its jurisdiction to proceed under the sections of the Code of Civil Procedure. As was held by the District Court of Appeal for the Second appellate district in *Dawson v. Superior Court*, 110 Pac. 479, the jurisdiction conferred upon the city council by section 860 is not exclusive, but is concurrent with that of the superior court. Since the writ of prohibition lies only to arrest proceedings without or in excess of jurisdiction, it is clear that the relief sought against the superior court cannot be granted. That court has jurisdiction, concurrent with that of the city council, to entertain and determine the contest. We are not here called upon to consider the effect of conflicting adjudications that might be made by the two tribunals. It is claimed by the petitioner that, as the jurisdiction of the city council was first invoked, the judgment of that body would prevail. But if this be so, the point is not one that goes to the jurisdiction of the superior court. At most, that court would be bound, upon being informed by proper pleading and proof that a tribunal of concurrent jurisdiction had first taken cognizance of the controversy, to stay a trial and decision until the proceedings first instituted should be disposed of. The plea in such case would be analogous to that of "another action pending." A failure to recognize the effect of such plea would be mere error, to be corrected on appeal. *State v. Withrow*, 108 Mo. 1, 18 S. W. 41. If McGregor should hereafter abandon or dismiss his contest before the trustees, there would be nothing to prevent the determination of the contest in the superior court.

Clearly, then, that court cannot be said to be without jurisdiction to entertain the contest.

The writ of mandate to the board of trustees will issue as prayed.

The alternative writ of prohibition to the superior court is discharged, and the proceeding dismissed.

We concur: SHAW, J.; MELVIN, J.; HENSHAW, J.

ANGELOTTI, J. I concur in the judgment directing the issuance of a writ of mandate to the board of trustees, and dissent from the judgment denying a writ of prohibition against the superior court; my opinion being that the jurisdiction of the board of trustees of the town of Burlingame over the election contest between McGregor and Sheehan is, under our statute, exclusive.

159 Cal. 439

LUND v. SUPERIOR COURT IN AND FOR
THE CITY AND COUNTY OF SAN
FRANCISCO et al. (S. F. 5,506.)

(Supreme Court of California. March 8, 1911.)

CERTIORARI (§ 27*)—RIGHT TO REVIEW.

A writ of review to determine the jurisdiction of the probate judge of a superior court to fix the fee of an attorney who prosecuted a suit for an infant under guardianship, alleged to have been previously fixed by another judge of that court in the case in which the services were rendered, presents no question of law where it appears from the record that the last-mentioned judge did not fix the fee, but that the attorney relies on an agreement with the guardian ad litem, so that the writ must be discharged.

[Ed. Note.—For other cases, see *Certiorari*, Dec. Dig. § 27.*]

In Bank. Petition by P. R. Lund for certiorari against the Superior Court in and for the City and County of San Francisco, and J. V. Coffey, judge thereof. Writ discharged.

Jas. P. Sweeney, for petitioner. J. K. Johnson, for respondents.

HENSHAW, J. Writ of review was issued from this court under the following allegations set forth in a verified petition: Frank B. Del Carlo, a minor, through his guardian ad litem. Frank Del Carlo, duly and regularly appointed, brought an action in the superior court of the city and county of San Francisco against the United Railroads of San Francisco, to recover damages for personal injuries. The action was assigned to the department presided over by the Honorable Frank J. Murasky. The guardian ad litem employed petitioner, an attorney at law, to prosecute the action on behalf of the minor. Leave to compromise the action was obtained from the superior court, and the action was compromised and settled for the sum of \$1,300. The superior court in which

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the action was thus compromised and settled "allowed petitioner an attorney's fee in the sum of \$650." Thereafter, in the probate department of the superior court, presided over by the Honorable J. V. Coffey, Frank Del Carlo was appointed guardian of the estate of the minor, and from the last-named court a citation was issued to petitioner to show cause why the judge in probate should not fix the compensation of petitioner for his services rendered in the litigation against the United Railroads above set forth. In response to this citation petitioner made answer and showing that his fee had been fixed by the Honorable Frank J. Murasky in the sum of \$650, and for this reason objected to the jurisdiction of the court in probate to proceed with the hearing of the matter. Notwithstanding this, the court in probate made its order fixing petitioner's compensation in the sum of \$250, and requiring him to pay over \$50 of the \$300 which he had collected and retained under the compromise.

It was under these allegations of fact that the order was issued to determine the question of the jurisdiction of the probate court to make its order fixing the fee of petitioner, when that fee had already been previously fixed by another department having jurisdiction of the litigation, in prosecution of which the services were rendered. *Cole v. Superior Court*, 63 Cal. 90, 49 Am. Rep. 78. But upon the presentation here of the record it is established that no such order was made by the Honorable F. J. Murasky, and that no order at all was made by him, fixing the fee of petitioner. Moreover, that petitioner before the probate court did not make the contention that such an order had been made by the Honorable F. J. Murasky, but, to the contrary, contended that he was entitled to a fee of \$650 by virtue of a written agreement made with the guardian ad litem of the minor, by which he was to receive 50 per cent. of any recovery had from the United Railroads.

Under these facts no question of law is presented, and the writ is therefore discharged.

We concur: SLOSS, J.; ANGELLOTTI, J.; SHAW, J.; MELVIN, J.; LORIGAN, J.

159 Cal. 425

In re PARSONS' ESTATE.

HYNES v. CASHMAN et al.
(S. F. 5,638.)

(Supreme Court of California. March 7, 1911.)

1. APPEAL AND ERROR (§ 544*)—BILL OF EXCEPTIONS—QUESTIONS REVIEWABLE.

Where the record contains no bill of exceptions showing the evidence considered, the only question that can be considered is whether the record is sufficient to sustain the order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2426; Dec. Dig. § 544.*]

2. WILLS (§ 399*)—APPEAL—RECORD—CONFLICT IN EVIDENCE.

Code Civ. Proc. § 1327, limits the time within which proceedings to revoke the probate of a will may be commenced to one year after the will has been admitted to probate. On appeal from an order dismissing a petition to revoke the probate of a will, the petition showed that it was filed May 7, 1909, and the order dismissing the petition recited that the will was admitted to probate by an order "duly given and made on the 4th day of May, 1908." The transcript of the record also set forth the order admitting the will to probate, the certificate of proof and facts found, and the certificates of the clerk showing the date of the filing thereof. The order admitting the will to probate declared that it was admitted on May 4, 1908, and the certificate of the judge attached to the will bears the same date; but the certificates of filing showed that both documents were filed on May 12, 1908. *Held*, that the evidence was sufficient to sustain an order of the court dismissing the petition for failure to file within one year after the will was admitted to probate, as the court on appeal must consider as conclusive the recital in the order appealed from as to the date admitting the will to probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 868; Dec. Dig. § 399.*]

3. WILLS (§ 353*)—PROBATE PROCEEDINGS—ORDER ADMITTING WILL TO PROBATE—FILING.

The filing by the clerk of an order signed by the judge is not an essential or necessary part of the making of an order admitting a will to probate; the proper record of such admission being in the minutes of the court.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 809; Dec. Dig. § 353.*]

4. WILLS (§ 260*)—PROCEEDINGS TO REVOKE PROBATE—LIMITATIONS.

Where a proceeding to revoke the probate of a will is begun more than one year after the will was admitted to probate, it is properly dismissed under Code Civ. Proc. § 1327, limiting the time within which such contests may be commenced to one year after the will has been admitted to probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 602; Dec. Dig. § 260.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

George Ayling filed a petition against W. E. Cashman, executor of the estate of Jemima Parsons, deceased, and others, to revoke the probate of the will of Jemima Parsons. The court dismissed the petition on motion of Cashman, and M. J. Hynes, administrator of the estate of George Ayling, deceased, appeals from the order of dismissal. Affirmed.

Cullinan & Hickey, John J. O'Toole, and Darwin C. De Golia, for appellant. J. W. Dorsey, W. E. Cashman, E. J. Talbott, Lewis F. Byington, Harris & Hess, Jordan, Rowe & Brann, John A. Percy, W. H. Barrows, G. W. Haight, and Naphtaly & Freidenrich, for respondents.

SHAW, J. The will of Jemima Parsons, deceased, was admitted to probate in the superior court of the city and county of San Francisco, by an order made by the court and

signed by the judge thereof. W. E. Cashman was duly appointed executor of the estate, and letters testamentary thereon were issued to him on May 12, 1908. On May 7, 1909, George Ayling, claiming to be the cousin and sole heir of the decedent, filed a contest, or petition to revoke the probate of said will. Thereafter, Cashman, as executor, and another party, as a legatee under the will, moved the court to dismiss Ayling's petition on the ground that it was filed more than one year after the will was admitted to probate, and that, consequently, under section 1327, Code of Civil Procedure, such petition or proceeding to revoke the probate of the will could not be maintained. The court granted said motion and thereupon made an order dismissing said contest and petition. Ayling afterwards died, and M. J. Hynes, having been appointed special administrator of his estate, appeals from said order of dismissal.

The record contains no bill of exceptions showing the evidence taken and considered by the court upon the hearing of the motion. None was prepared or settled. The only question we can consider on this appeal, therefore, is whether or not the record, or what may be treated as the judgment roll, is sufficient to sustain the order. In *re Ryer*, 110 Cal. 559, 560, 42 Pac. 1082; *Miller v. Lux*, 100 Cal. 612, 35 Pac. 345, 639; *Estate of Page*, 57 Cal. 240; *Estate of Isaacs*, 30 Cal. 111.

If the contest or petition for revocation filed by Ayling is to be deemed the initiation of the proceeding, the only papers in the transcript which we could consider are Ayling's petition, the two papers called "motions," and the order of dismissal. The petition shows that it was filed on May 7, 1909, and the order recites, or finds, that the will was admitted to probate by an order "duly given and made on the 4th day of May, 1908." Section 1327, Code of Civil Procedure, limits the time within which such contests after probate or petition for revocation may be commenced to one year after the will has been admitted to probate. *Estate of Sbarboro*, 63 Cal. 7; *Estate of Davis*, 136 Cal. 594, 69 Pac. 412. As error must be made to appear and all legal intendments are in favor of the regularity and validity of the action of the court below, it is obvious that, if this is considered as the record, the order is regular and valid.

The transcript also sets forth the order admitting the will to probate and the certificate of proof and facts found, together with the certificates of the clerk showing the date of the filing thereof. The appellant contends that these papers must also be considered as a part of the record and that they show that the will was not admitted to probate until May 12, 1908, which was less than one year prior to the commencement of the contest.

The order admitting the will to probate is in the usual form, is signed by the judge, and declares that it was "done in open court this 4th day of May, 1908." The certificate of the judge attached to the will bears the same date. These certainly constitute ample evidence that the will was admitted to probate on that date. The certificates of filing show that both documents were filed on May 12, 1908. This does not prove that the order was not made on May 4th, or that it was not made until May 12th. The filing by the clerk of an order signed by the judge is not an essential or necessary part of the making of an order, or of the admission of a will to probate. It is well settled that such order need not be signed or filed. The proper record thereof is in the minutes of the court. If the entry in the minutes is considered a necessary part of the making of such order, the point would not aid the appellant, for the transcript does not show when it was entered. If the clerk has performed his duty, as we must presume he did in the absence of any evidence to the contrary, he entered the order in the minutes immediately after it was made. However this may be, upon this appeal and upon this record we must consider as conclusive the recital in the order appealed from, which has the effect of a finding that the proofs upon the hearing showed that the will was admitted to probate on May 4, 1908. The contest, being filed more than a year thereafter, was unauthorized, and the proceeding was properly dismissed.

The order is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

159 Cal. 429

SCUDDER v. PERCE. (L. A. 2,348.)

(Supreme Court of California. March 7, 1911.)

1. PARTNERSHIP (§ 311*) — DISSOLUTION — AGREEMENT—CONSTRUCTION—"EARNED AND COLLECTED."

A partnership agreement provided that on dissolution the partners shall make a just and final account; that the gains and increase, either in money or in fixtures and furniture, debts, or otherwise, shall be divided between the partners, share and share alike; and that after making the division the first party should pay to the second party \$1,000; and that the second party shall transfer and assign to the first party all interest in the office, laboratory, furniture, and fixtures and in the good will of the business, and in all gains "of said business other than moneys earned and collected." *Held*, that it was the duty of the second party on the payment of the \$1,000 to transfer to the first party all the property of the firm, except such moneys of the partnership as had actually been collected, and the exception did not include outstanding uncollected accounts.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 718-725; Dec. Dig. § 311.*]

2. CONTRACTS (§ 156*)—CONSTRUCTION—GENERAL AND SPECIFIC PROVISIONS.

When general and specific provisions of a contract deal with the same subject-matter, the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes Cal.Rep. 114-117 P.—5

specific provisions, if inconsistent with the general ones, are to control.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 737; Dec. Dig. § 156.*]

3. **CONTRACTS (§ 153*)—CONSTRUCTION—CONSTRUCTION AS A WHOLE.**

All parts of a contract are to be given effect, if this may be done without doing violence to the manifest intention of the parties.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 734; Dec. Dig. § 153.*]

4. **CONTRACTS (§ 152*)—CONSTRUCTION—ORDINARY MEANING.**

The terms of a contract are to be construed according to the ordinary and usual acceptance of the language, unless an intent that they are to be construed otherwise plainly appears.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 732, 733, 738; Dec. Dig. § 152.*]

In Bank. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by H. Ford Scudder against L. A. Perce. From a judgment for plaintiff, defendant appealed to the Court of Appeals, which affirmed the judgment, and a hearing was ordered before the Supreme Court. Reversed, with directions.

Denio & Hart, for appellant. F. A. Knight, for respondent.

HENSHAW, J. The appeal is from the judgment on the judgment roll. The question presented is the true construction of a partnership agreement.

The facts found by the court, so far as necessary to this consideration, are that defendant was a physician and surgeon with an established practice in the town of Long Beach. He entered into a partnership agreement with plaintiff, who also was a physician and surgeon, but without practice in Long Beach. By the terms of the agreement the partnership was to continue until a given date, when it became optional with either party to terminate the relationship. Plaintiff was to pay and did pay \$1,000 down on account of the purchase price for his interest in the partnership, and was to continue to pay therefor at the rate of \$50 a month until the full sum of \$4,000 had been paid. The provision of the partnership agreement touching the termination of the contract is as follows: "That at the end or other sooner determination of their copartnership the said copartners, each to the other, shall and will make a true, just and final account of all things relating to their said business, and in all things truly adjust the same; that all and every of the stock and gains and increase thereof which shall appear to be remaining, either in money, goods, fixtures and furniture, debts or otherwise, shall be divided between them, share and share alike. It being distinctly understood that at the expiration of said one year, as aforesaid, in case either of the parties hereto

decide to terminate and after making the division hereinbefore provided, that the party of the first part will pay to the party of the second part the sum of one thousand (\$1,000) dollars; and the party of the second part shall thereupon transfer and assign to the party of the first part all his interest in and to all the office and laboratory furniture and fixtures and in the good will of said business, and in all gains of said business *other than moneys earned and collected.*" The controversy between the parties arises over the meaning of the language here quoted and in particular over the meaning of the words italicized. Plaintiff sued, demanding the payment of the \$1,000, and insisted that he was entitled under the contract to one-half of the moneys earned by the partnership and not collected; in other words, to one-half of the book accounts. Defendant answered, expressing his willingness to pay the \$1,000, but contending that he was entitled upon this payment to all of the uncollected book accounts. The trial court construed the contract in accordance with plaintiff's contention. The Court of Appeals took the same view of it, and a hearing before this court was ordered.

It is to be remembered that this is not an action for the reformation of a written instrument. It is simply an action calling for a legal construction of the terms of a written instrument in the light of the circumstances surrounding its execution as found by the trial court. It is to be noted, also, that there is no question here involved of an ambiguity, latent or patent. By the terms of the contract it became the duty of the defendant upon its termination to pay to plaintiff the sum of \$1,000, and upon that payment it became the duty of the plaintiff to make over to the defendant all his interest in the business and in its property, other than his interest in the moneys of the partnership which had been "earned and collected." There can be no possible doubt of the meaning of this language. It excepts from the operation of the transfer which plaintiff was to make only such moneys of the partnership as had actually been collected. As to those moneys, the agreement elsewhere provided for their equal division between the partners. Color and force for the construction adopted by the trial court is found in the language preceding, to the effect that an accounting should be had, and that "all and every of the stock and gains and increase thereof which shall appear to be remaining, either in money, goods, fixtures and furniture, debts or otherwise, shall be divided between them, share and share alike." And it is said that a provision for an accounting would be idle, and a provision that the debts (meaning debts due the partnership) should be divided equally between them would be meaningless, if it was contemplated

that upon a tender by defendant of \$1,000 all of the property, including these debts, was to be transferred to him. The difficulty with this argument is that it proves too much. If, upon the tender, the debts were not to be transferred, then neither were the goods, fixtures, and furniture, as to which it is also specifically provided in the first clause that they should be divided equally between the partners, and as to which in the last clause of the agreement it is also specifically provided that a transfer of them should be made to the defendant. Nor can it be said that an accounting under the construction contended for by appellant would be a vain thing, since that accounting might very properly go, upon the one hand, to the amount of moneys which had been actually collected, and of which plaintiff was entitled to one-half, and, upon the other hand, to the amount of moneys properly chargeable and not collected, which, upon the dissolution of the partnership, would go to the defendant, who retained the business and the books and continued in the practice, and to whom naturally the collection of the debts due from his patients would properly fall.

But if it be conceded that up to this point the arguments for each construction of the contract are of equal weight, certain considerations yet to be adverted to give determinative force to the construction contended for by appellant. The first of these is the familiar rule that when general and specific provisions of a contract deal with the same subject-matter, the specific provisions, if inconsistent with the general provisions, are of controlling force. If, therefore, it be said that by the general provision accounts are to be taken and the properties of the partnership, including the book accounts, are to be divided between the partners equally, this must be considered as controlled by the specific provision that upon the payment of \$1,000 all assets of the partnership, including the book accounts, shall become the property of the defendant. The second consideration is that all parts of a contract are to be given effect, if this may be done without doing violence to the manifest expressed intent of the parties, and that the terms of a contract are to be construed according to the ordinary and usual acceptance of the language, unless an intent that they should be construed otherwise plainly appears. Appellant's construction of the contract gives to the italicized language the meaning which it naturally and ordinarily bears. The respondent's construction, on the other hand, is a distinct change in the meaning of the contract and amounts to a judicial reformation of it, by which reformation it would be made to say that there should be excepted from the transfer all moneys earned and *not collected*, when the contract itself declares that there shall be excepted from the contract

only the moneys earned and actually collected.

Since the sole error into which the trial court fell was in the construction of the terms of a written instrument, a new trial is unnecessary. The judgment is therefore reversed, with directions to the trial court to enter judgment in accordance with the construction of the contract herein expressed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

(159 Cal. 434)

CLOUSE et al. v. CITY OF SAN DIEGO
et al. (L. A. 2503.)

(Supreme Court of California. March 8, 1911.)

1. MUNICIPAL CORPORATIONS (§ 330*)—PROCEEDS OF BONDS—EXPENDITURE—IMPROVEMENTS—MANNER OF MAKING—"MUNICIPAL AFFAIR."

San Diego City Charter, art. 6, c. 2, § 13, provides that the common council shall determine the necessity for public improvements, and that where the ordinary revenues are insufficient, bonds may be issued, the proceedings for which shall be in accordance with the general laws relating to municipal bonded debts, but the charter is silent as to how money so raised shall be spent. *Held* that, in the silence of the charter, the expenditure of the money was not a "municipal affair" within Const. art. 11, § 6, providing that city charters shall be controlled by general laws, "except in municipal affairs," so that the general law followed as to the mode of issuing the bonds for the improvement, St. 1901, c. 32, § 9, was controlling, which forbids spending such funds, except on competitive bidding.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 854-855; Dec. Dig. § 330.*]

For other definitions, see Words and Phrases, vol. 5, p. 4619; vol. 8, p. 7726.]

2. PLEADING (§ 8*)—NECESSITY OF PLEADING FACTS.

In an action by taxpayers to enjoin the making of public improvements for which city bonds had been sold otherwise than by contract, let by competition, an answer which charges that plaintiffs were contractors, acting in collusion, in order that some of them might obtain contracts for the proposed work and profit thereby, but which wholly fails to plead any facts showing collusion, is bad on demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28; Dec. Dig. § 8.*]

3. MUNICIPAL CORPORATIONS (§ 993*)—ACTIONS—INJUNCTION—RIGHT TO SUE.

The mere fact that a method of paying for municipal work which is contrary to the statute might be expensive and wasteful, and might preclude responsible contractors from securing it, gives a citizen of the municipality a sufficient standing to maintain an action for an injunction to prevent the illegal expenditure.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2153-2161; Dec. Dig. § 993.*]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by J. E. Clouse and others against the City of San Diego and others, to restrain the expenditure of the proceeds of certain

bonds. From a judgment for plaintiffs, defendants appeal. Affirmed.

W. R. Andrews, for appellants. Haines & Haines, for respondents.

MELVIN, J. This is an appeal from a judgment on the pleadings after defendant's refusal to amend its answer, to which a demurrer had been sustained.

The city of San Diego had sold bonds, and the proceeds of the sale were to be used for certain purposes, including the building, construction, and acquisition of designated roads and boulevards. After the sale of the bonds and before the commencement of this action, an ordinance was adopted, whereby the board of public works of the city of San Diego was authorized "to employ men and teams by the day and to purchase all necessary material for the construction of all of said boulevards, roads, and like, except the boulevards to be constructed in the Fourteen Hundred Acre Public Park." Respondents sued as taxpayers to restrain the board of works from the expenditure of the money derived from the sale of said bonds, except upon contracts awarded according to the provisions of section 9 of the act of 1901, which had been followed in voting for the authorization of the bonds. Stats. 1901, p. 30. Plaintiffs contended that the ordinance was void so far as it provided the manner of doing the work and purchasing material without previous advertisement and the letting of contracts, because it was inconsistent with the provisions of the said act of 1901.

After demurrer to the complaint, which was overruled, defendant answered, averring that the indebtedness for the work in question was authorized at a bond election held under the provisions of its own charter, and not under those of the act of 1901 above mentioned, although admitting that said indebtedness was incurred according to the manner prescribed in said general statute, asserting that the ordinance in question was adopted by due authority of law; and as a separate defense alleging on information and belief that plaintiffs were contractors, acting in collusion, to the end that some of them might obtain contracts to do the work in question and derive large profits therefrom. A general demurrer to this answer was sustained, and, defendant declining to amend, judgment went for plaintiffs, and the city of San Diego and its officers were perpetually enjoined from expending any of the sums which had been realized from the sale of bonds in the manner indicated by the municipal ordinance.

Appellants invoke section 13 of chapter 2, article 6, of the charter of San Diego in support of its assertion that the charter gives the city power to incur bonded indebtedness. The provision cited is as follows: "Whenever the common council shall determine that the public interest or necessity demands the acquisition, construction, or completion of any

municipal buildings, bridges, sewers, water works, water rights, reservoir sites, rights of way for pipes, aqueducts, flumes or other conduits, or any other property or appliances suitable or proper for supplying said city or its inhabitants with water, or other municipal improvements, the cost of which will be too great to be paid out of the ordinary annual income and revenue of said city, the said common council may contract bonded indebtedness for said purposes, or any of them, and the proceedings taken for incurring such indebtedness shall be in accordance with the mode and manner prescribed by the provisions of the general laws of the state of California, relative to incurring bonded indebtedness by municipalities, in force at the time such proceedings are taken. Said common council may also contract bonded indebtedness for any other purpose authorized by this charter or the general law of the state of California; provided, that the proceedings taken therefor shall be in accordance with the provisions of the general law in force at the time such proceedings are taken."

The contention is made on behalf of appellants that this section is broad enough to confer authority to create the indebtedness; that, although the method of securing the money is that prescribed by general law, the power itself comes from the charter and relates to a "municipal affair," over which general statutes have no control (section 6, art. 11, Const.); and that the expenditure of the fund for the purposes of road making and the like being also a "municipal affair," the manner of securing and paying for material and labor to be used in such improvements is not subject to the direction of general statutes in cases where municipal ordinances have been made applicable.

Respondents admit that in a general sense street improvement is a "municipal affair," but they assert that in this case, where the charter is silent upon the subject of power to devote the ordinary revenues of the city to street improvements and leaves that matter to the Vrooman act, the expenditure of this money is not a "municipal affair" beyond the power of legislative regulation. In support of this position they quote the following language from *Fragley v. Phelan*, 126 Cal. 395, 58 Pac. 928: "If, however, the charter of a city, whether given to it by the Legislature prior to the Constitution of 1879, or framed by a board of freeholders, contains no provision in reference to subjects which might have been included therein, that city or its inhabitants is not thereby freed from legislative control. The Legislature is vested with the lawmaking power of the state, and the general laws passed by it have force in all parts of the state, unless, by virtue of some provision in the Constitution, such effect is limited, or the lawmaking power has been lodged elsewhere. A city cannot claim to be exempt from general laws relating to municipal affairs if there is no provision re-

lating to such affairs in the charter under which it is acting, whether such charter is one framed by itself or was given to it by the Legislature."

Counsel for appellants maintain that as the charter does provide for the levy of taxes by the common council to carry on the different departments of the municipal government; gives the council authority to open, close, widen, lay out, and otherwise deal with public highways; and establishes a street fund from which shall be paid all expenses for street improvements not otherwise provided for in the charter—that there is ample authority for the construction of streets out of the ordinary revenue of the city without the help of section 26 of the Vrooman act (St. 1891, c. 147) or any other provision of general law. Whether we regard the authority to raise the fund as being derived from the charter which has adopted the method of the Vrooman act, or from that general statute itself, the fact remains that no scheme of expenditure has been provided in the charter for the payment of this money, and we are convinced that the statute of 1901 must be followed and the work must be done according to contract as therein commanded. While the charter does confer certain powers upon the common council in the matter of laying out and repairing streets and the like, no rules are made by charter for the payment of the money used in such improvement. It follows that the demurrer to the first defense set up in the answer was properly sustained. *Matthews v. Town of Livermore*, 156 Cal. 294, 104 Pac. 303.

We need not review in detail the second defense sought to be pleaded in the answer. Suffice it to say that it utterly fails to set up any facts showing collusion. The demurrer to it was properly sustained.

There remains only to consider appellants' contention that their demurrer to the complaint should have been sustained because of failure to disclose plaintiffs' right of action, in that the sort of injury which plaintiffs, as citizens, would suffer, is not therein described. We think it is sufficient answer to this contention that a method of paying for work in a manner not prescribed by law might be expensive and wasteful, and that contractors capable of giving the best service might be precluded from participating in the effort to secure contracts to do the work. This would give plaintiffs, as citizens, sufficient standing to maintain this action. *Winn v. Shaw*, 87 Cal. 636, 25 Pac. 968; *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. Ed. 1070; *Barry v. Goad*, 89 Cal. 222, 26 Pac. 785; *Bradford v. San Francisco*, 112 Cal. 543, 44 Pac. 912.

It follows that the judgment should be affirmed, and it is so ordered.

We concur: LORIGAN, J.; HENSHAW, J.

(159 Cal. 459)

WEBSTER v. SOMER et al. (S. F. 5,320.)

(Supreme Court of California. March 10, 1911.
Rehearing Denied April 7, 1911.)

1. APPEAL AND ERROR (§ 935*)—REVIEW—ORDER OPENING DEFAULT.

The Supreme Court favors a hearing on the merits in deciding appeals from orders setting aside default judgments.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 935.*]

2. JUDGMENT (§ 139*)—DEFAULT JUDGMENT—VACATING.

The trial court has necessarily much discretion in passing upon applications to vacate a default judgment under Code Civ. Proc. § 473, on the ground of excusable neglect and inadvertence.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 265-268; Dec. Dig. § 139.*]

3. JUDGMENT (§ 138*)—DISCRETION OF TRIAL COURT—VACATING DEFAULT JUDGMENT.

Where a default was entered October 30th, and notice of a motion to set aside the default and for permission to file an answer on the ground of excusable neglect and inadvertence, to be made December 13th, was served on December 4th, and the evidence warranted the trial court in concluding that defendant had acted in good faith, and believed he had done all that was essential to a defense on the merits, and the setting aside of the default could not prejudice plaintiff except to require him to show that his claim to have title quieted based wholly on documentary evidence, was well founded, there was no abuse of discretion in setting aside the default.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 249-254; Dec. Dig. § 138.*]

4. TAXATION (§ 769*)—TAX DEED—CORRECTING DEED.

Since Pol. Code, § 3898, requires a tax deed to recite the facts necessary to authorize the sale and conveyance, if a tax deed did not recite that there was a written authorization from the State Controller to the tax collector to sell the property as required by section 3897 in order to authorize a sale, and the recital of publication of notice by the tax collector before selling was defective, the tax collector had authority to issue a corrected deed containing such recitals, though such a deed is not expressly authorized by statute.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1533-1536; Dec. Dig. § 769.*]

5. TAXATION (§ 734*)—TAX DEEDS—IRREGULARITIES.

Real estate was assessed to the owner at a certain sum "less mortgage \$900." There was an outstanding mortgage by the owner for \$700, and the mortgagee had assigned his mortgage to a society to secure a loan to him of \$250. *Held*, that the irregularity in assuming that there was a mortgage to the society and assessing it avoided the tax deed based upon such assessment, Pol. Code, § 3628, providing that no mistake in the name of the owner or supposed owner of the realty shall render the assessment invalid, not curing such irregularity, since the mistake was not merely one as to the owner's name.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 734.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by George A. Webster against

George Somer and others. Judgment for defendants, and plaintiff appeals. Affirmed.

H. M. Anthony, for appellant. Jordan & Brann and Jordan, Rowe & Brann, for respondents.

PER CURIAM. This is an action to quiet plaintiff's title to a lot of land 75 by 150 feet on London street, in the city and county of San Francisco. Defendant had judgment that he was the absolute owner thereof, and enjoining plaintiff from claiming any interest therein. This is an appeal by plaintiff from such judgment.

It is contended that the trial court erred in granting defendant's motion to set aside his default for not answering after his demurrer to plaintiff's complaint had been overruled with leave to him to answer within 20 days. The demurrer was overruled September 27, 1907, and notice thereof served on defendant's attorneys on October 1, 1907. No answer having been filed, defendant's default was entered October 30, 1907. No judgment was ever entered on this default. On December 4, 1907, defendant served his notice of motion to be made December 13, 1907, for a setting aside of the default, and permission to file his answer on the ground of excusable neglect and inadvertence, with his affidavits in support thereof, and on December 5, 1907, served his verified answer. This motion was contested, and, having been heard and submitted on December 20, 1907, was granted on January 9, 1908, on condition of payment by defendant to plaintiff of \$50. This amount was deposited by defendant with the clerk of the court for plaintiff, but has never been accepted by him.

We have carefully considered the facts relied on in support of the motion, and, under all the circumstances, do not feel that we would be warranted in holding that the trial court abused its discretion in granting the same. The motion to set aside the default was made within a reasonable time after the default and the granting of the motion involved no possible prejudice to plaintiff except the necessity of showing that his claim against defendant, a claim based wholly on documentary evidence, was well founded. There was sufficient in the evidence to warrant the trial court in concluding that defendant believed that he had done all that was necessary to insure a defense of the action on the merits, and that he was acting in good faith throughout. The disposition of this court in favor of a hearing on the merits is well known by reason of its decisions on appeal from such orders as the one under review. In the matter of applications for relief under section 473 of the Code of Civil Procedure, much is necessarily left to the discretion of the trial court. While the situation here was such that we would probably not have felt justified in interfering had the trial court denied the motion, we cannot say

that it abused its discretion in granting it. Merchants' Ad-Sign Co. v. Los Angeles, etc., Co., 128 Cal. 619, 61 Pac. 277.

Plaintiff's claim that he is the owner of the property involved is based solely on certain tax proceedings founded on an assessment for state and county taxes for the year 1896. In support of his claim, plaintiff offered in evidence a conveyance of the property to the state of California by Edward J. Smith, tax collector of the "county of San Francisco," dated July 7, 1902. This deed contained the recitals required by section 3785 of the Political Code, reciting an assessment of the property here involved for the year 1896 at \$250 to "Fr. V. Sassinek No. 33 National Slavonic Society," the nonpayment of the tax thereon or any portion thereof, the amount for which it was sold to the state, being \$2.43 for tax for county purposes, \$1.07 tax for state purposes, and 94 cents accruing costs and charges, an aggregate of \$4.44, the sale of said property on July 3, 1897, for said \$4.44 delinquent taxes and charges to the state of California as required by section 3771 of the Political Code, a description of the property so sold (being the property here involved), the time when the right of redemption had expired, viz., July 5, 1902, and that no person had redeemed the property. The deed was duly acknowledged and recorded. Plaintiff followed up this deed with a deed from Edward J. Smith, tax collector of the city and county of San Francisco, to F. J. Ghiselli, plaintiff's grantor, purporting to convey said property to Ghiselli as the purchaser thereof for \$230 from the state at a public sale had on March 11, 1905, under the provisions of section 3897 of the Political Code. Section 3898 of the Political Code requires such a deed to recite the facts necessary to authorize such a sale and conveyance, and the deed offered was defective, in that it failed to recite that there was a written authorization from the state controller to the tax collector to sell the property, as is required by section 3897 of the Political Code before any sale can be made. There was also a defect in the recital of publication of notice by the tax collector before making the sale. An objection to this deed was sustained. Plaintiff subsequently offered a new deed from the state of California by the tax collector of the city and county of San Francisco to said Ghiselli, based upon said public sale and fully complying with all the requirements of the law as to such deeds, and showing the facts which authorized such sale. An objection of defendant to the reception of this deed in evidence was sustained by the trial court, and error is here predicated on this ruling. The only claim made in support of this ruling is that there is no provision of statute authorizing the issuance of a new or correction deed. No such statute is essential. The law requires the tax collector to make a deed complying with its terms, and, until he had done so, he had not complied with its

mandate, and could be compelled by mandamus to do so. *Grimm v. O'Connell*, 54 Cal. 523. What was said in *Fox v. Townsend*, 152 Cal. 51, 91 Pac. 1004, 1007, in relation to correction deeds by the tax collector to the state, is applicable here. The court said: "Certain correction deeds were made by the tax collector to the state, and it is urged that these deeds were without authority and void. The general principles governing such correction deeds are well settled. When a tax deed does not conform in its recitals to the facts the officer is authorized to execute a second and corrected deed, but he has no power to execute a second deed which shall misstate the facts respecting any proceedings prior to its execution. Such a deed would be void. The power and the duty of the public officer is not exhausted by the execution of an irregular or imperfect tax deed"—citing authorities. The objection made to the introduction of this deed was not well based. The only other evidence introduced by plaintiff was evidence showing that he had acquired Ghiselli's title.

Upon this evidence, including the correction deed, plaintiff was entitled to judgment that he was the owner of the land, unless the evidence introduced by him showed the invalidity of the deeds. See *Klumpke v. Baker*, 131 Cal. 80, 63 Pac. 137, 676. The deed to the state was primary evidence of a proper assessment, equalization, levy of tax, non-payment of tax, a sale as prescribed by law, nonredemption of the property, and that the person who executed the deed was the proper officer (section 3786, Pol. Code), and, so far as the Legislature could make it, was conclusive evidence of the regularity of all other proceedings (section 3787, Pol. Code). Unless successfully impeached by the defendant, its effect was to convey to the state the absolute title to the property described therein. Section 3787, Pol. Code. The correction deed from the tax collector was prima facie evidence of all facts recited therein (section 3898, Pol. Code), and the facts so recited showed a vesting of the title of the state in plaintiff's grantor.

The facts relied upon by the defendants to overcome the effect of these deeds are practically conceded, and are substantially as follows: The land itself was assessed to George Somer for the year 1896, the real estate being assessed at \$450 and the improvements thereon at \$900, making a total of \$1,350, with a deduction on account of mortgage of \$900. The following is a copy of that part of the assessment roll stating these values: "Real estate \$450. Imp. \$900. Total \$1350. Less mortgage \$900." The tax on this assessment had been paid. Somer had given a mortgage on the property to one Krshak and his wife for \$700, which had been duly recorded. Krshak had borrowed \$250 from the Fr. V. Sasinek No. 33 National Slavonic Society, and to secure the debt had given to said society a contract which Krshak called

a "mortgage upon a mortgage" covering the same property. It was, in effect, an assignment of the Somer mortgage as collateral security, and nothing more, though in form a mortgage on the lot. It was duly recorded as a mortgage. The mortgage of Somer to Krshak for \$700 had apparently been regularly assessed for 1896 as a mortgage interest, and the tax paid thereon. The purported mortgage of the Slavonic Society was also assessed separately as a mortgage interest in the real property. The tax deed, as before stated, was based on the last-mentioned assessment. The case of the holder of the tax title is predicated upon the provision of section 3628 of the Political Code that "no mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid." The argument is that the law in force at the time of these transactions provided that a mortgage on land constituted a taxable interest therein, to be taxed separately to the owner of the mortgage, the value of which was to be deducted from the total assessed value of the property, as was done in this instance; that the assessment of the property in three parcels, or parts—one to the owner of the land, one to the owner of the Krshak mortgage, and another to the owner of the Slavonic Society mortgage—was, in effect, an assessment of three parcels of property, and that the only defect therein was that the assessment of the interest represented by the society mortgage was a mistake since there was no such mortgage, in fact, that this interest really belonged to Somer, and that it was an assessment of property to the wrong person; in other words, a mistake in the name of the owner, which, under the provision above quoted, would be immaterial and would not affect the validity of the sale.

The theory of the provision of section 3628 is that the owner must be charged with knowledge of the property which he owns, that it is his duty to list the same for assessment and to see that he pays the taxes thereon, and that when endeavoring to ascertain the amount of his tax he must search until he finds his property—if not in his own name, then in such name as the assessor has listed it. If there was nothing more than a mistake in the name in which the property was assessed, the provision of section 3628 would clearly be applicable. But we have here more than a mistake in the name. There was a mistake in assuming—as this assessment did—that there was any such mortgage interest as that which was assessed to the Slavonic Society. The substantial objection to this assessment is not based solely upon the mistake in the name of the person to whom this interest was assessed. It is that the method of assessing the property was such as would naturally mislead the owner in his search for the particulars of his assessment. The entry opposite his prop-

erty, where it is assessed to himself, did not inform him that there were two mortgages against it. The word "mortgage" is in the singular number, and it gave him notice only that there was somewhere another assessment against the mortgage interest of the value of \$900. He had no knowledge, actual or constructive, of the society mortgage, so-called. As a mortgage it was absolutely void. He knew of the mortgage to Krshak, and that it was only \$700. Having examined further and found that mortgage, his natural inference would be that there was no other. The finding of the Krshak mortgage, properly assessed, would satisfy the inquiry invited by the reference in his own assessment, and he had nothing to cause suspicion that there was another assessment charged upon a mortgage interest which did not exist. While it may have been his duty—and may still be his duty—to pay the remainder of the tax due from him upon the \$200 valuation, which was represented by the assessment of the society mortgage, being the difference between the Krshak mortgage and the \$900 mortgage deduction, it cannot be held that such a glaring and deceptive irregularity in the method of assessment is cured by the provision that a mistake in the name shall not invalidate it. Furthermore, so far as appears, the assessment of the society mortgage was for too large a sum. The Krshak mortgage was for \$700, and, if it was assessed for its full amount, there was left but \$200 of the assessed valuation to be represented by the society mortgage. The evidence is that this assessment was for \$250, making an excess of \$50 in the amount upon which the tax was computed. The tax for which the sale was made would therefore be excessive upon this theory of the case.

For these reasons, we think the court below correctly held that the tax deed was invalid.

The judgment is affirmed.

BEATTY, O. J., does not participate in the foregoing.

(159 Cal. 456)

PEOPLE v. TRESCHENKO. (Cr. 1,595.)

(Supreme Court of California, March 9, 1911.
Rehearing Denied April 7, 1911.)

1. CRIMINAL LAW (§ 589*)—CONTINUANCE—GROUNDS—FAILURE TO FILE TRANSCRIPT OF TESTIMONY AT PRELIMINARY EXAMINATION.

Where the reporter fails to file within the time prescribed by law a transcript of the testimony at the preliminary examination, the court may grant a continuance until the transcript is filed, and may compel the prompt filing thereof.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 589.*]

2. CRIMINAL LAW (§ 1166*)—REFUSAL TO GRANT CONTINUANCE—HARMLESS ERROR.

Refusal to grant a continuance on the ground that the testimony at the preliminary

examination has not been filed as required by law is not prejudicial to accused where a continuance is sought only to show by the transcript that he was not represented by counsel, which fact may be shown by other evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3110-3112; Dec. Dig. § 1166.*]

3. INDICTMENT AND INFORMATION (§ 140*)—MOTION TO SET ASIDE INFORMATION—PRELIMINARY EXAMINATION.

A motion by accused to set aside the information on the ground that he has not been legally committed because he was not represented by counsel on his preliminary examination is properly denied, in the absence of evidence supporting it.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 140.*]

4. CRIMINAL LAW (§ 1038*)—APPEAL—OBJECTIONS BELOW—INSTRUCTIONS.

An instruction in the language of the Code defining murder and manslaughter and their degrees being good as far as it goes, where accused makes no request for further explanation, he may not complain on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2646; Dec. Dig. § 1038.*]

5. CRIMINAL LAW (§ 977*)—JUDGMENT—TIME TO PRONOUNCE.

Under Pen. Code, §§ 1191, 1202, requiring the court to fix a time for judgment not less than two nor more than five days after verdict, and empowering the court to extend the time not more than 10 days longer to hear any motion for new trial, to warrant an extension, the motion need not be actually pending, but the court on the counsel of accused declaring that he desires to move for a new trial may extend the time for pronouncing the judgment beyond the 5 days and less than 15 days.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2482-2502; Dec. Dig. § 977.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Geo. H. Cabaniss, Judge.

Demetry Treschenko was convicted of murder in the first degree, and he appeals. Affirmed.

Philip C. Boardman, Emerson W. Read, Ernest B. D. Spagnoli, and Thos. Bartow (Spagnoli & Spagnoli, of counsel), for appellant. U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., Chas. M. Fickert, Dist. Atty., and Jas. F. Brennan, Asst. Dist. Atty., for the People.

HENSHAW, J. The appellant was convicted of murder in the first degree and the death penalty was imposed. Upon this appeal he contends:

1. That the court erred in refusing to grant a continuance requested upon the ground that the evidence and testimony taken in the police court upon the preliminary examination had not been written up and filed in the office of the clerk of the superior court as required by law. The court, having denied this motion, directed the defendant to plead to the information. Defendant thereupon moved that the information be set aside upon the ground that he had not been legally committed for the reason that he had not been represented by counsel upon his preliminary examination in the police

court, and that, through his ignorance of and unfamiliarity with the English language, he did not understand his right to be represented by counsel. Where nonperformance of an official duty is shown, such as the failure of the reporter to file a transcript of the testimony taken at the preliminary examination within the time prescribed by the law, the court might well have granted a continuance until this was done, and likewise have taken measures to see that it was promptly done. But it may not be said that the court's refusal to grant the motion amounted to error, unless it can be seen that the defendant was prejudiced in a substantial right, and this is not made to appear; for, upon the motion which followed to set aside the information on the ground that he was not represented by counsel, and to support which motion he desired the transcript of the proceedings upon the preliminary examination, such a transcript while evidence was not the only evidence available to defendant. If the grounds of his motion were true, he could at the time of its presentation have supported it by affidavit. As this record stands, there is no evidence whatsoever in support of the motion, and it was therefore properly denied.

2. The court instructed the jury in the language of the Code as to the definition of murder and manslaughter, their kinds, and degrees. Complaint is made that these instructions confused and misled the jury. The court, however, adopted the language of the Code, and no instruction in elaboration or exposition of the principles of the code definitions was requested by defendant. The plain and explicit language of the code sections could not mislead a jury.

3. Defendant moved for a new trial; his motion being based on the following state of facts as disclosed by the record: After recollection of the verdict the court, addressing counsel, said:

"How with reference to the sentence, gentlemen?

"Mr. Boardman (for defendant): We will want time to move for a new trial and to have the record.

"Mr. Hanley (for the prosecution): The 25th?

"The Court: September 25th for judgment?

"Mr. Hanley: A week from to-morrow.

"The Court: A week from to-morrow?

"Mr. Boardman: That is satisfactory."

It is contended that the court in thus postponing the pronouncement of judgment for a period of more than five days after the verdict violated the provisions of section 1191 of the Penal Code, and that under the provisions of section 1202 of the same Code defendant was entitled to a new trial. In support of this position Rankin v. Superior Court, 157 Cal. 189, 106 Pac. 718, is

relied on. Section 1191 contemplates that judgment shall be pronounced in not less than two nor more than five days after the verdict or plea, provided that the court may extend the time, not more than ten days longer for the purpose of hearing or determining any motion for a new trial or in arrest of judgment. In the case of Rankin v. Superior Court the verdict was returned upon September 10, 1909, and the 7th of January, 1910, was fixed by the court as the date for pronouncing judgment. This date was far beyond the time to which, under any power, the court could delay pronouncing judgment. In the case at bar the time which the court fixed—seven days after verdict, was within fifteen days—the maximum time allowed, excepting in cases of probation or insanity. It is not necessary for the exercise of the court's discretion in extending the time beyond the five days and less than the fifteen days that a motion for new trial should actually be pending and undetermined. It is sufficient, as in the case here presented, that a motion for a new trial was in contemplation, that the defendant's counsel declared that they desired to move for a new trial, and expressed themselves as satisfied with the date which the court fixed, which was within the maximum limit of fifteen days which the statute allows.

Consideration of no other questions being asked upon this appeal, for the reasons given, the judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; SHAW, J.

159 Cal. 443

DOUELLE v. SHOO et al. (S. F. 5,755.)
(Supreme Court of California. March 8, 1911.)

1. APPEAL AND ERROR (§ 458*)—SUPERSEDEAS PROCEEDINGS—UNDERTAKING.

In a suit for a partnership accounting, the court entered what was styled an "interlocutory decree" ordering an accounting, and the appointment of a referee for that purpose, and ordering that the sheriff restore plaintiff to the possession of the premises, and that defendants be enjoined from interfering with plaintiff in the exercise of his rights as managing partner, and that the making of further findings of fact and law and other matters to be determined be reserved until the coming in of the referee's report. Defendants appealed, and gave an undertaking staying the execution of the judgment in so far as it directed the delivery of real or personal property. Thereafter the superior court filed its decision adopting facts found by the referee finding the interests of the parties and entered a decree designated as a "final decree," whereby defendants were enjoined from interfering with plaintiff in his rights as partner, whereupon defendants filed a notice of appeal from such decree. *Held*, that defendants not having applied to have the amount of a bond fixed under Code Civ. Proc. §§ 943, 945, to stay execution on the final decree, were not entitled to a writ of supersedeas to protect their possession pending the appeal, a contention that

the first decree was in fact a final judgment or final as to the injunction, and that the giving of a bond to stay execution on it prevented the court from carrying the same into effect by means of further decree or otherwise, being without merit, the first decree having merely been an injunction pendente lite provided for by Code Civ. Proc. § 525.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 458.*]

2. JUDGMENT (§ 217*)—"FINAL JUDGMENT."

A judgment is final when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce, by execution, what has been determined.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 394; Dec. Dig. § 217.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2774-2798; vol. 8, p. 7663.]

3. JUDGMENT (§ 203*)—"FINAL JUDGMENT."

There can be but one final judgment in a cause.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 361; Dec. Dig. § 203.*]

In Bank. Action by John Doudell against John J. Shoo and others. From a decree in favor of plaintiff, defendants appeal. Application for writ of supersedeas against I. R. D. Chittenden, as Sheriff of Fresno County. Application denied.

See, also, 109 Pac. 615.

A. L. Frick, Carter & Carter, and Carl F. Wood, for appellants. C. K. Bonestell, for respondent.

SLOSS, J. The action was commenced in the superior court of Fresno county. The complaint alleged that a partnership agreement had been entered into between the plaintiff and the defendant John J. Shoo; that under said agreement the plaintiff was to have the sole management of the business, which was that of a billiard and pool hall, together with a saloon and cigar store; that on February 8, 1910, the defendant excluded the plaintiff from the premises occupied by the firm and from all participation in the affairs of the copartnership. It was further alleged in the complaint that large profits made in the business were unaccounted for, that certain real property belonging to the partnership had been transferred to the defendants other than John J. Shoo, and prayer was made that the defendants be enjoined from interfering with plaintiff in the management of the business and the partnership property, that a receiver be appointed to carry on the business pending the action, and that an accounting be had between the parties. An answer was filed denying that any partnership agreement had ever been entered into, and denying that the plaintiff ever had any interest as partner, or otherwise, in the business or property referred to in the complaint.

On the 6th of June, 1910, the court, after a hearing, filed a document entitled "Findings of Fact, Conclusion of Law, Interlocutory Decree." This paper, after reciting a

trial, finds that since July, 1909, the plaintiff and the defendant John J. Shoo have been conducting as partners a saloon and cigar business and a billiard hall on the premises described in the complaint; that the real and personal property described in the complaint is partnership property of said partners; that in February, 1910, the defendant John J. Shoo wholly excluded plaintiff from the partnership property and business, and has ever since refused to account to him concerning the partnership affairs. It is found that profits have been derived from the business; that a portion of said profits has been expended by the partners; that payments have been made on account of the unpaid purchase price of the real property; that the partners have received unequal shares of the profits of said business; that there are outstanding debts, among which is a debt due the defendant Herrick, who holds the legal title to the real property of the partnership as security for his loan.

There is but one conclusion of law, which is "that an accounting is necessary between plaintiff and the defendant John J. Shoo, covering all the property and business of the partnership found to exist between them from the commencement thereof." The decree entered upon these findings and this conclusion of law was styled by the court an "interlocutory decree." It ordered that a full and complete accounting be taken of all the partnership dealings between the plaintiff and John J. Shoo, and that D. M. Speed be appointed referee for that purpose. The referee was directed to report an itemized statement of the facts to the court, stating separately the amounts contributed by each of the partners to the partnership business, the receipts from the business, rents received from the real property, amounts expended for repairing buildings, for fixtures, furniture, etc., for merchandise and stock in trade, for salaries, for interest; also the amounts received by each of the partners from said business for his personal account, the amount of partnership assets in the business or under the control of the defendant John J. Shoo, and the debts of the copartnership. It was further ordered that the sheriff restore the plaintiff to the possession of the premises, and that the defendants be enjoined from interfering with the plaintiff in the exercise of his rights and duties as managing partner of the partnership. The decree concludes with these words: "It is further ordered that the making of further findings of fact and law and other matters to be determined herein be reserved until the coming in and settlement of the referee's report." The defendants served and filed a notice of appeal from this judgment and applied to the court below for an order fixing the amount of an undertaking on said appeal to stay the execution of said judgment in so far as it directed the delivery of real or personal

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

property. The court declined to make such order, and on July 5, 1910, this court issued its peremptory writ of mandate requiring the superior court of Fresno county to fix the amount of such undertaking. Thereafter such amount was so fixed at \$75,000, an undertaking was filed by the appellants, and the court below ordered the execution of the judgment stayed, and ordered the sheriff of Fresno county to restore the defendants to the same possession of the property as they had had prior to the entry of the judgment.

On September 15, 1910, the superior court filed its decision reciting the making of the prior findings and of the order appointing a referee to take an account, reciting that the referee had made his report, that the court had examined said report, and that the same was based upon competent evidence. The decision adopts the facts found by the referee, finds anew the making of the partnership agreement and the conducting of the business by Doudell and Shoo as partners, and then goes on to make elaborate findings showing the amounts paid by the respective partners, the purchase of property for the partnership, the indebtedness incurred by defendant Shoo and the security given for such indebtedness, the receipts of the partnership business, the expenditures in conducting the business, and the amounts received by each of the partners. As conclusions of law the court finds that the plaintiff and the defendant John J. Shoo have equal interests in the real and personal property described in the complaint; that the defendant Herrick holds the legal title to said property as security for the repayment to him of certain moneys advanced; that the defendant John J. Shoo has a lien upon the real estate for a certain amount found to be due him; that the plaintiff is entitled to recover costs from the defendant John J. Shoo; and that the defendants should be enjoined from interfering with plaintiff in the exercise of his rights in managing the partnership. A decree designated as a "Final Decree" was made carrying into effect these conclusions of law. Thereupon the defendants served and filed a notice of appeal from this decree and filed an undertaking on appeal in the sum of \$300.

The present petition is presented by the defendants and appellants, and alleges that upon the entry of the final decree the sheriff of the county of Fresno, acting under and by virtue of said decree, removed the petitioners from the possession of the property described in said interlocutory decree and said final decree, and delivered the possession thereof to the plaintiff, who has ever since had, and now has, the possession of the same. They ask for a writ of superseadeas to protect their possession pending the appeal. Upon the hearing of this application the plaintiff appeared and denied that he had been put in possession by the sheriff, or under the order of the court, averring that he had without the interposition of the court, or any officer thereof, claimed possession un-

der the decree, and that such possession had been surrendered to him. It will not be necessary to determine the issue of fact so presented, as we are satisfied, upon the showing made by the petitioners, that they are not entitled to the relief sought. No undertaking to stay execution was given upon the last appeal; i. e., that from the decree entered in September, 1910. That decree, like the interlocutory decree, undertook to enjoin the defendants from interfering with the plaintiff in the exercise of his rights and duties as managing partner. Its effect was to direct a delivery of the possession of real and personal property (see *Clute v. Superior Court*, 155 Cal. 15, 99 Pac. 362, 132 Am. St. Rep. 54), and its enforcement could not be stayed without the giving of a bond in an amount to be fixed by the judge of the court below (Code Civ. Proc. §§ 943, 945). The appellants have not applied to have the amount of such bond fixed.

The petitioners seek to avoid the conclusion that they have not acquired the right to have proceedings stayed by the claim that the so-called interlocutory decree of June 6, 1910, was in fact a final judgment, and that the giving of a bond to stay execution on that judgment prevented the court below from carrying the same into effect, whether by means of further decree or otherwise. Under the ordinary definition of final decree the judgment entered on June 6, 1910, was not final. A judgment is final "when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined." *Klever v. Seawall*, 65 Fed. 373, 12 C. C. A. 653; *The Express Co.'s Case*, 108 U. S. 24, 2 Sup. Ct. 6, 27 L. Ed. 638; *Griffin v. Orman*, 9 Fla. 22, 46, 47. See, also, *In re Smith*, 98 Cal. 636, 640, 33 Pac. 744. The first decree entered in this cause was certainly not intended by the court to be an ultimate adjudication of the merits as between the parties. It was based upon findings which determined none of the questions at issue except the fact of partnership and the existence of mutual and undetermined claims and demands, and upon a conclusion of law which declared no more than that an accounting was necessary. The decree, declared by the court itself to be an "interlocutory decree," appointed a referee to state an account, the settlement of which was essential to the fixing of the relative rights of the parties in the partnership property. Under all the authorities, such a decree is not final. *White v. Conway*, 66 Cal. 383, 5 Pac. 672, distinguishing *Clark v. Dunnam*, 46 Cal. 208, relied on by the petitioners; note to *Williams v. Field*, 2 Wis. 421, 60 Am. Dec. 426, 435; *Gray v. Palmer*, 9 Cal. 616; *Rhodes v. Williams*, 12 Nev. 20; *Cocke's Adm'r v. Gilpin*, 1 Rob. [Va.] 20.

But if the judgment of June 6, 1910, viewed as a whole, cannot be regarded as final, the petitioners argue that it was neverthe-

less final with respect to the matter here complained of—I. e., the order of injunction—that this injunction was merely repeated by the decree of September, 1910, and remained in force by virtue of the original judgment of June 6th, notwithstanding the entry of a subsequent decree disposing of other issues. If the first decree was a final adjudication of the rights of the parties with respect to any matter contained in it, it might well be claimed that the appeal from that order, together with the giving of the bond required by the order of the trial court, would stay the power of the court to take any further proceedings with reference to the matter covered by the judgment appealed from while the appeal remained undisposed of. Code Civ. Proc. § 946; *Vosburg v. Vosburg*, 137 Cal. 493, 70 Pac. 473. But we are satisfied that the judgment of June 6, 1910, is not to be construed as a final determination of the rights of the parties with respect to any of the matters embraced therein. In the first place, our system of procedure contemplates that there shall be but one final judgment in a cause (*Thompson v. White*, 63 Cal. 505; *Thompson v. White*, 76 Cal. 381, 18 Pac. 399; *Stockton Works v. Ins. Co.*, 98 Cal. 557, 577, 33 Pac. 633; *Nolan v. Smith*, 137 Cal. 360, 70 Pac. 166), and, in the absence of a clear showing, it is not to be presumed that the court would attempt to dispose of a case piecemeal by successive final judgments, each covering a part of the matters in controversy.

In view of the nature of the findings and of the decree entered on June 6, 1910, we think the injunction, which was a part of that decree, should be interpreted as intended to be no more than an injunction pendente lite, and that its operative force therefore ended with the entry of the final decree. By the judgment of June 6, 1910, the court did not undertake to determine the rights of the parties. It did not decide that the partnership found to exist between the parties should or should not be dissolved. It went no further than to determine that there was a partnership of which plaintiff was managing partner, that plaintiff had been excluded therefrom, and that an accounting was necessary in order to fix the relative property rights of the parties. As an incident to the ordering of this accounting, it undertook to enjoin the defendants from interfering with the plaintiff in his conduct of the business as managing partner. But the determination of the further questions remaining at issue between the parties was expressly reserved for subsequent adjudication. While the injunction was not in terms limited to the pendency of the action, it seems clear that its purpose was merely to hold matters in what the court found to be the existing condition until the rights of the parties should be finally adjudicated. Upon the en-

try of a final decree, the court might have decided that the partnership should be dissolved and the property sold. Had it done so, there would be little question that the injunction theretofore granted would have ceased to be effective. The injunction gained no additional force from the circumstance that the court, upon a final hearing, left the partnership in existence, and reordered an injunction. If this be so, the prohibitive relief granted by the interlocutory decree of June 6, 1910, was simply the injunction pendente lite provided for in section 525 et seq. of the Code of Civil Procedure. It was a provisional remedy, intended to cover the interval which should elapse before the entry of the final decree. Upon such entry the "provisional remedy was merged in the perpetual injunction thereby granted to the plaintiff, and ceased to have any operative effect." *Sheward v. Citizens' Water Co.*, 90 Cal. 635, 638, 27 Pac. 439, 440; *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327.

Under these views, the appeal from the decree of June 6, 1910, did not affect the power of the court to subsequently make a final decree disposing completely of all of the issues involved in the case. The order for the temporary injunction was appealable by the terms of section 963 of the Code of Civil Procedure. In so far as it was mandatory in character, its enforcement could be stayed pending such appeal. *Clute v. Superior Court*, supra, and cases cited. But the appeal did not operate to deprive the court of power to proceed to a final hearing of the case. If the final decree had resulted in a judgment in favor of the defendants, the temporary injunction would have fallen to the ground. The same effect must follow where an injunction is granted anew by the final decree, and this for the reason, as stated above, that the injunction of June 6th was intended to be operative only until the final hearing, and its effect has accordingly ceased by the expiration of the time during which it was designed to have life.

The application for a writ of supersedeas is denied.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

15 Cal. App. 260

PEOPLE v. PANG SUI LIN et al. (Cr. 139.)
(Court of Appeal, Third District, California.
Feb. 1, 1911.)

1. CRIMINAL LAW (§ 730*)—APPEAL—HARMLESS ERROR—CONDUCT OF DISTRICT ATTORNEY—PREJUDICIAL EFFECT.

In a joint prosecution of several Chinamen for robbery, the district attorney asked one of them whether he did not steal the woman he was living with, which was objected to, and the question was twice reiterated, and finally answered in the negative over objection, when the district attorney asked, "Now, haven't you mort-

gaged or pledged this woman?" when an objection was made and the trial judge stated, and repeated, that the question was wholly improper, and he did not want a discussion as to its admissibility. The district attorney also asked such defendant whether he was the same person who violated an injunction and mashed a cabin, to which the court sustained an objection, telling the jury to pay no attention to such question and draw no inferences from it, because it was improper. The district attorney asked another defendant on cross-examination whether he and another defendant were not what was known among Chinamen as "hatchet men," when the court stated that the question was not proper on cross-examination. *Held* that, notwithstanding the court's action, the jury might have believed that the defendants were of bad character and likely to commit the crime charged, and it could not be said that all of defendants were not prejudiced by such questions, especially as the evidence was sharply conflicting.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

2. CRIMINAL LAW (§ 700*)—TRIAL—CONDUCT OF DISTRICT ATTORNEY.

A district attorney should be as solicitous to obtain a fair trial for accused as to obtain a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1658; Dec. Dig. § 700.*]

3. CRIMINAL LAW (§ 919*)—APPEAL—REVIEW—MATTERS REVIEWABLE—MOTION FOR NEW TRIAL.

Alleged misconduct of the district attorney in asking improper questions cannot be reviewed on a motion for a new trial, but only upon appeal from the judgment of conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2197-2201; Dec. Dig. § 919.*]

4. CRIMINAL LAW (§ 1181*)—APPEAL—DISPOSITION.

Since alleged misconduct by the district attorney in asking questions can only be reviewed on appeal from the judgment of conviction, the order denying a new trial will be affirmed and the judgment reversed upon finding that such misconduct is reversible error.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1181.*]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Pang Sui Lin and others were convicted of robbery, and they appeal from the judgment of conviction and an order denying a motion for a new trial. Order affirmed and judgment reversed.

J. C. Webster, for appellants. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

BURNETT, J. The defendants, who are of the Mongolian race, were convicted of robbing another Chinaman, and they appeal from the judgment and the order denying their motion for a new trial.

Several assignments of error are made, but, save one, we deem them without substantial merit. During the cross-examination of one of the defendants the following proceedings, as shown by the transcript, took place: "The district attorney asked the following question: Is it not a fact that you

stole from a merchant in Virginia City the woman you are living with now? Mr. Webster: We object. Witness: I never been in Virginia City in my life. Mr. Holland: Is it not a fact that you took the woman away from her husband, a Chinese merchant, the woman you are living with now? A. I never been in Virginia City in my life. Q. It might not have been in Virginia City. A. I did not. Mr. Webster: This is entirely improper, your Honor. Mr. Holland: I will ask the question. Mr. Webster: I object on the ground the question is improper. The Court: He has already answered it. That is enough. Mr. Holland: Now, haven't you mortgaged or pledged this woman— Mr. Webster (interrupting): I object to any further examination on that line. The Court: Counsel has asked him if he didn't mortgage this woman. The question is highly improper, and the objection is sustained. I don't want any discussion about the admissibility. Mr. Holland: I asked him if he had always led a proper kind of life. I think I have a right to ask the question. The Court: I don't think you have a right to ask this kind of a question, and I want no discussion about it. Again, the district attorney in cross-examination of the same defendant asked the following question: Are you the Charley Jones, who, in conjunction with Jim Lee, violated an injunction issued out of this court and mashed a cabin down on the Shawmut mine and broke into a cabin and violated an injunction of— Mr. Webster: I object as not proper cross-examination. The Court: I will sustain the objection. Let me state, gentlemen of the jury, you will pay no attention to any such question asked, draw no inference from that at all. It is not a proper question to ask the witness, and you are instructed now, gentlemen, to pay no attention to it. The objection is sustained. Again, on cross-examination of the defendant, Leong Ah Din, the district attorney asked him the following question: Q. Is it not a fact that you and Charley Jones are what is known among Chinamen as 'hatchet men'? Which question was objected to by defendants' counsel on the grounds that it was improper, not proper cross-examination, incompetent, irrelevant, and immaterial. The Court: It is not cross-examination, gentlemen. The court is limited in the cross-examination to the examination in chief; it is not cross-examination."

In reference to the foregoing we deem it proper to make the following observations: The learned trial judge readily perceived that the questions were improper and promptly sustained objections thereto. He went further, and endeavored to fortify the minds of the jury against any unfavorable impression that might be created by what is assigned as the misconduct of the district

attorney. It is nevertheless true that this officer is the representative of the people in a very important capacity, is generally of consequence in the community, and it is a reasonable and almost necessary inference that some at least of the jurors would conclude that the district attorney would not ask such questions unless he could prove what was implied in such questions if he had been allowed to do so. The result of this impression would be the opinion that the defendant is a man of bad character, and likely to commit the crime charged against him. It is apparent that this circumstance may have weighed decisively against the defendants here, and we cannot say that otherwise they would have been convicted in the face of the directly conflicting evidence. The effect upon the minds of the jury would be the same whether the district attorney was acting in good faith or with a purpose of prejudicing the defendants. Of course, in the trial of criminal cases, questions will frequently arise about which lawyers and judges may fairly differ in opinion, and in those cases defendants cannot complain of the mere asking of questions to which an objection may be sustained, but there are certain elementary rules of evidence so clearly established and fundamental rights of persons charged with crime so generally recognized that any infraction or invasion of them cannot be justified or excused on the ground of ignorance or good faith even. It is a trite saying, but its repetition seems not uncalled for, that a fair trial for the defendant should invite and receive from the district attorney the same solicitous consideration as the conviction of the guilty. If the district attorney should be more anxious to win a victory in the lower court than to accord to the defendant the rights that he is entitled to under the Constitution, he must not be surprised if his success comes to naught in the higher forum. The case is brought within the principle announced in *People v. Wells*, 100 Cal. 459, 34 Pac. 1078; *People v. Valliere*, 127 Cal. 65, 59 Pac. 295; *People v. Derbert*, 138 Cal. 467, 71 Pac. 564; *People v. Derwae*, 155 Cal. 592, 102 Pac. 266.

As the defendants were jointly charged with the crime and tried together, it is probable that they were all prejudiced alike by the said incidents. The ground herein considered cannot be regarded on the motion for a new trial, but can be reviewed only on an appeal from the judgment. *People v. Amer*, 151 Cal. 303, 90 Pac. 698. The effect of the reversal of the judgment is obviously the same as of the order denying the motion for a new trial, but under the decisions as we view the matter the order denying said motion should be affirmed and the judgment reversed and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

15 Cal. App. 273

PEOPLE v. KERR. (Cr. 293.)

(Court of Appeal, First District, California.

Feb. 2, 1911.)

1. HOMICIDE (§ 176*)—ASSAULT TO MURDER—EVIDENCE—SERIOUSNESS OF INJURY.

In a trial for assault with intent to murder, the seriousness of the injury inflicted can be shown.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 379; Dec. Dig. § 176.*]

2. CRIMINAL LAW (§§ 419, 420*)—CONCLUSIONS.

Testimony as to a conclusion drawn by witness' brother is inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.*]

3. CRIMINAL LAW (§ 1170½*)—HARMLESS ERROR—EXAMINING WITNESSES.

Error in permitting a witness to be asked concerning a conclusion drawn by his brother was harmless where he answered, "I think I have mentioned it."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. § 1170½.*]

4. CRIMINAL LAW (§ 1171*)—HARMLESS ERROR—MISCONDUCT OF PROSECUTOR.

It was not prejudicial error, in a trial for assault with intent to murder, for the prosecutor to state that, on misinformation that the victim had been killed, a complaint for murder had been prepared, but afterwards dismissed, where the statement was made in support of an objection to evidence offered.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1171.*]

5. FINES (§ 11*)—SENTENCE—VALIDITY.

Where judgment imposed imprisonment and a fine, the part of the judgment imposing imprisonment in default of payment of the fine is void.

[Ed. Note.—For other cases, see Fines, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.*]

6. CRIMINAL LAW (§ 991*)—PARTLY VOID JUDGMENT—EFFECT.

Partial invalidity of a judgment of conviction in imposing imprisonment in default of payment of a fine does not require reversal of the entire judgment; it being proper to strike the void part.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2528; Dec. Dig. § 991.*]

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

C. I. Kerr was convicted of assault with a deadly weapon, and he appeals from the judgment and from an order denying a new trial. Modified and affirmed.

M. R. Jones and J. E. Rodgers, for appellant. Attorney General Webb, for the People.

HALL, J. This is an appeal from a judgment and order denying defendant's motion for a new trial. Defendant was charged with the crime of assault with intent to commit murder. The assault is charged to have been committed with a deadly weapon, and upon his trial the jury found the defendant guilty of assault with a deadly weapon.

The evidence showed that defendant became engaged in a quarrel with one Soberes-

ka, and shot him twice with a pistol. One shot passed through the breastbone, the chest cavity a little above the heart, and lodged in the muscles of the back about three inches from the surface. The other passed completely through the thigh, cutting both a vein and an artery. The physician who attended the wounded man fully described both wounds, and at the conclusion of his examination concerning the chest wound was permitted by the court, over the objection of the defendant, to answer a question calling for his opinion as to the seriousness of such wound. It is not claimed that the physician was not qualified to speak as an expert, but that the question of the seriousness of the wound had nothing to do with the guilt or innocence of the defendant. In view of the facts testified to and clearly proven, it probably was quite unnecessary to take the opinion of the physician, but the seriousness of the injury actually produced is a pertinent fact to be considered in any case where a defendant is charged with assault with intent to murder.

The court overruled an objection made by defendant to a question by the district attorney on cross-examination of a witness as follows: "Isn't it a fact that you and your brother came to the conclusion it was necessary for you to remember that particular part of the conversation which you claim you had with Mr. Fahey on that occasion?" The objection to this question should have been sustained in the form at least in which it was put, as it called for the opinion of the witness as to the conclusion of his brother, but the answer to the question was not responsive and was entirely harmless. It was: "I think I have mentioned it." No motion to strike out the answer was made, and the question ruled on was not in fact answered at all. It would be a farce to order a new trial for such a trifle.

A complaint was filed charging defendant with murder. While the person who swore to this complaint was being examined on cross-examination by defendant's counsel regarding this complaint, the district attorney lodged an objection to a question, and in doing so made a statement to the effect that the first information brought to the county seat was that the assaulted man had been killed by defendant, and that he, the district attorney, had first prepared a complaint for murder, and subsequently dismissed it, and prepared a new one charging him with assault to commit murder, and procured the witness to swear to it. The court overruled the objection of the district attorney, and very properly told the jury that the statement of the district attorney was not evidence, and at once instructed the jury not to consider it. The statements made by the district attorney were in explanation of his own conduct as well as that of the witness

in relation to the filing of a complaint for murder in the first instance and the delay in dismissing it. While it should not have been made, it apparently was made in good faith in support of the objection to the question. Certainly it is not such a case of willful or injurious misconduct as to require a new trial, in view of the prompt action of the court, both in striking out the statement of the district attorney and instructing the jury as to its duty, and in requiring the witness to answer the question put by defendant's attorney. No other rulings are complained of on appeal from the order denying the motion for a new trial.

The court, however, besides imposing imprisonment for 15 months, imposed a fine, with additional imprisonment in default of payment of the fine. The part of the judgment imposing imprisonment in default of payment of the fine is void. *People v. Brown*, 113 Cal. 35, 45 Pac. 181, and cases there cited. This court is not required, however, to reverse the entire judgment, but the proper course is to require the void portion of the judgment to be stricken out. *People v. Hamberg*, 84 Cal. 468, 24 Pac. 298.

The order denying the motion for a new trial is affirmed. The court below is instructed to modify the judgment by striking out the part thereof as follows: "And that in default of payment of said fine that he be imprisoned in the county jail of the county of Contra Costa one day for each \$2 of said fine not paid. Said imprisonment to commence at the expiration of the term of imprisonment of fifteen months herein imposed."

In all other respects the judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

15 Cal. App. 220

PEOPLE v. JENSEN. (Cr. 140.)

(Court of Appeal, Third District, California.
Jan. 27, 1911.)

SEDUCTION (§ 45*)—PROMISE OF MARRIAGE—EVIDENCE.

Testimony of prosecutrix on the direct and redirect that she yielded to defendant on his unconditional promise to marry her warrants a conviction under Pen. Code, § 268, of "seduction under promise of marriage," though on her cross-examination she appeared to say that she did so on the condition or promise only that he would marry her if she became pregnant thereby; it not being clear that her cross-examination was a contradiction of her direct testimony, or involved an intention to go farther than to say that, in addition to the unconditional promise of marriage, defendant assured prosecutrix that, should she become pregnant, he would protect her, and it being for the jury to determine whether the probative value of her direct testimony was impeached or destroyed by her cross-examination.

[Ed. Note.—For other cases, see *Seduction*, Cent. Dig. §§ 80-82; Dec. Dig. § 45.*]

Appeal from Superior Court, Humboldt County; Clifton H. Connick, Judge.

Peter M. Jensen was convicted of crime, and, from the order denying a motion for new trial, appeals. Affirmed.

Puter & Quinn, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

HART, J. The defendant was convicted of the crime of "seduction under promise of marriage," and prosecutes this appeal from the order denying his motion for a new trial.

The only point urged against the validity of the order appealed from is that the evidence does not disclose that the defendant committed the crime denounced by section 268 of the Penal Code, under which the information upon which he was tried and convicted is founded. Said section reads as follows: "Every person who, under promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character, is punishable by imprisonment in the state prison for not more than five years, or by a fine of not more than five thousand dollars, or by both such fine and imprisonment." By the terms of the succeeding section a prosecution of an offender under section 268 may be barred by the intermarriage of the parties prior to the finding of an indictment or the filing of an information charging such offense.

The contention is that the testimony of the prosecutrix discloses that the defendant promised to marry the plaintiff, if she would consent to and have sexual relations with him, only in the event that she became pregnant as a result of such relations, and that, if this be true, the promise so proved is not the promise essential to constitute the crime denounced by section 268 of the Penal Code. In support of this proposition, the case of *State v. Adams*, 25 Or. 172, 35 Pac. 36, 22 L. R. A. 840, 42 Am. St. Rep. 790, is cited. There it is held that seduction accomplished under a promise that the seducer will marry the female only in case she becomes enceinte as a result of their immoral relations is not a crime within the meaning of a statute similar to ours in language and terms. The reasoning upon which the conclusion in that case is reached appears to be impregnable. But we think there is a wide difference, as to the facts, between that case and the one at bar. In the Oregon case, so far as we are advised by the opinion therein, there was no evidence disclosing or tending to show any promise of marriage by the accused except the one conditioned on the prosecutrix becoming pregnant by him. In the case at bar, as we shall presently perceive by a brief examination of the testimony, there is evidence that the defendant promised to marry the prosecutrix if the latter would consent to and have sexual intercourse with

him, and that upon such promise she did have such relations with him.

Appellant builds his contention around the testimony of the prosecutrix brought out on cross-examination. On direct examination she testified that some time previously to the time at which she first became immorally intimate with the defendant the latter and she became engaged to be married; that subsequently, for some reason, said engagement was broken; that during the period of said engagement the defendant did not have sexual relations with her; that thereafter she resumed keeping company with the defendant, and it was then that he began coaxing her to yield to his lust and submit to his embraces. She testified that she did not submit to his entreaties in this regard until he had promised her that, if she would do so, he would marry her, and that, finally relying upon said promise, she consented to and did have sexual connection with him. Repeatedly, she declared, on her direct examination that her immoral relations with the defendant were upon an unconditional promise upon his part to marry her. It is true that, on one occasion, she did say to the district attorney that the defendant declared that he would "take care of her" in the event that she became pregnant, but this statement is not necessarily inconsistent with her testimony previously given on direct examination that the seduction was brought about under an unconditional promise of marriage. But, by an adroit cross-examination of the prosecutrix, she was made to say or to appear to say several times that she consented to and had sexual intercourse with the defendant upon the condition or promise only that he would marry her in the event that she became pregnant by reason of their relations. On redirect examination, however, she reiterated her oft-repeated statement that the promise of marriage was without qualification or condition, declaring that such promise was made by defendant prior to any discussion of the question of possible pregnancy by reason of their relations.

It is not at all unreasonable to assume that the jury in considering her testimony concluded that she regarded the questions put by defendant's counsel as possessing neither more nor less significance than those propounded by the district attorney on her direct examination, or, in other words, that she did not mean to say, in testifying on her cross-examination, that the defendant did not in the first instance make an unqualified promise of marriage which solely influenced her in consenting to and having sexual relations with him.

The learned trial judge, in his charge, instructed the jury in accord with the theory of the defense—i. e., that, if the evidence disclosed that the promise of marriage was based upon the contingency of the prosecutrix's pregnancy by reason of their relations, the

accused would be entitled to an acquittal. Thus recognizing the rule of law contended for by the appellant, the court nevertheless denied his motion for a new trial from which circumstance it is, of course, plainly apparent that the judge, having equal opportunity with the jury of hearing and seeing the prosecutrix testify, did not form the conviction that her cross-examination should be interpreted as developing a contradiction of her direct testimony or as involving an intention on her part to go further than to say that, in addition to the unconditional promise of marriage, the defendant assured her that should she become pregnant he would by executing such promise of marriage protect her against the humiliation and disgrace of bearing a child unacknowledged in a legal manner by the father of the child. At any rate, it was entirely with the jury to reconcile and adjust to their own satisfaction the discrepancies, if any, which might have been made to appear by cross-examination in the testimony of the prosecutrix. It was, in other words, for the jury to determine whether the probative value of the direct testimony of the prosecutrix was impeached or destroyed by her cross-examination, and the verdict is, of course, indubitable evidence that it was not. The direct testimony of the prosecutrix, as we must view it, warranted the verdict, if the jury believed it, as evidently they did.

We can perceive no ground on which any interference with the verdict could reasonably be founded, and the order appealed from is therefore affirmed.

We concur: **CHIPMAN, P. J.; BURNETT, J.**

15 Cal. App. 253

WOOD v. JAMES. (Civ. 811.)

(Court of Appeal, Third District, California.
Jan. 31, 1911. Rehearing Denied by
Supreme Court March 31, 1911.)

1. EXECUTORS AND ADMINISTRATORS (§ 455*)— ACTION ON CLAIM—PLEADINGS—VARIANCE BETWEEN CLAIM AS PRESENTED AND AL- LEGED.

In an action against an administrator on a claim which as presented to the administrator was for services as nurse to decedent, and as alleged in the complaint was for services as nurse to decedent, "including the cooking, house-keeping, laundering and caring for" decedent, where defendant admitted that plaintiff's services as nurse were of the value claimed by her for all her services rendered, which fact was so found by the court, any variance between the claim filed and the complaint was not prejudicial to defendant.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 455.*].

2. EXECUTORS AND ADMINISTRATORS (§ 221*)— ALLOWANCE OF CLAIMS—SERVICES RENDER- ED TO DECEDENT—PERSONS IN FAMILY RE- LATION—EXPRESS PROMISE BY DECEDENT TO PAY—EVIDENCE.

Evidence held to support a finding that a decedent expressly contracted to pay her daugh-

ter for services rendered her by such daughter as a nurse.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 901-903½, 1858-1876; Dec. Dig. § 221.*]

Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by Annie E. Wood against Henry W. James, administrator of Mary J. James. Judgment for plaintiff, and defendant appeals. Affirmed.

F. E. and L. E. Johnston, for appellant.
Harvey & Goodman, for respondent.

CHIPMAN, P. J. Plaintiff sues to recover on a rejected claim against the estate of deceased. The claim presented to the administrator reads as follows: "Estate of Mary J. James, deceased, to Annie E. Wood, Dr. November 26th, 1909. For services as nurse for Mary J. James, 204 days, from January 30th, 1909, to August 21, 1909, at \$2.50 per day \$510.00." Duly verified. Indorsed: "The within claim rejected this 15th day of February, 1910. H. W. James, Administrator." The charging paragraph of the complaint is as follows: "That within two years last past, to wit, from January 30, 1909, to August 21, 1909, at and in Solano county, Cal., plaintiff rendered services as nurse to Mary J. James at her request and for her use and benefit, performing at such time and times in said capacity as nurse all the duties of a nurse, including the cooking, housekeeping, laundering, and caring for the said Mary J. James during her last illness, which services were, and are, reasonably worth the sum of \$2.50 per day." Defendant answered the complaint, without demurring thereto, and made specific denials of all its averments, except that defendant admitted the presentation of the claim as shown by plaintiff's Exhibit A, but denied "that said claim was for the same services as alleged in the complaint herein." The court made the following finding: "That within two years last past, to wit, from January 30, 1909, to August 21, 1909, at and in Solano county, Cal., plaintiff rendered services as nurse to Mary J. James, at her request and for her use and benefit, performing at such time and times all the duties of a nurse, which services were, and are, reasonably worth the sum of \$2.50 per day; that said Mary J. James during her lifetime promised to pay for said services; that nothing had been paid for or on account of said services; that the claim attached to said complaint and made a part thereof is the claim presented by plaintiff to defendant and is for the same services as sued for in the complaint of plaintiff herein." Judgment passed accordingly, from which defendant appeals on bill of exceptions.

The evidence is brief. It was admitted by plaintiff that she was the daughter of deceased. Defendant admitted "that \$2.50 per

day was a reasonable value for the services of a nurse to decedent and was a reasonable compensation to plaintiff for her services to her mother—if she was entitled to any compensation at all." Defendant made this admission, "reserving at all times his objection to any testimony being given or received to support the allegations of plaintiff's complaint." Defendant further admitted that plaintiff had cared for her mother during the period claimed, to the date of her mother's death.

Mrs. Rose McLaughlin was the only witness sworn. She testified that she was a neighbor of Mrs. James in her lifetime, "and, when she received a stroke of paralysis, she went to see her. Mrs. James said she wanted a doctor and a nurse, and they were sent for and came. Mrs. Wood (plaintiff) lived in St. Helena, Napa county, Cal., and the doctor notified her and she came to her mother's house soon after her mother was taken sick, and cared for her till her mother's death." Plaintiff then offered to prove certain conversations, statements, and declarations made to witness by Mrs. James during her illness, "for the purpose of proving an express contract and agreement on the part of decedent, Mrs. James, to pay plaintiff, her daughter, for taking care of her during her illness." Defendant objected to the evidence on the ground of irrelevancy and immateriality for the reason that it was not within the issues made by the pleadings; that plaintiff had not sued upon an express contract, nor based her claim as presented against the estate upon an express contract, and should not be permitted to prove such a contract; that the claim sued on was not the same claim presented to the estate. The court overruled the objection and defendant duly excepted. The witness testified: "During the time plaintiff was taking care of her mother, during her mother's illness, I do not remember the exact date, but it was some time after Mrs. Wood came to take care of her mother, Mrs. James said to me, referring to Mrs. Wood: 'Tell Annie to stay and I will pay her.' Another time she said: 'Don't let Annie go. She shall be paid.' I communicated the statements to Mrs. Wood, but not in her mother's presence, and she said: 'I will stay with mother; I haven't intended to leave her.'" The record then states: "The above is all of the testimony given or offered on behalf of the plaintiff, proving, or tending to prove, an express agreement by Mrs. James to pay her daughter for her said services."

Defendant moved for a nonsuit on the ground: (1) That there was a fatal variance between the claim presented and the claim sued on. (2) That there was a like variance between the allegations of the complaint and the proof adduced in its support. (3) The proof was insufficient to justify a finding of an express contract.

Respondent concedes the point made by

appellant that the law does not raise an implied contract to compensate a daughter for services rendered her mother, and she also concedes that it was necessary to prove an express contract to pay her for her services. She contends that, if an express contract to pay is shown, she may show the reasonable value of the services without showing an express contract as to the value of the services. The claim presented was "for services as nurse" and the complaint claims for services as nurse, "including the cooking, housekeeping, laundering and caring for the said Mary J. James." The court found that plaintiff had "rendered services as a nurse, * * * performing at such time and times all the duties of a nurse," and that Mrs. James "during her lifetime promised to pay for said services." Defendant "admitted that \$2.50 per day was a reasonable value for the services of a nurse to decedent, and was a reasonable compensation to plaintiff for her services to her mother." It seems to us that there is no variance between the claim presented, and the claim alleged in the complaint and found by the court, except as such variance may arise from the averment in the complaint—"including the cooking, housekeeping, laundering, and caring for" Mrs. James. It does not appear whether the pleader intended by this averment to make these additional services a necessary part of the nurse's duties for which the compensation is claimed. The term "nurse" as commonly understood would not include "cooking," "housekeeping," or "laundering." There was no demurrer to the complaint for uncertainty or indefiniteness, and it seems to us that the complaint may reasonably be said to mean that plaintiff performed services as nurse, and, in addition thereto, performed these other services, but that her claim was for nursing. And this view is supported by the admission of defendant that plaintiff's "services as a nurse" were of the value of \$2.50 per day as claimed by plaintiff. Defendant having admitted that plaintiff's "services as nurse" were of the value of \$2.50 per day and the court having so found, he has no cause for complaint on any ground of variance between the claim filed and the complaint.

The sole question, as we view the case, is: Does the evidence support the finding of an express contract to pay for the services rendered? Plaintiff resided in an adjoining county, and left her home to attend her mother in her sickness. There is no evidence that she went to her mother's bedside under any promise or expectation of compensation for services she might render. This, however, does not change the fact, if it was the fact, that her mother subsequently agreed to compensate her for her services. Her mother must have had some apprehension that her daughter might not remain to the end and so sent word to her to remain and she would pay her. Her message was: "Tell Annie to

stay, and I will pay her." She then at another time told the witness, Mrs. McLaughlin: "Don't let Annie go. She shall be paid." Plaintiff replied: "I will stay with mother." She said: "I haven't intended to leave her." But this is not inconsistent with her willingness to receive pay for her services or with her remaining under a promise to be paid by her mother. Defendant suggests that there is no evidence that plaintiff's mother ever spoke to plaintiff about compensating her, nor could there be, for the law closed the lips of plaintiff and did not permit her to testify to such fact. Code Civ. Proc. § 1880.

Defendant cites cases to show that mere general expressions, such as used by Mrs. James, are not sufficient to show an express contract. The intention of the promisor is not always to be determined from the language used. Where, as in some of the cases cited, a son or daughter, living with the parent, makes claim for similar services, the circumstances may be such as to justify the court in holding the evidence insufficient to establish an express contract even though some expressions of gratitude and of an intention to pay for such services are shown. "Whenever compensation is claimed in any case by either parent or child against the other for services rendered, or the like, the question whether the claim should be allowed must be determined from the particular circumstances of the case. There can be no fixed rule governing alike all cases." 21 Ency. of Law, p. 1062. As a general rule, a child who is living with its parent is not entitled to compensation for services rendered to the parent, even though an adult, but the parent may contract to pay the child for its services. 29 Cyc. 1630. Where, however, "the relation was not such as imposed any special obligation on the claimant of support of, care for, or tenderness towards the decedent, a claim for compensation will be more favorably regarded, and in a suitable case upheld, especially where decedent and claimant did not live together." 18 Cyc. 414. Mrs. Wood, the daughter, as we have seen, resided in another county from that of the decedent's residence. She left her own home to minister to her mother, whose malady was paralysis of uncertain duration. The daughter was told to remain and she would be paid, and she did remain until her mother's death. The suspicion with which the courts sometimes look at claims of children against estates of deceased persons for personal services is more especially indulged where they live under the same roof, and there are mutual dependent relations. Here no such suspicion can arise, and, if there were circumstances influencing the mind of the learned trial court of which we have no knowledge, we must presume that they were such as supported the fairness of the contract and

repelled any ground for suspicion of its not having been made in good faith. No ground is shown why we should disturb the view of the evidence taken by the trial court.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

15 Cal. App. 276

KULLMAN, SALZ & CO. et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR COUNTY OF SOLANO et al. (Civ. 814.)

(Court of Appeal, Third District, California. Feb. 2, 1911.)

1. EVIDENCE (§ 318*)—HEARSAY EVIDENCE—STATEMENTS IN PLEADINGS.

Statements in a pleading, affidavit, or deposition made on information and belief are mere hearsay testimony, incompetent to prove a fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1193-1200; Dec. Dig. § 318.*]

2. WITNESSES (§ 16*)—PRODUCTION OF DOCUMENTS.

Where, on the showing made, the court is without authority to compel a witness to produce for examination by the court a record, it is immaterial whether or not the witness responded to a subpoena duces tecum for the record.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 19-27; Dec. Dig. § 16.*]

3. WITNESSES (§ 16*)—PRODUCTION OF DOCUMENTS.

An omnibus order of a subpoena duces tecum for private books and papers is, in the absence of a clear showing that they contain evidence material to the inquiry, absolutely void.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 19-27; Dec. Dig. § 16.*]

4. PROHIBITION (§ 26*)—ISSUES—ADMISSIONS BY ANSWER.

Where the answer to a petition for a writ of prohibition to restrain the execution of a judgment admits that the petition contains a correct statement of the proceedings culminating in the judgment, there is no issue of fact, and the court will consider the answer filed as an admission of the averments of the petition.

[Ed. Note.—For other cases, see Prohibition, Dec. Dig. § 26.*]

5. EVIDENCE (§ 368*)—PRODUCTION OF PRIVATE PAPERS—POWER OF COURT.

Where, in a suit for divorce against an alleged stockholder in a corporation, the testimony showed without dispute that defendant had sold his stock before the commencement of the action, and had no interest in the corporation except as an employé thereof, the court was without authority to compel the production of the books of the corporation disclosing its profits during a specified period, because the books were immaterial.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1540-1558; Dec. Dig. § 368.*]

6. SEARCHES AND SEIZURES (§ 7*)—CONSTITUTIONAL PROVISIONS—POWER OF COURT.

Under Const. art. 1, § 19, guaranteeing the people against unreasonable seizures and searches, a person cannot be forced to surrender his private books to another, who does not claim to own or have any interest in them, except on convincing proof that such books contain evidence materially affecting the rights in litigation of the person demanding them, and the power of the court to compel the production of

private papers can be exercised only where a person has books containing evidence material to the issue before the court, and where the precise book containing the evidence is designated or so described that it may be identified.

[Ed. Note.—For other cases, see Searches and Seizures, Cent. Dig. § 5; Dec. Dig. § 7.*]

Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Application for writ of prohibition by Kullman, Salz & Co. and another against the Superior Court in and for the County of Solano and the judge thereof, to restrain respondents from executing a judgment. Writ issued.

A. E. Shaw, for petitioners. D. McLeod, for respondents.

HART, J. This is an application for a writ of prohibition to restrain the respondents from causing to be executed a judgment for contempt of court rendered by said respondents against the petitioner Ansley K. Salz. The contention is, of course, that the action of the court in adjudging said petitioner guilty of contempt is in excess of the jurisdiction of respondents.

The petitioner Kullman, Salz & Co. is a corporation, duly organized and existing under the laws of this state, and engaged in the business of manufacturing and selling leather and the products of leather, its tannery being located at Benicia, in the said county of Solano. The petitioner Ansley K. Salz is the secretary of said corporation, Kullman, Salz & Co.

The petition discloses that the proceedings culminating in the order adjudging said petitioner guilty of contempt of court arose under the following circumstances: On the 5th day of October, 1910, one Jean McGregor Kullman instituted an action for divorce against her husband, Jacob Kullman, in the superior court of the county of Solano. The complaint in said action, in support of plaintiff's claim for an allowance for her own support and maintenance and for the support, maintenance, and education of their minor child, aged about seven years, the only living issue of their marriage, alleged that Jacob Kullman was a man of large and ample means; that he not only received a salary of about \$300 per month as an employé of the petitioner Kullman, Salz & Co., but that he owned stock in said corporation of the value of about \$250,000; that he "is also the owner of certain real estate of large value, situated in or near the city of Benicia, county of Solano," and, furthermore, owner of other property the character and value of which it is not necessary here to enumerate or specify. It is further alleged in said complaint that the defendants (in said action) Amalia Kullman and Herbert Kullman, mother and brother, respectively, of said Jacob Kullman, and the petitioner

herein Kullman, Salz & Co. (also made defendants in the action for divorce), "have entered into a combination and conspiracy and have colluded and conspired together with the object and purpose of taking away from said defendant Jacob Kullman, and of concealing and covering up, all his property, so that the plaintiff will not be able to obtain for herself and her minor child substantial support and maintenance." In furtherance of the object of said conspiracy, it is alleged in said complaint, the mother of Jacob, on the 16th day of September, 1910, brought an action in the superior court of Solano county against said Jacob upon three promissory notes, aggregating in amount the sum of \$24,000; that an attachment was issued in said action and levied on certain property of said Jacob; that said Jacob made no appearance in said action, but allowed judgment to be taken against him therein by default; that the shares of stock of said Jacob in the corporation petitioner herein were at approximately the same time transferred to some other person or persons upon a pretended sale thereof, and that all said transactions were not bona fide, but consummated only for the purpose of preventing plaintiff in said action for divorce from securing a just and suitable allowance for herself and the minor child of the parties. Upon the filing of the complaint in said action for divorce the court made an order commanding the defendants to appear before the court on the 15th day of October, 1910, to show cause why an order should not be made appointing a receiver of and for all the property of the said Jacob Kullman, including the stock which it was alleged that he was still the owner of in the corporation petitioner, and restraining in the meantime any sale or disposition of any of said property. An order was also made at the same time requiring the defendants to appear in court on the same day that the former order was to be heard to show cause why a temporary injunction, restraining the defendants from selling, transferring, or in any manner disposing of or dealing with the property belonging to Jacob Kullman and referred to in said complaint, should not be granted.

It is alleged in the petition herein that on the 18th day of November, 1910, the petitioner Kullman, Salz & Co. filed its amended answer to the said action of Jean McGregor Kullman for a divorce, and in said answer "alleged that it had on the 10th day of September, 1910, and long prior to the commencement of said action so pending in Solano county, and before the service of said or any restraining order and upon the presentation of certificates duly indorsed and showing the sale, at public auction, of all interest of said Jacob Kullman therein, canceled certificate 209 for 1,900 shares of the

capital stock of said corporation, and had issued in place thereof its certificate No. 210 to one Amalia Kullman for said 1,900 shares of its capital stock," etc. Further answering said complaint, said corporation alleged that Jacob Kullman, at the time of the commencement of the suit for divorce by his wife, "did not own, nor has he at any time since owned, any stock of this defendant corporation standing upon the books of the same in his name," and denied the existence or prosecution of any conspiracy or collusion "with said other defendants in said action, or any of them, or with any person whomsoever," as charged in said complaint. An order having been made commanding the defendant Jacob Kullman to appear before the respondents on the 19th day of November, 1910, to show cause why he should not pay the plaintiff alimony pendente lite and certain moneys for costs and counsel fees in said action, a subpoena duces tecum was on the 18th day of November, 1910, served on the petitioner Ansley K. Salz, requiring him to appear before the respondents on said 19th day of November, and further commanding him to "bring with him all books of account of Kullman, Salz & Co., a corporation, and the Benicia Waterworks, a corporation (Jacob Kullman was the secretary of the last-named corporation), including all stock books and inventories, all cash books, all ledgers, all journals, all trial balances during the years 1909 and 1910, all books, documents, and papers, showing bills receivable and bills payable by said corporations, and the value of the shares of stock of said corporations and the value of the interest of the defendant Jacob Kullman in said corporations."

On the 19th day of November, 1910, the hearing on the order directed to Jacob Kullman to show cause why he should not pay to the plaintiff in said action alimony pendente lite, etc., came up for hearing before the respondents, and it was in this proceeding that the petitioner Ansley K. Salz, having been sworn as a witness and refused to produce a certain book called for by counsel for the plaintiff in the divorce suit, was, for such refusal, adjudged guilty by the respondents of contempt of court, to interdict the execution of which judgment is the purpose of the present proceeding. All the testimony taken on that hearing is before this court, having been made a part of the petition herein. This testimony is all one way, no material fact to which it relates being controverted. It is true that plaintiff's verified complaint contains averments, "on information and belief," that the several transactions resulting in the transfer by defendant of his property and the sale of his stock in the corporation petitioner to his mother were fraudulent and so consummated in view of contemplated divorce proceedings for the purpose of defeating plaintiff's claim and right to alimony. But obviously

statements in a pleading or an affidavit or deposition upon "information and belief" are no more to be accepted as evidence in a trial of an issue of fact than if they were orally made. They can amount to no more than mere hearsay testimony, incompetent for the proof of a fact, and therefore cannot serve as the basis for a finding or raise a conflict. Therefore, as stated, the testimony taken at the hearing shows without dispute that the stock which had been owned by Jacob Kullman in the corporation petitioner was some weeks prior to the date of the commencement of the action for divorce sold, at public auction, to the mother of Jacob, said stock having been previously pledged to Mrs. Kullman, for the purpose of securing the payment of certain promissory notes executed to her by Jacob. The certificate of said stock in the name of Jacob was, as we have seen from the allegations of the petition, canceled by the corporation, and in lieu thereof a certificate of the same stock issued to his mother. At the hearing the petition alleges the petitioner Ansley K. Salz was sworn as a witness and questioned concerning the alleged ownership of certain stock in the corporation petitioner by Jacob Kullman. Among other questions Salz was asked whether as secretary of the corporation Kullman, Salz & Co. he had the custody of or under his control any book "which shows upon its face the profits earned by Kullman, Salz & Co. during the last few years, say, five years," and, upon replying that he had "such records," was asked to produce the same. At this point an objection was interposed by the attorney for the corporation to the production by the witness of any book or record disclosing the profits of the concern during the period mentioned on the ground that any information with regard to the profits earned by said corporation during that or any period of time would not be relevant or material to any issue before the court; it having been indisputably shown that Jacob Kullman no longer owned any stock in said corporation. The court overruled the objection and ordered the witness to produce the record called for, but the witness by and on the advice of the attorney for the corporation, refused to produce the book or record containing the information specifically asked for by the question and the demand of counsel for plaintiff, and the court thereupon adjudged the witness for such refusal to be in contempt of court.

The foregoing, so far as we are advised by the record before us, represents a brief but correct statement of the entire record on which the respondents adjudged the petitioner, Salz, in contempt of court.

It is alleged in the petition that Salz was ordered "by the judge of said court to produce said books, and all thereof, and all papers and documents belonging to said corporation, and to permit the same to be examined in open court and to be made a part of

the records of said court." It is true that the court ordered, by its subpoena duces tecum, all the books, records, etc., referred to in the petition to be brought into court, but this order was made prior to the reception or hearing of any evidence, there then being nothing before the court but the dubious evidence furnished by the allegations of plaintiff's complaint, on information and belief, as to the materiality of said books, records, etc. The only order which we have been able to find in the record requiring the petitioner to produce and subject to examination and inspection by the court any book or record is the one to which we have adverted as compelling the production of the book or record disclosing the profits earned in past years by the corporation, and which the petitioner Salz refused to obey, and, as we are of opinion that the court, under the showing made, was without authority to compel the witness to produce for examination by the court said book or record, it is manifestly not material to the inquiry here whether or not the witness responded to the subpoena duces tecum by bringing into court all the books, papers, documents, etc., mentioned in the petition as having been thus called for. It may be stated that it does not appear that he did bring into court all the books and documents required by the subpoena, and it may be added that such an omnibus order for private books and papers, in the absence of a clear showing that they contained evidence material to the inquiry, would have been absolutely void.

However, a demurrer was interposed to the petition by the respondents and at the same time an answer to said petition was presented for filing and to be filed only in the event that the demurrer was overruled. It was stipulated between counsel that, in case of the overruling of the demurrer and the filing of the answer or return to the writ, the petitioners might be permitted to interpose a traverse to said answer or return. But, although the answer denies, upon information and belief, all the averments of the petition, it nevertheless admits that the petition contains a correct statement of the proceedings, including the testimony taken on the hearing in which the judgment for contempt against Salz was rendered. The answer declares, in this regard: "Said respondents in this behalf allege that the facts brought forth on said hearing are set forth in the transcript of testimony taken at said hearing, a copy of which is annexed to and made a part of the petition on file herein." It will thus be observed that under our view of the case as to the point submitted here for decision there is, in fact, nothing in the answer which could tender an issue of fact material or necessary to the determination of the controversy here. In other words, the admission of the answer that the petition contains a correct statement of the proceedings culminating in the order or judgment,

enforcement of which is here sought to be restrained, leaves no question of fact, vital to the decision on this writ, to be traversed by petitioner or to be considered and determined by this court. We therefore deem it not only the more expeditious course but proper to consider the answer as filed for the purpose of disclosing the admission referred to the consequence of which is manifestly that the important averments of the petition stand before this court admitted both by the answer and demurrer, the latter further admitting for the purposes of this decision the truth of said averments.

The sole question, then, which is submitted for solution here, is: Did the respondents, under the circumstances as disclosed by the petition, exceed their jurisdiction by their order or judgment adjudging Ansley K. Salz guilty of a contumacious violation of their order requiring him to produce in court, to be used as evidence, a book or record disclosing the profits of the corporation petitioner for the five years or for any time prior to the time at which such information was thus asked for? It seems to us that there can be but one answer to this question. It must be kept in mind that counsel for the plaintiff called for the production of no book or record that would show or tend to show that Jacob Kullman still owned stock or had any other interest in Kullman, Salz & Co. It may here be remarked that if such book or record had been shown to exist and to be in the possession or custody of the witness as the secretary of the corporation, or that there existed and was in the custody of the corporation a book or record showing or tending to show that the charge of fraud in the transfer and disposition of Jacob's stock in said corporation was true, and the same had been sufficiently identified and had been ordered by the court to be produced as evidence in this inquiry, we doubt not that a refusal to produce such book or record under the indicated circumstances would have laid the foundation for an unimpeachable judgment or order adjudging the witness in contempt of court. But the book or record called for and specifically designated by counsel for plaintiff, the refusal to produce which brought upon Salz the judgment for contempt, was the book or record which would disclose the profits only of a corporation in which the testimony without conflict shows that Jacob Kullman then held no stock or had no interest of whatsoever nature other than that of a mere employé. There was introduced before the court, as seen, no evidence whatsoever from which the court would have been justified in finding that Jacob Kullman owned any stock or had any interest, except as an employé, in the corporation, and the proposition certainly will not be disputed ~~that~~ before the court could acquire any authority to order the production of books disclosing the profits earned by the concern or any other

of its affairs, there must have been previously produced some evidence of which said order could properly be predicated—that is, evidence warranting a finding that the defendant in the divorce action owned stock or was otherwise so interested in the corporation as to entitle him to share in the profits thereof. As we have shown and before declared, there is absolutely no such evidence in the record. It follows, therefore, that, no showing having been made that the book or record specifically called for by counsel for plaintiff and ordered to be produced by the court contained any evidence material to the issue on trial before the court, the order requiring the production of the same was beyond the jurisdiction of respondents, and consequently void.

The right of the people to be secure against unreasonable or unnecessary seizure of their private papers and documents is justly regarded as a highly sacred one—so much so, in fact, that the people themselves have taken the pains in express written terms to guarantee and safeguard its perfect enjoyment. Const. art. 1, § 19. In no case, therefore, should a person be forced to surrender his private books and papers to another who does not claim to own or have any interest in them except upon convincing proof that such books or papers contain evidence which materially affects the rights in litigation of the person demanding them. As was so clearly and forcefully said by the late learned Justice McFarland, in the case of *Ex parte Clarke*, 126 Cal. 238, 58 Pac. 546, 46 L. R. A. 835, 77 Am. St. Rep. 176: "To compel a person to deliver his books and papers to another who does not claim any ownership in them is to violate the sanctity of most important private rights, and is not to be tolerated except when warranted by some law clearly not inconsistent with the constitutional provision." The petition alleges that in the business in which the corporation petitioner is engaged there is extensive competition, and that the exposure to the public of the books or records disclosing its profits would result in great and irreparable damage to the corporation and its stockholders. It is readily perceivable how such a result might follow the disclosure of the profits and specific sources thereof earned by a concern operated on an extensive scale in lively rivalry with other concerns engaged in like business. Such a book or record might expose its methods of business—methods which, legitimately pursued, and being of its own invention, have contributed largely to the successful and profitable prosecution of its business. In *Ex parte Clarke*, supra, the court further say: "The privacy of private books and papers is not only of inestimable value to the owner on account of various personal and sentimental rea-

sons, but is of the greatest value also from mere business considerations. The exposure of a man's method of business would frequently be highly injurious to him, and, although really solvent, might produce such embarrassments as would ruin him. His right, therefore, to the sole possession and knowledge of his private books and papers, is not to be violated, except where the power to do so clearly appears."

We do not, of course, intend to be understood as saying that there is no power in the court to compel the production of private books and papers, or that such power is inconsistent with the constitutional provision, for "when a witness is in court, no matter how brought there, and discloses the fact that he has a paper, document, or book which would be evidence in favor of the party desiring it, he may, in a proper case, be rightfully ordered to produce it." *Ex parte Clarke*, supra. But what we do intend to say is that such power can be exercised by the court only where the facts clearly and without question warrant it, and that such facts must be produced, manifestly, only through the instrumentality of competent and not hearsay evidence. Nor is it enough, as is said by the court in *Morrison v. Sturges*, 26 How. Prac. (N. Y.) 179, "that the party believes or is advised that the paper contains material evidence. Facts must be shown to support it." There are, in other words, two essential facts which must be made to appear by clear and unequivocal proof as a condition precedent to the right of a court to require a person to deliver up for examination by a court his private books and papers, viz.: (1) That such person has a book or paper or document containing evidence material to the issue before the court. (2) That the precise book or paper or document containing such evidence be designated or so described as that it may be identified. The last-mentioned requisite is in point of importance equal with or, if there be any difference, paramount to the first, for, however much proof may be adduced of the materiality of the evidence, the constitutional right of people to be protected against the unlawful seizure of their private documents forecloses authority in the courts to order a general or indiscriminate ransacking of one's private books, papers, and documents as the means for locating the desired evidence.

Our conclusion is, as must be apparent from the views expressed in the foregoing, that the order or judgment adjudging the petitioner Ansley K. Salz guilty of contempt of the order of the court was *coram non iudice*, and is therefore nonenforceable.

Let a peremptory writ issue.

We concur: CHIPMAN, P. J.; BURNETT, J.

15 Cal. App. 244

In re TILTON'S ESTATE AND GUARDIANSHIP. (Civ. 780.)

(Court of Appeal, Third District, California.
Jan. 31, 1911, Rehearing Denied by
Supreme Court March 31, 1911.)

1. APPEAL AND ERROR (§ 931*)—PRESUMPTION.

The evidence not being brought up on the appeal, it must be presumed to have supported the findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3762-3771; Dec. Dig. § 931.*]

2. APPEAL AND ERROR (§ 1037*)—HARMLESS ERROR—REMOVAL OF GUARDIAN.

That the citation on an order of the court on a petition to have letters of guardianship revoked and a new guardian appointed did not contain "a brief statement of the nature of the proceeding," as required by Code Civ. Proc. § 1707, cannot be complained of on appeal; the guardian having appeared and fully answered, so that the citation served its purpose.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4032; Dec. Dig. § 1037.*]

3. INSANE PERSONS (§ 38*)—GUARDIANS—PETITION TO REMOVE—SHOWING AS TO PETITIONER.

The averment in the petition to remove the guardian of an insane person, and to appoint another, that petitioner was 20 years a friend of the deceased husband of the insane person, and has interested himself in behalf of said insane person, as her friend, since a certain date, is sufficient to qualify petitioner to appear as her friend.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 57, 58, 60; Dec. Dig. § 38.*]

4. INSANE PERSONS (§ 38*)—GUARDIANS—REMOVAL AND APPOINTMENT OF SUCCESSOR—CITATION—SERVICE.

In the absence of requirement therefor in the statute, the citation on petition to remove the guardian of an insane person, and to appoint another, need not be served on the next of kin.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 57-60; Dec. Dig. § 38.*]

5. INSANE PERSONS (§ 38*)—GUARDIANS—PETITION TO REMOVE.

The petition to remove a guardian of an insane person and to appoint another is not subject to the tests of a complaint in an action, but, if enough is stated to inform the court that it should interfere for the protection of the insane person, it is sufficient, and devolves on the court the duty to inform itself and take proper action.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 57-60; Dec. Dig. § 38.*]

6. INSANE PERSONS (§ 38*)—GUARDIANS—REMOVAL AND APPOINTMENT OF SUCCESSOR—CITATION.

Code Civ. Proc. § 1763, relative to the original appointment of a guardian for an insane person, provides for the giving notice to such person of the hearing. Section 1801 provides that the guardian may be removed on notice to the guardian, and that on his removal the guardian may appoint another in his place; and, in this connection, says nothing as to notice to the incompetent. *Held*, that a citation to the insane person was unnecessary to authorize the court, on removing a guardian, to appoint another.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 57-60; Dec. Dig. § 38.*]

7. APPEAL AND ERROR (§ 1039*)—HARMLESS ERROR.

That there is a finding as to a matter as to which there is no specific averment in the petition for removal of the guardian of an insane person is immaterial, where, disregarding it, sufficient remains to support the order of removal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. Dig. § 1039.*]

8. APPEAL AND ERROR (§ 931*)—PRESUMPTION.

Though the court after removing the guardian of an insane person appointed one requested by the insane person, it will be presumed that it was otherwise satisfied that the appointee was a proper person.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3762-3771; Dec. Dig. § 931.*]

Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate and guardianship of Chloe F. Tilton, an incompetent, Louis Hammersmith petitioned for removal of Ida A. Killey, the guardian, and the appointment of a successor. From an order in accordance with the petition, said Killey appeals. Affirmed.

Joseph Slye (Chas. W. Kitts, of counsel), for appellant. Vogelsang & Brown, for respondent.

CHIPMAN, P. J. This is an appeal from an order revoking letters of guardianship issued to appellant, Ida A. Killey, of the person and estate of Chloe F. Tilton, an incompetent, and appointing petitioner, Louis Hammersmith, such guardian.

The petition was filed on January 17, 1910, and on that day the court fixed the hearing for January 31, 1910, on which day the guardian of said incompetent appeared and answered and embodied therein as part thereof what purports to be her first account as such guardian. At the same time her attorney filed a motion that "the order or citation * * * to show cause why her letters of guardianship in said matter should not be revoked, be quashed and the petition * * * be stricken from the files and said matter dismissed on the ground that under the alleged facts * * * the court had no jurisdiction to make said order nor issue said citation," and that, admitting all the averments of the petition to be true, the court had no authority to revoke the guardian's letters. The evidence is not brought up, and we must therefore presume that it supported the findings of the court. There was no demurrer to the petition on the ground of any indefiniteness or uncertainty in the petition or on any other ground, and it may be doubted whether the sufficiency of its averments to support the order can properly be raised by a motion to quash the citation. However, as the motion is based on alleged want of jurisdiction and as the question of jurisdic-

tion may be raised at any stage of the proceedings, we will not deny appellant's right to have the order reviewed and the question of jurisdiction determined.

It appears from the petition: That petitioner has been a friend of Charles Tilton, deceased, husband of said Chloe Tilton, for more than 20 years, "and has interested himself in behalf of said Chloe Tilton, as her friend, since December 12, 1909." That on April 12, 1905, Ida A. Killey, a resident of the city and county of San Francisco, was appointed by said court the guardian of the person and estate of said Chloe Tilton and ever since has been and now is such guardian. That ever since April 15, 1904, the said Chloe Tilton has been and still is an inmate of the State Hospital for the Insane at Napa. That said incompetent has property, of the value of about \$30,000, consisting of real and personal property situated in this state. That all the proceedings in the matter of said guardianship were destroyed by fire on or about April 18, 1906, and said guardian has never taken any steps to restore the same or any part thereof, and there is neither an inventory of said estate, nor any account of receipts and disbursements on file herein. On information and belief, it is alleged that said guardian has never filed an inventory in said estate, and has never presented to the court any account therein since her appointment as guardian. That petitioner has been informed by the medical superintendent of said hospital "that the said Chloe Tilton is sufficiently restored to health so that she is able to leave said hospital at any time, provided that she be placed under the care of a nurse." That petitioner has personally visited said incompetent at said hospital, "and is convinced from observation, conversation, and reliable inquiry made that she should leave said hospital and take up her private abode attended by a nurse, and that it would be for her best interest and welfare to do so. That the condition of her health is such as to permit her removal from said Napa State Hospital and to continue under the care of a nurse." It is further averred that said guardian is also administratrix of the estate of Charles Tilton, the deceased husband of said incompetent, and was duly appointed as such administratrix in April, 1905, and that said incompetent is sole heir to the estate of said deceased; that all the records and proceedings in said last-mentioned estate were destroyed by fire about April 18, 1906, and said administratrix has never taken any steps to restore the same, or any part thereof; that the interests of said Ida A. Killey as such administratrix are adverse to the interests of said incompetent; that the said incompetent, by a proper guardian, should at once bring proceedings in this court against said administratrix to compel an accounting in the matter of the estate of said Charles Tilton, deceased, and to take other steps for the benefit of said estate, and also to obtain a

family allowance and distribution on behalf of said incompetent. Whether or not an inventory was ever filed by the guardian does not appear, and none accompanied the account filed with the answer. The court made no finding on that fact, but otherwise the court found the facts as alleged in the petition to be true. It also found that "more than one year ago Dr. Elmer E. Stone, then and now superintendent of said hospital, notified said Ida A. Killey that it was for the best interests and welfare of said Chloe F. Tilton to be forthwith taken away from said hospital, and its other inmates, to abide elsewhere with a nurse; that at said time and ever since the financial condition of her estate enabled her to be supported and maintained in an abode outside of said hospital and in care of a nurse; that said Ida A. Killey has in no way ever attempted to remove said Chloe F. Tilton from said hospital to abide elsewhere in care of a nurse, or otherwise, and has never taken any action to apply any part of her estate, or any proceeds derived therefrom, toward her maintenance and support outside of said hospital." It is also found that the guardian has mismanaged certain designated real property of her ward, and has continuously up to the time of her answer to said citation failed to present or file in court any account or report of her said guardianship, although often notified so to do.

The court also made the following findings:

"(9) That the said Chloe F. Tilton was examined as a witness in her own behalf in this proceeding and questioned at great length by the court for the purpose of ascertaining the condition of her mind and her desires as to the revocation of the said letters of guardianship issued to said Ida A. Killey; that the court found and finds her memory, far above the average, her thoughts rational, and her mind perfectly clear and sound in reference to the nature of this proceeding in every respect; that said Chloe F. Tilton in such examination expressly stated that she desired the immediate revocation of said letters and the removal of said Ida A. Killey as such guardian.

"(10) That said Ida A. Killey mismanaged the estate of said Chloe F. Tilton and persisted in a continued failure to perform her duties, both as such guardian of her person and of her estate.

"(11) That said Chloe F. Tilton in her said examination in this proceeding in open court expressly requested that Louis Hammersmith, of the city and county of San Francisco, be appointed guardian of her person and estate upon the removal of said Ida A. Killey as such guardian; that said request and nomination for the said appointment of said Louis Hammersmith was and is a rational act on the part of said Chloe F. Tilton and she well understood the purport and meaning thereof in all respects."

Appellant, in her brief, states that she

relies on the following points: That the motion to quash the citation and dismiss the petition should have been granted, because: (1) The citation is not sufficient; (2) the court was without jurisdiction to remove the guardian or appoint a new guardian; (3) the findings are broader than the petition; (4) the incompetent, after commitment and appointment of a guardian is without civil capacity to nominate a guardian and an appointment based thereon is void.

1. The prayer of the petition was that the guardian show cause why her letters of guardianship should not be revoked and a new guardian appointed. The order for citation to issue is in the record, but not the citation itself. It appears, however, that the citation was issued and served "pursuant to the above order." The point now made is that "the citation herein issued does not contain a brief statement of the nature of the proceeding so as to inform one answering." Section 1707 of the Code of Civil Procedure, provides what a citation is to contain, among other requirements: "(2) A brief statement of the nature of the proceeding." The order stated that it issued "on reading and filing the petition of Louis Hammersmith, on behalf of Chloe Tilton, for the revocation of the letters of guardianship of Ida A. Killey, in the matter of said guardianship," and it ordered said "Ida A. Killey to show cause why such letters of guardianship should not be revoked." The guardian came in and answered fully. She seems to have had no difficulty in answering the petition because of any insufficient statement in the citation, and as it served its purpose appellant has now no cause for complaint.

2. Want of jurisdiction to remove the guardian is based upon the alleged insufficiency of the petition. It is claimed that the petition "contains no allegation that it is brought on behalf of the insane person by the petitioner as her friend, next of kin, or kin," and does not set forth the names of the kin in order that the citation may be issued to them. Civil Code, § 253, states the causes for which a guardian may be removed: "(1) For abuse of his trust; (2) for continued failure to perform his duties; * * * (5) for having an interest adverse to the faithful performance of his duties. * * *" Section 1801, Code of Civil Procedure, provides: "When a guardian, appointed either by the testator or a court, becomes * * * incapable of discharging his trust or unsuitable therefor, or has wasted or mismanaged the estate, or failed for thirty days to render an account or make a return, the superior court may, upon such notice to the guardian as the court may require, remove him * * * the court may appoint another in the place of the guardian who resigned or was removed." Section 1763, Code of Civil Procedure, provides as follows: "When it is represented to the superior court, or a judge thereof, up-

on the verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, such court or judge must cause a notice to be given to the supposed insane or incompetent person of the time and place of hearing the case, not less than five days before the time so appointed, and such person, if able to attend, must be produced on the hearing." Section 1764, Code of Civil Procedure, provides that, if after a full hearing it appears that such person is incapable of taking care of himself and of managing his property, the court must appoint a guardian of his person and estate. The averment as to the friendly relation of petitioner to Mrs. Tilton and her husband was, we think, sufficient to qualify petitioner to appear as her friend. The court, no doubt, inquired fully into that alleged relation. The statute does not require service of the citation on the next of kin. It was served upon Mrs. Killey, and she appeared personally in court. Some of the averments are conclusions or opinions of the petitioner, and others were stated on information and belief, still others did not in themselves, unaided, constitute ground for the removal of the guardian. Viewed as a pleading in an ordinary action at law, it was perhaps open to special demurrer on the ground of uncertainty or want of facts to support averments of mere conclusions. But in proceedings of the character here a petition is not subjected to the tests given to complaints in actions at law. If there is sufficient stated to inform the court that it should interfere for the protection of persons dependent upon it for protection, it is sufficient, and the duty is then devolved upon the court to inform itself and take such action as may seem to be necessary and proper. Enough was stated in the petition to authorize the court to inquire whether the guardian had abused her trust; or was guilty of continued failure to perform her duties; or had an interest adverse to the faithful performance of her duties; or was unsuitable to act; or had mismanaged or wasted the estate. How far the evidence went to establish dereliction of duty in any or all of these particulars we do not know, as the evidence is not before us, and, as already stated, we must presume that there was sufficient evidence to support the findings, which latter, in our opinion, fully support the order complained of.

3. It is claimed that the court was without jurisdiction to appoint a new guardian because the citation was "addressed solely and alone to the guardian, Ida A. Killey, and was only to show cause why her letters should not be revoked." The argument is that section 1763, Code of Civil Procedure, provides for notice to insane or incompetent persons for the appointment of a guardian, and it is urged that the same formality is required to appoint a new guardian upon the

removal of one already appointed. Section 1763 has reference to the original appointment. It is section 1801 of the same Code which gives the authority to the court to remove a guardian. The section provides that the guardian may be removed, "upon such notice to the guardian as the court may require"; and, upon his removal, "the court may appoint another in the place of the guardian who has resigned or was removed." Nothing is said in this connection about a notice to the incompetent person. In the case of *Halett v. Patrick*, 49 Cal. 590, a petition was filed praying for the appointment of a guardian of one Wright, an insane person. Notice was served upon Wright and the appointment was made as prayed for. The appointee failing to file his bond, the court, without further notice to Wright, made another appointment. Said the court: "His appointment was not a step in a new and original proceeding commenced by him, but in the former proceeding commenced by Enos" (the first appointee). It was held that the court did not lose its jurisdiction to appoint a guardian because the person first selected failed to qualify. "Wright had his day in court, was notified of the proceeding, and was bound to take notice that Enos failed to qualify, and that the court would appoint another in his stead. Having had one notice of the first step in the proceeding, Wright was bound to take notice of every subsequent step until a guardian was appointed and qualified, or the application otherwise definitely disposed of." The only question not covered by this decision is whether, where an appointment having been made and the appointee has qualified, the court may make a new appointment on removal of the first appointee, without taking the steps required in making an original appointment; that is, serve notice on the incompetent. Appellant invokes by analogy the case of a removed administrator or executor. We can see why notice might be required in such case, for the right to administer an estate of a deceased person is given by statute to different persons in a certain order of priority. No such right exists in a case such as we have here. As in the case cited, the court acquired jurisdiction in the original proceeding and it continued after the removal of the guardian. The questions first determined were incompetency and the necessity for a guardian. While this condition continued, the court had jurisdiction to do whatever subsequently arose to make the further action of the court necessary, and this without further notice to the incompetent. Besides, it appears that the incompetent was, by order of the court, present at the hearing, and, so far as she was capable of giving consent, it was given to the appointment of petitioner.

4. The findings are not broader than the averments of the petition in any objectionable sense. The findings complained of, with one exception, assuming as we must that the evidence was sufficient to support them, might well be based upon the averments of the petition. The court found that the guardian had neglected her duty in respect of a certain dwelling as to which there was no specific averment. This finding may be disregarded and sufficient remain to support the order.

As to the point that she was incapable of giving consent and hence the order based upon such consent is void, it is sufficient to say that the appointment of the new guardian was not made as her nominee and upon her request alone. Presumptively the court was otherwise satisfied that petitioner was a proper person to be appointed. Whether findings are required at all admits of some question. Code Civ. Proc. § 1704; *In re Violet Lundberg*, 143 Cal. 402, 411, 77 Pac. 156. We think the court was justified in interrogating the incompetent and ascertaining as far as it could her mental condition, and was also justified in complying with her wishes if he found her mentally capable of aiding his judgment. The course taken by the court was not unusual. Appellant cites *McGee v. Hayes*, 127 Cal. 336, 59 Pac. 767, 78 Am. St. Rep. 57, where it was held that upon an application for appointment of a guardian of an incompetent person service of notice on the incompetent is essential to jurisdiction. That was the case of an original application and first appointment where the personal presence of the incompetent was held by the trial court to be sufficient and the Supreme Court decided that the court was without jurisdiction. If we are correct in the view previously expressed under point 3, the case cited does not apply here. The authority of the court to appoint a new guardian did not come alone from the provisions of section 1763, Code Civ. Proc., but from a necessity arising after an appointment had been made under that section.

The order is affirmed.

We concur: BURNETT, J.; HART, J.

15 Cal. App. 224

In re WEBER'S ESTATE.

In re SPRANGER. (Civ. 777.)

(Court of Appeal, Third District, California.
Jan. 27, 1911.)

1. WILLS (§ 52*)—PRESUMPTIONS—SANITY.

Soundness of mind is presumed, and the burden is upon contestant seeking to overthrow a codicil to a will on the ground of testator's mental incapacity to show such incapacity by satisfactory evidence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 101-110; Dec. Dig. § 52.*]

2. WILLS (§ 55*)—EXECUTION—TESTAMENTARY CAPACITY—EVIDENCE.

Evidence *held* to support a finding that testator was of sound and disposing mind when he executed a codicil to his will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-161; Dec. Dig. § 55.*]

3. WILLS (§ 45*)—TESTAMENTARY CAPACITY—PHYSICAL INFIRMITY.

One may be very feeble, aged, and infirm and suffering from disease, and yet be capable of disposing of his property by will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 92; Dec. Dig. § 45.*]

4. WILLS (§ 159*)—EXECUTION—"UNDUE INFLUENCE."

Undue influence that will destroy a will must be such as in effect destroyed testator's free agency and substituted for his own another person's will, and directly affected the testamentary acts.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 387; Dec. Dig. § 159.*]

5. WILLS (§ 166*)—"UNDUE INFLUENCE"—EVIDENCE.

Though circumstantial evidence of undue influence inducing a will is sufficient, it must do more than merely raise a suspicion or show mere opportunity to exercise the influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 432; Dec. Dig. § 166.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7166-7172; vol. 8, pp. 7823, 7824.]

6. WILLS (§ 166*)—EXECUTION—UNDUE INFLUENCE—EVIDENCE.

Evidence *held* to support a finding that there was neither conspiracy of testator's son and testator's executor nor undue influence exercised by either of them in connection with the execution of a codicil to the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

7. WILLS (§ 302*)—EXECUTION OF CODICIL—EVIDENCE.

Evidence *held* to support a finding that at the execution of a codicil testator acknowledged his signature to the attesting witnesses that such witnesses signed their names at the end of the codicil at testator's request, and that the codicil was published and acknowledged by testator as his codicil.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 697, 700, 708; Dec. Dig. § 302.*]

8. WILLS (§ 322*)—PROCEEDINGS FOR PROBATE—ADMISSIBILITY OF EVIDENCE.

In a proceeding for revocation of probate of a codicil, the exclusion of a question asked a witness who had testified that testator's son called more frequently upon testator than when witness was first employed in testator's household as to whether he ever heard any loud talking going on in the room between testator and such son was not error, where it was not suggested that such loud talking had any relation to any issue in the case, or that it was to be followed up or explained.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 762-765; Dec. Dig. § 322.*]

Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Petition of Augusta C. H. W. Spranger for revocation of probate of a codicil to the will of Adolph C. Weber. From a decree dismissing the petition and an order denying a new trial, contestant appeals. Affirmed.

J. C. McKinstry and John A. Wright, for appellant. F. H. Dam, for respondent Bender. Craig & Craig, for respondent Jordan, Jr. Goodfellow & Eells, for respondent Weber.

CHIPMAN, P. J. This is an appeal from a decree of the superior court of the city and county of San Francisco dismissing a petition for the revocation of the probate of a codicil to the last will of deceased and from an order denying a motion for a new trial.

Adolph C. Weber made his will August 29, 1905, and the codicil attacked was made April 5, 1906. He died at San Francisco in the German Hospital on April 27, 1906. Both the will and the codicil were admitted to probate June 19, 1906. Deceased left surviving him a son, Adolph, and a married daughter, Mrs. Spranger, the latter being the contestant and appellant. At the time of her father's death she was in Europe. She returned to San Francisco on June 19, 1906, the day on which the will and codicil were admitted to probate, of which, however, she does not appear then to have had knowledge. On June 18, 1907, she filed her contest of the codicil on these grounds: (1) That at the time of its execution her father was not of sound and disposing mind; (2) Because of the undue influence of the testator's son, Adolph, and one Maximilian Bender in procuring the codicil to be executed. (3) That the codicil was not executed, attested, or published as required by law.

Among the provisions of the will was the following: "I have heretofore made gifts and advances to my children Adolph H. Weber and Augusta Spranger. It is my intention that neither of my said children be charged with any gifts or advances that heretofore have been made to them or that shall hereafter before my death be made to them, or to either of them." No question arises as to the mental and physical capacity of the testator to make the will at the time of its execution, and it is not now attacked. The codicil is as follows: "I hereby add the following to my last will and testament: I hereby declare that the following gifts and grants made by me to my children, herein-after named, were made as and are hereby charged to be advancements by me to them of a part of their respective shares." A certain gift of money by him to his son is then specifically mentioned, and also certain real property conveyed to the son. Next is specified certain pieces of real estate conveyed by him to his daughter. The codicil concludes as follows: "Inasmuch as the said advancements made by me to my said daughter greatly exceed in value said advancements made by me to my said son, I hereby give and bequeath to my said son, Adolph H. Weber, the equivalent in value in cash or

negotiable securities or both, as he may select, of the excess in value of the said advancements made by me to my said daughter over the said advancements made by me to my said son. [Signed] Adolph C. Weber." The certificate signed by the witnesses conforms to the requirements of the Code and is signed by Erasmus Ad. Dahlstrom and Mrs. Elizabeth Steiner, both residing at 1422 Sutter street, the home of deceased. They were servants in his household.

The will was prepared by Mr. Alexander D. Keyes from instructions given him directly by Mr. Weber. Mr. Keyes was attorney for the Humboldt Savings Bank, of which Mr. Weber had been the president for many years and of which Mr. Keyes had at times served as co-director. One of the witnesses to the will, Dahlstrom, was a witness to the codicil. The codicil was prepared by Mr. Francis H. Dam, one of the attorneys for respondent, from instructions received from Mr. Weber's son, and when prepared was sent to Max F. Bender, named in the will as one of the executors, who attended to its execution. The son, so far as appears, took no part in securing its execution, and did not appear as a witness at the hearing of the contest of the codicil.

The court made findings in favor of respondents, and, as they meet the specific averments of the petition to revoke the codicil, they will serve the double purpose of showing what was alleged in the petition as grounds for the contest, and the findings of the court and conclusions thereon, dismissing the petition. These findings are as follows:

"(3) That said codicil was executed by said Adolph C. Weber, deceased, on the 5th day of April, 1906, and bears the date of April 5, 1906. That at the time of the making and signing of said codicil the said Adolph C. Weber, deceased, was of sound and disposing mind. That on the date last aforesaid said deceased was not of unsound mind or mentally incompetent or unable to make or then execute the said codicil, or make or execute any codicil whatever.

"(4) That said Adolph C. Weber, deceased, left a will executed and dated August 29, 1905, and that said will was admitted to probate by an order of this court, duly given and made, on the 19th day of June, 1906. That said codicil was admitted to probate by an order of this court duly given and made on the 19th day of June, 1906. That at the time said will was made said Adolph C. Weber was of the age of 79 years. That at the time the said will was made the said Adolph C. Weber was not then suffering or did not continue to suffer thereafter until the date of his death, or did not suffer thereafter at any time prior to the making of said codicil, from disease or diseases which produced in him great physical or any mental weakness. That at the time said will was made said Adolph C. Weber was not physically or mentally weak or feeble. That

physical or mental weakness on the part of Adolph C. Weber did not steadily or rapidly increase from the making of said will until the time of his death. That Adolph H. Weber did not learn of the contents of said will shortly after the execution thereof or long or at any time prior to the making of said codicil. That Adolph H. Weber did not conspire or collude with Maximilian Bender to induce said Adolph C. Weber to change said will by the execution of said codicil. That it was not the will or intention of said Adolph C. Weber continuously from the date of the execution of the said will to the date of his death or at the time of making the said codicil, or thereafter, to dispose of his property as provided in said will. That said codicil did and does express the wishes and will of said testator, and did not or does not express the wishes or will of said Adolph H. Weber. That the said Adolph H. Weber did not with the assistance of said Maximilian Bender, or otherwise, or at all, overcome the wishes of said testator, or constrain him to do that which he would not otherwise have done, by the exercise of undue or any influence on the part of Maximilian Bender, or by the exercise of duress on the part of Adolph H. Weber, or otherwise, or at all. That said Bender was an intimate acquaintance of the said Adolph C. Weber for many years prior to his death. That said Bender did not pretend to be a friend of said testator or to advise him in his affairs impartially or disinterestedly, because of any pretended friendship, but said Bender was in fact a friend of said testator, and did advise him in his affairs impartially and disinterestedly. That said Bender did not designedly, or otherwise, or at all, seek to influence said testator by conspiring or colluding with the said Adolph H. Weber in order to procure for said Weber a larger or any interest in said testator's estate, or at all. That said Bender did not, as a pretended friend of said testator, wait upon him or perform various or any services for a year or more, or at any time prior to the death of said testator. That said testator was not at any time after the execution of said will of August 29, 1905, or up to the time of his death, by reason of any infirmities, or otherwise, or at all, easily or at all influenced or susceptible to the influence or will of said Bender, or unable to oppose his wishes or will to the wishes or will of said Bender. That Adolph H. Weber did not notify the said Bender of the terms or conditions of said will shortly after August 29, 1905, or for weeks, or at any time prior to the date of said codicil. That at the time of the making of said codicil the said Bender did not know and was not aware of the terms or conditions of said will, except that the said Bender had been appointed an executor thereof. That said Bender did not continuously, or at any time after the making of said will, actively, or at all, urge upon said testator that he modify said will

by the execution of said codicil, or otherwise, or at all. That the said Adolph H. Weber did not at any time before the making of said codicil in an angry or threatening manner, or otherwise, or at all, demand or insist of said testator that he execute said codicil or threaten to apply for letters of guardianship on the ground of the alleged incompetency of said testator, unless he execute said codicil, or at all. That the said testator was not induced, contrary to his wishes or intention, to execute said codicil as a result of any duress or menacing conduct by said Adolph H. Weber, or any undue or any influence of said Bender, or otherwise. That said codicil was and is executed, attested and published as required by law. That the signature of said testator was acknowledged by him to the attesting witnesses to said codicil, and each of them, to be made by said testator. That the attesting witnesses to said codicil did sign their respective names at the end of said codicil at the request of said testator. That the said codicil was published and acknowledged by said testator as his codicil, and that the said codicil is a codicil of said testator."

The record is somewhat voluminous, and upon vital facts the evidence is conflicting. We shall not undertake to analyze all the testimony or enter upon any extended discussion of its legal effect, for we are satisfied that, under rules of procedure by which we are governed, there is but one conclusion open to us—namely—that there is evidence sufficient to support the findings.

1. The first question presented by appellant concerns the mental capacity of deceased when he executed the codicil. Appellant attempts to sustain her contention by casting doubt upon the soundness of mind of deceased when he executed the will. We attach no importance to that question for the witness, Keyes, upon whose testimony appellant relies, said that, while he had "some slight hesitation on the subject," he testified: "My conclusion was that he was a man of sound mind." He added: "But very much weakened." Suffice it to say that the findings of the court on the probate of the will are not called in question and the soundness of the testator's mind when the will was executed cannot now be disputed. At a later stage of his testimony Mr. Keyes gave strong emphasis to the fact that Mr. Weber was a very self-willed, strong-minded man. "He was a man who believed in what he called military discipline, in obedience and submission to authority, and he was a leader; a man of positive views. He would not tolerate interference with his plans. * * * He was a fair-minded man." He was asked if he noticed anything in his demeanor after the will was executed and replied: "I noticed he was growing weaker steadily; I think mentally, and particularly physically. Q. What signs of mental weakness, if any,

did you observe in him? A. Inability to grasp ideas quickly and loss of memory." On cross-examination by counsel for respondent he said he had signed the petition for the probate of the will and codicil.

Witness Max F. Bender was made an executor of the will. His relations with the testator were quite intimate and friendly, and in many respects may be said to have been confidential. During the last year or two of his life Mr. Weber had retired from active business and was confined to his house by illness, not of such nature, however, as would necessarily at once impair his mental faculties. Bender was a frequent visitor at the home of deceased. He testified that he read the letters aloud to Mr. Weber which came to him from his daughter then in Europe "and discussed the same with him"; that Mr. Weber delivered stocks and bonds into Bender's possession to hold in trust for deceased; that he "frequently wrote letters for Mr. Weber." In many other ways it was shown that Mr. Bender was in a position to know Mr. Weber's mental condition and whether he was of sound and disposing mind, as his visits at his home continued up to April 17, 1906. He testified: "I have known Adolph C. Weber since the year 1874. My relations with Mr. Weber were always friendly. During the first year of my acquaintance with him I saw him a great deal as he was a next door neighbor of a family named Schmidt. I married a daughter of Mr. Schmidt. During the last two years of his lifetime I saw Mr. Weber from two to three times a week. I conversed with him quite frequently. I knew the members of Mr. Weber's family in San Francisco and he knew the members of mine. I have an opinion as to the soundness or unsoundness of mind of Adolph C. Weber on the 5th day of April, 1906. It is my opinion that on that day he was of perfectly sound mind."

Erasmus Ad. Dahlstrom was the witness to the codicil on whose testimony it was admitted to probate. In his affidavit he stated: "The said instrument was signed and sealed by the said Adolph C. Weber at his residence in the city and county of San Francisco on the said 5th day of April, A. D. 1906, the day it bears date, in the presence of myself and of said Elizabeth Steiner, and the said Adolph C. Weber thereupon published the said instrument as, and declared to us the same to be, a codicil to his last will and testament and requested us in attestation thereof to sign the same as witnesses. The said Elizabeth Steiner and I then and there in the presence of the said Adolph C. Weber and in the presence of each other, subscribed our names as witnesses to the said instrument. At the time of executing the said instrument, to wit, the 5th day of April, 1906, the said Adolph C. Weber was over the age of 18 years, to wit, of the age of 80 years or thereabouts, and was of sound and disposing mind, and not acting under

duress, menace, fraud, or undue influence."

Attorney Jubal Early Craig conducted the proceedings for the executors at the probate of the codicil. He testified: "I asked Mr. Dahlstrom his name and residence. He replied that his name was Erasmus Ad. Dahlstrom. I asked Mr. Dahlstrom if he was acquainted with the testator in his lifetime. He said he was. By the testator I mean Adolph C. Weber. I asked him if he was present at the execution of the document purporting to be a codicil to the last will and testament of Adolph C. Weber. He said that he was. I asked him if he knew the other witness whose name was subscribed to that document, as a subscribing witness, Mrs. Elizabeth Steiner. He answered 'Yes.' I asked him if the instrument purporting to be the codicil of the last will of Adolph C. Weber was executed by, was signed by, Adolph C. Weber and declared by him to the two witnesses to be his codicil to the last will and testament. He answered 'Yes.' I asked him if Adolph C. Weber requested him and the other witness, Elizabeth Steiner, to sign this document as subscribing witnesses, and he answered 'Yes.' I asked him if he then signed it in the presence of the testator as a subscribing witness and in the presence of the other subscribing witness, and he answered 'Yes.' I asked him if the other subscribing witness signed in the presence of the testator and in his presence, and he answered 'Yes.' I asked him if the testator, Adolph C. Weber, was of sound mind at the time, and he answered 'Yes.' Those are substantially the questions and answers. Q. Did you ask him as to whether he was of disposing memory? A. I asked him in the words that are here; sound mind, sound and disposing mind, and whether he was acting under duress, menace, fraud, and undue influence. He said Mr. Weber was of sound mind, and that he was not acting under menace, duress, fraud, or undue influence. I framed two questions. The first as to sound and disposing mind. He answered 'Yes.' To the second he answered 'No.' After I completed my examination of the witness, Judge Coffey asked Mr. Dahlstrom some questions with reference to the execution of the codicil and also with reference to the execution of the will. Whether Judge Coffey covered the same ground as I did I do not know. I know he covered part of the same ground."

Dahlstrom was called as a witness for contestant upon the point relating to the publication of the codicil, presently to be noticed. He was also asked some questions as to whether any change had taken place in Mr. Weber's health since the will was executed, and answered that he was "gradually weaker day by day"; that he read the morning paper and the witness generally read to him the Post in the evening—"up to the time of the earthquake" (of April 18, 1906); after that he was "upset too much to

read." He also testified that "his memory was getting weaker." Witness "waited on him personally," helped him up and down stairs. It appeared that Mr. Weber suffered from rheumatism and diabetes; that he kept close watch on what was transpiring in the house; that he enjoyed hearing witness read the newspapers; was interested in what was going on in the world; witness had known him for 16 years; that he was a strong-minded, self-willed man, ran things in his house his own way; "he was an exceptionally determined and strong-minded man"; that he did not want to be removed from the house, which occurred while the city was burning. This is substantially his testimony on the question of testator's soundness of mind.

Mrs. Steiner, the other witness to the codicil, was not called at the probate, but was a witness at the contest of the codicil. She testified to nothing bearing upon the testator's soundness of mind further than to speak incidentally of his growing weaker towards the close of his life.

Mr. Charles E. Hatch, an attorney at law, was called by contestant and testified that he had known Mr. Weber for many years and knew him in the month of February, 1906, and was in the habit of visiting him socially; that in his opinion Mr. Weber was not competent to make a will at that time; that his "opinion was based upon his physical condition and the remarks he would make showing that he did not have that capacity—he was not the Weber of old. * * * We did not talk about business in our conversation. I could see from his conversation that he was not capable of transacting business, because certain things he was interested in socially he would seem to forget all about."

Frederick Koch testified for contestant that he had known Mr. Weber many years, had attended to real estate business for the Humboldt Savings Bank; that he visited Mr. Weber in January, February, and March, 1906. When asked his opinion as to Mr. Weber's mental condition, he answered: "I don't think he was of sound mind like he used to be." His reasons for this opinion were called for and he answered: "Well, sometimes we talked about certain matters and he stopped all at once and started something else. Then it was something else, and finally he got back to the question about the same talk that we were talking on before."

We have given in substance all the testimony upon the point now being considered. It seems quite clear that there was a progressive decline in Mr. Weber's physical condition, and that there was gradual impairment of his mental faculties, but it does not appear from the reasons given by witnesses, as to the extent of this impairment, that, when he executed the codicil, he did not have such strength of mind as to fully understand what he was doing. The testi-

mony of Mr. Keyes and of the servants in the house, Dahlstrom and Steiner, is very guarded and inconclusive. Soundness of mind is to be presumed, and to show the contrary by satisfactory evidence was a burden cast upon contestant, which we do not think was sustained. Besides, there was evidence tending to show testamentary capacity and sufficient to produce a conflict upon the issue, which we must leave where the trial court left it. The proposition involved in the codicil was not complicated, but simple, and consisted merely in directing that the gifts already made to his children, being of unequal value, should be equalized in the final division of the property.

There is no necessary and compelling force in established physical infirmity which carries with it the inference of mental incapacity. A person may be very feeble, may be aged and infirm and suffering from disease, and yet be capable of disposing of his property. *Estate of Motz*, 136 Cal. 562, 69 Pac. 294; *Estate of Morey*, 147 Cal. 503, 82 Pac. 57. The mind may triumph over wasting disease, may rise superior to the decrepitude of old age. These are but evidences which may or may not exist but they are not incompatible with entire soundness of mind or of testamentary capacity.

2. It is next contended that the codicil did not express the wishes of the testator, but the wishes of his son, and that it was secured by the undue influence of the son and Max Bender, who, it is alleged, conspired to procure a larger interest in the estate for the son than was provided in the will. The support put forward to sustain this contention is largely, if not wholly, circumstantial. The chief of the circumstances relied upon are that the directions by the testator for the preparation of the codicil were given to Mr. Bender; that he communicated the desire of Mr. Weber to his son; that his son went to Mr. Dam, instead of Mr. Keyes who had drawn the will; that Mr. Dam made no inquiry as to Mr. Weber's mental condition, did not see the will or know its contents, but followed the son's direction, prepared the codicil and mailed it to Mr. Bender; that later Bender telephoned him that the codicil was mislaid and requested him to send a copy, which he did; that the codicil was subsequently executed with the guidance of Mr. Bender and under circumstances confirmatory of the alleged conspiracy between him and Mr. Weber's son, and that in the transaction Mr. Weber had no independent advice.

It appeared that the testator had made several wills previously to the one here; that the thought was in his mind that he might want to add a codicil; he talked with Mr. Keyes about it and Mr. Keyes gave him instructions showing how simple a thing it was; that in fact the will, by leaving the advancements to the two children unchanged, gave the daughter a greater share of the

property of their father than the son was to receive; that Mr. Weber talked these matters over with Mr. Bender, and finally gave him instructions to have the codicil prepared; that it was prepared as shown above and read to Mr. Weber and examined and kept by him; that some time later he brought the subject up again with Mr. Bender, and on inquiry the paper could not be found: that Mr. Bender sent to Mr. Dam for a copy which was received and shown Mr. Weber, who expressed satisfaction with it and declared his intention to then sign it; that the house servants, Dahlstrom and Steiner, were called to witness the codicil. Mr. Bender knew that a will had been made and also who were named as executors, but knew nothing of its provisions except as might be inferred from what Mr. Weber told him concerning the proposed codicil—that he wanted to equalize the estate so that each of his children should get his or her proper share, giving specific directions in respect of the advancements mentioned in the will. There is no evidence that the son knew what was provided in the will further than these directions as to the codicil disclosed. He was not called as a witness in the contest. Much stress is laid on the fact that Mr. Dam, instead of Mr. Keyes, was employed to prepare the codicil and upon the fact that the son was not called as a witness by the respondent to explain his part in causing the codicil to be executed, and also on the fact that Mr. Dam drew the document without seeing the will or talking with the one who executed it. We see no evidence of a conspiracy because Mr. Keyes was not chosen to prepare the codicil. Mr. Dam was a reputable attorney, the service was not an unusual one or in the least complicated or requiring directions first hand, and he testified that nothing transpired in the hour he spent with Mr. Weber's son to arouse any suspicion that any unfairness or advantage over anyone was being taken, that he assumed that Mr. Weber knew what he wanted, and had given directions to Mr. Bender as reported to him by the son. Nor can we say, as is urged, that the trial court erred in not further probing into the matter, and especially in not requiring the son to make explanation. The contestant made no such showing as demanded explanation on his part. He had nothing to do with procuring his father's signature to the codicil either before or at the time it was placed there. If the court was satisfied, as it must have been, with Mr. Bender's account of all the circumstances attending it, we see no reason why we should not be. The facts must go further than to raise a suspicion of undue influence. As was said in *Estate of McDevitt*, 95 Cal. 17, 33, 34, 30 Pac. 101, 106: "Evidence must be produced that pressure was brought to bear directly upon the testamentary act; but this evidence need not be direct. Circumstantial evidence is sufficient. It must, however, do more than raise a sus-

picion." Mere opportunity to exercise undue influence is not sufficient. Estate of Black, 132 Cal. 395, 64 Pac. 695. "The kind of undue influence that will destroy the instrument must be such as in effect destroy the testator's free agency, and substituted for his own another person's will." Estate of Motz, 136 Cal. 563, 69 Pac. 295. We think the court was fully warranted in finding that there was neither conspiracy on the part of the son and Mr. Bender, nor undue influence exercised by them, or either of them, to cause the execution of the codicil.

3. Was the codicil duly executed and published? At its probate one of the witnesses, Dahlstrom, testified, as we have seen, that the testator subscribed the instrument, declared it to be a codicil to his will, and requested the attesting witness to sign the same as witness. It is true that at this present hearing Dahlstrom's memory did not enable him to confirm his former testimony—in short, he retracted the statements made at the probate, and testified that Mr. Weber did not ask him to sign the paper, did not say what it was, nor did Mr. Bender. The other witness testified that nothing was said by the testator; that she was requested by Mr. Bender to come to Mr. Weber's room and sign a paper; that Mr. Weber said nothing and Mr. Bender said nothing "only to sign"; that she knew nothing at all about what she was signing. Mr. Bender testified that he called these two persons at Mr. Weber's request to witness the codicil. He testified: "When they came in Mr. Weber said: 'I am going to sign this codicil in your presence, the codicil to my will, and I want you to act as witnesses.' He said that to Mr. Dahlstrom and Mrs. Steiner. Both Mr. Dahlstrom and Mrs. Steiner were within his hearing at the time, at most perhaps not more than three or four feet away. * * * After having spoken, Mr. Weber got off the side of his bed—he was sitting on his bed—took the chair, and after I had put in the date, the 5th of April, into the document, he took the pen and signed his name." He testified that at the request of Mr. Weber Dahlstrom then signed and afterwards Mrs. Steiner did the same. They then left the room.

There was some evidence showing disappointment on the part of these two persons upon learning that no provision was made for them, and that they had shown some interest in Mrs. Spranger's success in her contest. But, apart from this, it seems to us that there is nothing in the evidence or in any or all of the circumstances connected with the preparation and final execution of the codicil which would justify us in holding that the trial court erred in accepting Mr. Bender's testimony and rejecting that of the two subscribing witnesses.

4. One error only is assigned as occurring
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in the course of the trial. Mrs. Steiner was called by the contestant on redirect examination. She testified that young Weber called more frequently than when the witness was first employed. "Q. Did you ever hear any loud talking going on in the room between them? Mr. Dam: I object as immaterial, irrelevant, and incompetent, and not redirect examination. The Court: Sustained. * * * Mr. Wright: We ask your honor to allow us an exception." It was not suggested that this loud talking had any relation to any issue in the case, or that it was to be followed up in any way or explained. The ruling was not error.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

time it takes effect, and has no application to causes in which judgments have been entered prior thereto, is especially applicable where the jurisdiction of the subject-matter of the appeal in the appellate court is constitutional and does not depend on statutory enactment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2563; Dec. Dig. § 1005.*]

3. CRIMINAL LAW (§ 183*) — JEOPARDY — WAIVER.

Where accused after his trial had begun consented to the discharge of the jury without a verdict in order that he might withdraw his plea of not guilty and demur to the indictment, he thereby waived his right to claim that he had been once in jeopardy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 335; Dec. Dig. § 183.*]

4. BANKS AND BANKING (§ 61*)—BANK OFFICERS — OFFENSES — STATUTES—CONSTRUCTION.

Pen. Code, § 558, provides that every officer, agent, or clerk of any corporation, or of any persons proposing to organize a corporation, or to increase its capital stock who knowingly exhibits any false, forged, or altered book, paper, voucher, security, or other instrument of evidence, to any public officer or board authorized by law to examine the organization of such corporation, or to investigate its affairs, or to be allowed an increase of its capital stock, with intent to deceive such officer or board in respect thereto, is punishable by imprisonment, etc. *Held*, that such section was not limited to one proposing to organize a corporation, or to increase the capital stock of any corporation, but extended to and covered the case of an officer of a bank charged with exhibiting a false report of the bank's affairs to the bank commissioners with intent to deceive them with respect thereto.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 121; Dec. Dig. § 61.*]

5. BANKS AND BANKING (§ 62*)—BANK OFFICERS—OFFENSES—FALSE REPORTS.

St. 1903, c. 266, required the officers of a bank whenever so required by the bank commissioners to make a written verified report showing the bank's actual financial condition at the close of any past day specified by the commissioners by stating, among other things, the total amount actually paid "in money" by stockholders for capital stock; and Pen. Code, § 558, declares that every officer of a corporation who knowingly exhibits a false statement to any officer or board authorized to examine the corporation with intent to deceive shall be punishable, etc. *Held*, that an indictment of a bank officer alleging that he exhibited to the bank commissioners a report which was false, in that it showed that the amount of capital of the bank actually paid "in coin" amounted to \$102,245, when in truth the amount of capital of the bank theretofore paid "in coin" did not amount to more than \$50,000, and that it was necessary and material for the bank commissioners to know from such report what amount of the capital stock of the bank had been paid "in coin," was not fatally defective in that the report stated the amount paid in coin instead of the amount paid "in money," since a statement that a certain amount had been paid "in coin" was in effect a statement that at least that amount had been paid in money.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 122-124; Dec. Dig. § 62.*]

6. CORPORATIONS (§ 324*)—OFFICERS—OFFENSES—FALSE STATEMENT—MATERIALITY.

In an indictment of an officer of a corporation for making an alleged false statement

15 Cal. App. 320

PEOPLE v. NASH. (Cr. 234)

(Court of Appeal, First District, California. Feb. 8, 1911. Rehearing Denied by Supreme Court April 7, 1911.)

1. CRIMINAL LAW (§ 1070½*) New, vol. 11, Key No. Series)—APPEAL—TIME—STATUTES.

Pen. Code, §§ 1239, 1240, providing that appeals may be taken by oral announcement in open court when the order or judgment is rendered, applies only to orders and judgments rendered after the amendment took effect.

2. CRIMINAL LAW (§ 1005*)—RIGHT OF APPEAL—STATUTES—CONSTRUCTION.

The rule that unless it is evident from the terms of a statute which gives, takes away, or modifies the remedy by appeal, that it was intended to have a retroactive effect, it applies only to cases pending and undetermined at the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to officials authorized to investigate the corporation's affairs, in violation of Pen. Code, § 558, an indictment containing a general averment that the false statement was material was sufficient.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1441; Dec. Dig. § 324.*]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

W. B. Nash was indicted for knowingly exhibiting to the Bank Commissioner a false paper and instrument of evidence, to wit, a report of the bank with intent to deceive the Bank Commissioner in respect to its affairs. From an order sustaining a demurrer to the indictment, the People appeal. Reversed, with directions.

Attorney General Webb, W. H. Langdon, and Louis Ferrari, for the People. Campbell, Metson, Drew, Oatman & Mackenzie and Carroll Cook, for respondent.

HALL, J. This is an appeal by the people from a judgment for defendant entered upon demurrer to an indictment charging him with a felony. Respondent in his brief raises the point that this court has no jurisdiction of the appeal because not taken in accordance with the law in force at the time it was taken. Upon being arraigned, the defendant filed a demurrer to the indictment, which was by the court overruled. The defendant entered a plea of "not guilty," and the cause came on for trial. A jury was impaneled and some testimony taken, when, after certain objections made by defendant to the introduction of certain testimony had been sustained by the court, the court, upon motion of counsel for defendant, in which the district attorney joined, and with the consent of defendant given personally in open court, discharged the jury from further consideration of the cause. It further appears from the bill of exceptions that this course was taken in order that defendant might be allowed to withdraw his plea of "not guilty" and file a supplemental demurrer. Not only did the defendant in person and through his attorney consent to the discharge of the jury, but also in person and by his attorney waived any claim of jeopardy by reason of the jury having been impaneled. After the discharge of the jury defendant, with the permission of the court, withdrew his plea of "not guilty" and filed a demurrer, and the court thereupon, on the 10th day of June, 1909, gave its judgment sustaining the said demurrer. On the 8th day of July, 1909, the district attorney served, and on the 9th day of July, 1909, filed, a written notice of appeal from the judgment on demurrer. This notice was filed within the time allowed by the statute as it existed when the judgment was rendered (sections 1239 and 1240, Pen. Code, prior to amendment of 1909 [St. 1909, c. 711]). At the time the judgment was ren-

dered, an appeal, either by the people or the defendant, might be taken by filing and serving a notice thereof, if from an order within 60 days from its rendition, and if from a judgment within 90 days from its rendition. Intermediate the rendition of the judgment and the filing of the notice of appeal in this case, to wit, on the 21st day of June, 1909, there went into effect an amendment to the Penal Code, approved on the 22d day of April, 1909 (sections 1239 and 1240), providing for appeals, either by the people or the defendant, by oral announcement thereof, in open court, at the time of the rendition of the judgment or order appealed from.

[1] It is claimed by the defendant that by the taking effect of the amendment, on June 21, 1909, providing that an appeal may be taken by oral announcement, in open court, at the rendition of the order or judgment, the right to appeal, at least by the people, from any judgment or order theretofore rendered, by the written notice, was at once cut off and ended, unless such appeal had been taken before the taking effect of the amendment. We think, however, the amendment to sections 1239 and 1240, Pen. Code of 1909 should not be construed as having any such effect. The provision in said amendment that appeals may be taken either by the defendant or the people by oral announcement in open court at the time the order or judgment is rendered, plainly was intended as a rule governing the method of taking appeals from orders and judgments thereafter rendered. To give it the effect of cutting off and ending the then existing right would be to give the statute a retroactive effect, which should not be done except where such is the plain intent of the law.

[2] "Unless it is evident from the terms of a statute, which gives, takes away, or modifies the remedy by appeal, that it was intended to have a retroactive effect, it applies only to cases pending and undetermined at the time it goes into effect, and has no application to causes in which judgments have been entered prior to that time." 2 Cyc. 524. Especially should this rule apply where, as in this case, the jurisdiction of the subject-matter of the appeal, in the appellate court, is constitutional, and does not depend upon statutory enactment.

The rule that statutes that modify the remedy by appeal should not be held to apply to judgments rendered before the taking effect of the statute was followed in *Pignaz v. Burnett*, 119 Cal. 158, 51 Pac. 48, and which case, we think, must be held to be determinative of the point now under discussion. In that case, after the entry of the judgment appealed from the law was amended so as to allow but six months after judgment for taking an appeal, instead of one year, the time allowed at the time of entry of judgment. The amendment took effect, as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in the case at bar, 60 days after its passage. During all of this time the appellant might have taken his appeal without doubt. He did not take his appeal, however, until after the amendment to the law had gone into effect, which was nine months after the entry of judgment. The appeal was taken however within one year from the entry of judgment, which was in accord with the terms of the statute as it existed at the time of the entry of judgment, but not in accord with the terms of the statute as it existed at the time of taking the appeal. Upon a motion to dismiss the appeal it was held that the amended statute should be limited in its operation to judgments entered after it went into effect, and that it should not be given the effect of cutting off any right of appeal that existed when it went into effect.

We are unable to see any difference in principle between the case above cited and the case at bar. True in the case at bar the appeal is by the people, and it is urged by appellant that we should hold that the right of the people to appeal was cut off, though we might not feel justified in holding the right of the defendant to be cut off under similar circumstances. We are unable to discover any merit in this suggestion. The language of the statute concerning the time and method of appeals by defendant and by the people is the same, and must be given the same effect. Unless we are prepared to hold that, upon the taking effect of the amendment to section 1239 on June 21, 1909, a defendant against whom judgment was rendered on June 20, 1909, when the law gave him 90 days to appeal therefrom, lost such right to appeal entirely, unless he had taken such appeal upon the day of the judgment (which we are not prepared to do), we must hold that the amendment to sections 1239 and 1240 had no effect upon the time for taking appeals from judgments and orders rendered at any time before the taking effect of such amendment. We think the right of appeal, both of defendant and the people, from orders and judgments rendered prior to the taking effect of the amendment of 1909 relative to appeals, was not affected by such amendment.

[3] Defendant further urges that we should dismiss the appeal because, as he has been once in jeopardy upon the charge made in the information, he cannot again be placed upon trial therefor, and in support thereof cites *People v. Stoll*, 143 Cal. 689, 77 Pac. 818. But in the case at bar the record shows that defendant, both personally and by his attorney, consented to the discharge of the jury without verdict, and waived the claim of once in jeopardy. The consent by defendant to discharge of jury without verdict is a bar to his plea of "once in jeopardy." This has been assumed to be the correct rule in all the California cases upon the subject (*People v. Webb*, 38 Cal. 487; *People v. Horn*,

10 Cal. 17, 11 Pac. 470; *People v. Roberts*, 114 Cal. 67, 45 Pac. 1016; *People v. Terrill*, 132 Cal. 497, 64 Pac. 894; *People v. Stoll*, 143 Cal. 698, 77 Pac. 818—opinion of Justice Angellotti), and has been expressly so decided in other jurisdictions (*Com. v. Sholes*, 13 Allen [Mass.] 554; *People v. Gardiner*, 62 Mich. 307, 29 N. W. 19; *People v. White*, 68 Mich. 648, 37 N. W. 34; *Arcia v. State*, 28 Tex. App. 198, 12 S. W. 599).

The objection to the jurisdiction of the court to entertain the appeal is without merit, and we must examine into the correctness of the ruling of the court in sustaining defendant's demurrer to the information.

The demurrer is a general one, and also contains the statement "that said indictment does not substantially conform to sections 950, 951, and 952 of the Penal Code of the state of California." The only point sufficiently raised by the demurrer is as to whether or not the indictment states facts sufficient to constitute a crime (*People v. Bradbury*, 155 Cal. 808, 103 Pac. 215), and this is the point discussed in the briefs.

[4] The indictment is drawn under section 558 of the Penal Code, which is as follows: "Every officer, agent, or clerk of any corporation, or of any persons proposing to organize a corporation, or to increase the capital stock of any corporation, who knowingly exhibits any false, forged or altered book, paper, voucher, security or other instrument of evidence, to any public officer or board authorized by law to examine the organization of such corporation, or to investigate its affairs, or to be allowed an increase of its capital, with intent to deceive such officer or board in respect thereto, is punishable by imprisonment in the state prison not less than three nor more than ten years."

The gravamen of the charge in the indictment against defendant is that he, as an officer of a banking corporation, to wit, the Market Street Bank, knowingly exhibited to the bank commissioners a false paper and instrument of evidence, to wit, a report of said bank, with intent to deceive said bank commissioners in respect to the affairs of said bank. It is not attempted to state that defendant was proposing to organize the said corporation or to increase its capital stock, or that said report was made in relation to any proposed organization of such corporation, or the increase of its capital stock. The contention of defendant is that the only purpose of the statute is to punish for frauds in procuring the organization of corporations or increasing the capital stock of corporations; and that no person can be guilty of a violation of the section under which the indictment is drawn "except persons who are proposing to organize a corporation, or to increase the capital stock of any corporation." In support of defendant's construction of the meaning of the language of the section, he points to the fact that the section is preceded

by a note or head line as follows: "Frauds in procuring organization of corporation, or increasing its capital." While such matters may be looked to in order to ascertain the meaning of a statute, where the operative language of the act is of uncertain meaning, such headlines are of no value where the language of the act is plain and unambiguous in its meaning.

While the section in question is in several respects awkwardly worded, it plainly covers the case of an officer of a banking corporation who exhibits a false report of the affairs of the bank to the bank commissioners, with intent to deceive such commissioners with respect to the affairs of the bank. So far as this indictment is concerned, the section may be read as though written thus: "Every officer, agent or clerk of any corporation * * * who knowingly exhibits any false * * * book, paper, * * * or other instrument of evidence to any public officer * * * or board authorized by law * * * to investigate its affairs, * * * with intent to deceive such officer or board in respect thereto, is punishable by imprisonment in the state prison not less than three nor more than ten years." This is the language of the section that covers the case made by the indictment, and plainly this language is not limited to one "proposing to organize a corporation, or to increase the capital stock of any corporation." By no fair reading of the entire section can its meaning be so limited.

[5] The only other point urged by defendant in support of his demurrer and of the ruling of the court thereon relates to the materiality of the matter contained in the report exhibited by defendant to the bank commissioners and alleged to have been false. The bank commissioners' act (Stat. 1903, p. 365), in force when the offense is charged to have been committed, required the officers of a bank, whenever so required by the bank commissioners, to make a written report to said commissioners, verified by the oath of its president and secretary or cashier, showing its actual financial condition at the close of any past day specified by the commissioners, by stating among other things: "Third. The total amount actually paid, in money, by stockholders for capital stock. * * *"

The indictment alleges in apt language that the report exhibited by defendant to the bank commissioners was false in this, that it showed that the amount of capital of said bank theretofore actually paid in coin, was, and amounted to the sum of \$102,245; whereas, in truth and in fact the amount of capital of said bank theretofore paid in coin did not amount to any greater sum than the sum of \$50,000. It was further alleged in apt language that it became and was necessary and material for the bank commission-

ers to know from said report what amount of capital stock of said bank had been theretofore paid in coin.

It was contended by defendant that, inasmuch as the statute requires the report to the bank commissioners to state the total amount actually paid in money for capital stock, it was utterly immaterial how much was paid in coin. That "the only material question was how much was paid in money." It is thus conceded, as it must be, that the question as to what amount was paid in money, was a material matter to be shown in the report. While all money is not coin, a statement that a certain amount has been paid in coin is in effect a statement that at least that amount has been paid in money. Such a statement, if true, shows and proves that at least the amount stated has been paid in money, for the word "coin" in such a statement means money of a particular kind. If it is false, and misstates the amount paid in coin, it is misleading and deceiving as to the amount paid in money. The crime denounced by the section under which this indictment was framed is akin to the crime of perjury. In perjury any fact which tends to prove or to disprove the ultimate fact in issue is material, and any testimony concerning such probative fact would be material to the issue to be determined. [6] In perjury a general averment that the false testimony was material is sufficient (*People v. Rodley*, 131 Cal. 240, 63 Pac. 351; *People v. Ennis*, 137 Cal. 263, 70 Pac. 84), unless it affirmatively appears from other averments that it was immaterial (*People v. Brilliant*, 58 Cal. 214). The same rule, we think, is applicable to an indictment under section 558 of the Penal Code. The indictment under examination fully complies with this rule.

No other reason is suggested why the demurrer should have been sustained.

For the reasons above set forth, this appeal is properly before this court, and the court erred in sustaining the demurrer to the indictment.

The order and judgment are therefore reversed, with directions to the trial court to overrule and disallow the demurrer.

We concur: LENNON, P. J.; KERRIGAN, J.

15 Cal. App. 329

In re DALY'S ESTATE.

DALY v. WEDEMEYER. (Civ. 776.)

(Court of Appeal, Third District, California. Feb. 9, 1911. On Petition for Rehearing, March 10, 1911. Rehearing Denied by Supreme Court April 7, 1911.)

1. TRIAL (§ 165*) — NONSUIT — MOTION — DETERMINATION.

A motion for a nonsuit presents a question of law for the court, it being equivalent to a demurrer to the evidence or an objection that,

admitting all the proved material facts to be true, they do not in legal effect operate in favor of plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

2. TRIAL (§ 165*)—NONSUIT—EFFECT OF MOTION.

The evidence on a motion for a nonsuit at the close of plaintiff's case must be accorded its full probative force, even if erroneously admitted, and must be taken most strongly against defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

3. WILLS (§ 326*)—CONTEST—TRIAL.

In determining whether, on a motion for a nonsuit at the close of contestant's case in a proceeding to contest a will, the evidence produced by the contestant is sufficient to require the submission of the case to the jury, the same rules apply as in civil cases, and every favorable inference fairly deducible, and every favorable presumption fairly arising from the evidence produced must be considered as facts proved in favor of the contestant.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 326.*]

4. WILLS (§ 326*)—CONTEST—TRIAL.

Where, on a motion for a nonsuit at the close of contestant's case in a will contest, the evidence is fairly susceptible of two constructions, the court must take the view most favorable to contestant, and, if contradictory evidence has been given, it must be disregarded. If there is any substantial evidence tending to prove in favor of contestant the facts necessary to make out his case, he is entitled to a submission of the case to the jury.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 326.*]

5. WILLS (§ 324*)—UNDUE INFLUENCE—EVIDENCE.

On a will contest, the question of undue influence *held* one for the jury.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 324.*]

On Petition for Rehearing.

6. WILLS (§ 326*)—CONTEST—NONSUIT.

On a motion for a nonsuit on a will contest, no question of conflicting evidence can arise, for the facts which appear to have been proved by the evidence must be assumed to be true, and if, so viewing the evidence, there appear sufficient facts to make out a *prima facie* case in favor of contestant, the court has no right to take the case from the jury, even if there is an abundance of evidence tending to sustain the will or disprove the facts established in favor of contestant.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 326.*]

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Proceedings by Matilda Daly to revoke the probate of the will of James Daly, deceased, against Elizabeth Wedemeyer. From a judgment of nonsuit, contestant appeals. Reversed, and rehearing denied.

S. K. Dougherty, for appellant. T. J. Geary and F. A. Meyer, for respondent.

HART, J. The contestant instituted proceedings for the revocation of the probate of the last will and testament of her son, James Daly, deceased, and, on the close of her case, the court, on the motion of the respondent,

granted a judgment of nonsuit. This appeal is from said judgment.

The will purports to give, bequeath, and devise all the testator's estate "of every kind and character and wherever situated to my friend, Mrs. Elizabeth Wedemeyer, absolutely and forever." Said Elizabeth Wedemeyer is named by the testator as executrix of said will to act as such "without being required to give any bonds whatever." The testament also authorizes the executrix "to sell, at either public or private sale, any or all of my estate without any order of court so to do and without any notice of sale." The grounds upon which the revocation of the order admitting said will to probate is urged are: (1) That said will was not properly or duly executed—that is, that the execution of the instrument was unattended by certain essential formalities; (2) that the execution of said will was procured solely by and through undue influence exercised by the beneficiary thereunder upon the testator at the time of the execution of the testament.

As stated, upon the close of the contestant's case a motion by the respondent for a nonsuit was granted by the court, and the important question involved here is whether the court was justified in thus taking the case from the jury.

[1] "A motion for a nonsuit presents a question of law for determination by the court. The motion is tantamount to a demurrer to the evidence, or an objection that, admitting all the proved material facts to be true, said facts do not in legal effect operate in favor of plaintiff, or, in other words, do not entitle him to the relief asked for by him." *Bush v. Wood*, 8 Cal. App. 650, 97 Pac. 710, and cases therein cited. [2] And the evidence, on a motion for a nonsuit on the close of plaintiff's case, must be accorded the benefit of its full probative force, and this is true whether the evidence has been erroneously admitted or not. It is also true that on such motion the evidence must be taken most strongly against the defendant (*Goldstone v. Merchants' Ice Co.*, 123 Cal. 625, 56 Pac. 776), and, if the plaintiff has introduced proof sufficient to make out a *prima facie* case under the allegations of his complaint, the motion, if made on the close of his case, should be denied. *Janin v. London, etc., Bank*, 92 Cal. 14, 27 Pac. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82; *Nonrefillable Bottle Co. v. Robertson*, 8 Cal. App. 103, 96 Pac. 324; *Archibald's Estate v. Matteson*, 5 Cal. App. 441, 90 Pac. 723; *Bush v. Wood*, supra. In short, as is said in *Bush v. Wood*, supra: "It is clear that it makes no difference, where the motion for a nonsuit is made on the close of plaintiff's case, whether the court itself believes the testimony or not, for, as is obvious, the material facts which the evidence tends to prove must be assumed to be true for the purpose of the motion, just the

same as the material facts alleged in a pleading must be so treated in the consideration of a demurrer to such pleading." In the case of the Estate of Arnold, 147 Cal. 583, 82 Pac. 252, speaking of a motion for a nonsuit upon the close of contestant's case, in a will contest, the Supreme Court says: [3] "In determining whether or not in a proceeding to contest a will, the evidence produced by the contestants is sufficient to require the submission of the case to the jury, the same rules apply as in civil cases. Every favorable inference fairly deducible, and every favorable presumption fairly arising, from the evidence produced must be considered as facts proved in favor of the contestants. [4] *Where evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the contestants.* (Italics ours.) All the evidence in favor of the contestants must be taken as true and if contradictory evidence has been given it must be disregarded. If there is any substantial evidence tending to prove in favor of contestants all the facts necessary to make out their case, they are entitled to have the case go to the jury for a verdict on the merits." See, also, Estate of Welch, 6 Cal. App. 45, 91 Pac. 336.

Viewed by the light of the foregoing rules, by which trial courts must be controlled in deciding a motion for a nonsuit on the close of plaintiff's case, the order allowing the motion for a nonsuit in the case at bar cannot for a moment be upheld, as we think an examination of the evidence produced by the contestant will clearly and unquestionably prove.

Of the two grounds upon which the probate of the will is sought to be revoked, the principal and most important is the charge that the alleged execution of the will was procured through the exercise of undue influence upon the testator by the respondent at the time of the execution of the instrument, to which proposition the evidence is mainly addressed.

The evidence discloses these facts: [5] The deceased, James Daly, was a native of Ireland, and at the time of his death, in the county of Sonoma, this state, on the 25th day of December, 1908, was of the age of about 53 years. He came to the United States when a young man, and for several years resided at Minneapolis, in the state of Minnesota. Residing in Ireland when first he came to the United States were his father, mother, sisters, and brothers. After having been in the United States for about six years, he returned to his old home in Ireland for the purpose of visiting with his mother; his father having died a short time previously. He remained in Ireland for three years, and then returned to the United States, finally locating on what is known as the Cotati Rancho, in Sonoma county, Cal. Here he

purchased two small tracts of land and engaged in the business of raising chickens and selling eggs to the markets. According to his own opinion, as expressed to several of his neighbors (witnesses at the contest), he was suffering from catarrh of the stomach, but, whatever might have been his precise physical malady, he for more than a year prior to his death continued to grow so weak in body and mind as the result of his illness that it became plainly apparent to his near neighbors, who saw him every day or two, that he was unable to take care of himself, and that consequently it was absolutely necessary that he should be given attention and care by some person or persons who would be willing to thus minister to his necessities. A Mr. Tompkins, a neighbor, as well as other neighbors, frequently urged him to procure the services of some one to look after him in his illness, and he was often heard to say that he would like to have a sister living in Ireland to come to his home for that purpose.

On the 22d day of December, 1908, however, said Mr. Tompkins called at the home of deceased and found him in almost a helpless condition. On that occasion Tompkins said to Daly that he (Daly) must be taken to some place where he could receive proper medical and other treatment, and deceased replied that he had made up his mind to go to the home of Mrs. Wedemeyer, a neighbor (the respondent here), where he would remain until he recovered. Tompkins thereupon promised Daly that he would return the following day and take him (Daly) to Mrs. Wedemeyer's. On the last-mentioned day—the 23d day of December—Tompkins went to the home of Daly, and, placing him in a wagon, drove to Mrs. Wedemeyer's. On arrival there, the respondent said she was perfectly willing to take care of Daly, and Tompkins helped the deceased into the house. At this time Daly had grown so weak physically that he was scarcely able to stand on his feet. In fact, Mrs. Wedemeyer herself testified that, on being lifted from the wagon to the ground by Tompkins, Daly sank to the ground, not being able to stand on his feet. On the way to the home of Mrs. Wedemeyer, however, Tompkins spoke to Daly about his property affairs. The deceased said to Tompkins that he desired that the stock and poultry on his place should be given to Mrs. Wedemeyer as compensation for taking care of him in his illness, and that all other property left by him, in case of his death, he desired should be given to his "folks" in Ireland. Tompkins suggested that he ought to make a will, and Daly thereupon requested him to write one for him, proceeding at the same time to give the names and post office addresses in Ireland of his mother, sisters, and brothers to whom it was his wish that his estate should go. As the deceased was thus naming his relatives, Tompkins suggested that the matter of executing

a will had better be postponed until they reached the home of Mrs. Wedemeyer, as he (Tompkins) could not remember all the names and addresses as Daly was then giving them. On reaching Mrs. Wedemeyer's home, Daly was placed on a lounge in the kitchen of that lady's house, and shortly thereafter Tompkins departed for home, intending to return on the next day and prepare a will for Daly in accordance with his wishes as to the testamentary disposition of his estate, as expressed by Daly on the way to Mrs. Wedemeyer's. On the afternoon of Wednesday, the 23d day of December (the same day, it will be borne in mind, on which Daly was brought to her house), Mrs. Wedemeyer went to Petaluma and interviewed Mr. Frank A. Meyer, an attorney at law and one of the counsel for respondent in this proceeding. She requested said attorney to call at her home the next day for the purpose of giving Daly legal advice with regard to the execution of a last will and testament. She testified that she called on Mr. Meyer for the purpose mentioned at the request of Daly himself. Early on the succeeding day—December 24th—Tompkins returned to Mrs. Wedemeyer's. The purpose of this visit was, as before suggested, to prepare a will for Daly. Tompkins found Daly still on the lounge in the kitchen. He testified that Daly kept his eyes closed all the time that he (Tompkins) was there that morning and that, concluding from appearances that Daly was unconscious at that time, he made no effort to talk to him about a will or the execution of one. Tompkins remained in the room for only a brief time, during which (he testified) Mrs. Wedemeyer gave him a glass of whisky, sweetened with honey, and also gave deceased what appeared to be the same kind of a beverage. Shortly after Tompkins had left, Mr. Meyer and a Henry Meyerholtz arrived at the residence of Mrs. Wedemeyer. What occurred there, if anything of importance, during the stay of these gentlemen, except the fact that the deceased is purported to have made a will, to which said Meyer and Meyerholtz are subscribing witnesses, giving all his property to Mrs. Wedemeyer, is not made to appear by the record. On the following day—Friday, the 25th day of December—Daly passed away. On the afternoon of the succeeding day—the 26th of December—his remains were interred. On that same day, immediately following the conclusion of the ceremonies attending the interment, Mrs. Wedemeyer repaired to the office of Mr. Frank A. Meyer, the attorney who witnessed the will and evidently drew it, and there and at that time signed a document that she called "the administrator papers," but which was, in fact, a petition for the probate of the will of Daly.

Several letters addressed to the deceased in his lifetime by his sisters and other relatives in Ireland were introduced and received

in evidence. These letters were couched in terms of endearment and affection, thus indicating that the most amicable and agreeable relations existed between the deceased and his family residing in his native country. A number of witnesses testified that Daly had often expressed the intention of leaving his property, on his death, to his mother or other relatives. There is evidence that the deceased had very slight, if any, acquaintance with Mrs. Wedemeyer, one of the witnesses testifying that the deceased declared to her, a few weeks before his death, that he had no personal acquaintance with the respondent whatsoever. It appears that a Mr. Raymond, a neighbor of deceased, had informed Daly prior to his removal to the home of Mrs. Wedemeyer that the latter had expressed a willingness to take care of him. That Daly had grown and was, for some time prior to his removal to the home of Mrs. Wedemeyer, greatly enfeebled in body and mind, is an inference clearly supported by the evidence. Moreover, as seen, there is evidence justifying the inference that Daly, at the time of the purported execution of the will, was in a condition, both physically and mentally, in which he could have been induced, with little persuasion, to have done almost anything that he might have been requested to do, particularly by one who had been kind and attentive to him in the last few hours of his fatal illness. In other words, it is fairly deducible from the evidence that at the time he signed the alleged will he was incapable of exercising independent judgment in any ordinary business transaction. And, not the least significant, as tending at least to excite suspicion as to her good faith in the part she took in the transaction leading to the execution of the alleged will, is the testimony of Mrs. Wedemeyer herself. She declared that, although she signed the petition for the probate of the will, as executrix thereof, on the day of the funeral and immediately after the conclusion of that ceremony, she nevertheless was ignorant of the contents of the will and of the identity of the person or persons to whom the deceased had thus given his property until some time after the petition for probate had been filed, when, for the first time, she learned that she was the sole devisee through an item printed in one of the local newspapers published at Petaluma. It is hardly believable that a party who has been made the executrix of the last will of a deceased person would take the essential preliminary steps toward proving such will without an examination of the document to ascertain something of the duties, responsibilities, and burdens imposed upon her by the terms of the testament, and it appears to us that the natural effect of such testimony, considered in connection with the circumstance of the haste after the death of the alleged testator with which the document was started on its way to the probate court, would at least be

to inspire great distrust in the honesty or good faith of the transaction by which the deceased was led to sign the purported will.

In short, it is very clear that the evidence produced by the contestant, and which appears in the record, fairly justifies the inference that Daly signed the alleged will, not as the result of his own volition, but solely through the influence which, by reason of his debilitated mentality, Mrs. Wedemeyer was able to exert upon him. There is certainly no ground for inferring from the evidence produced that Daly had any motive or reason for giving his property to a comparative stranger. There is, on the other hand, no apparent reason why he should have excluded his mother and brothers and sisters from his testamentary bounty. To the contrary, as seen, it would seem to be quite manifest, from the evidence, that up to the very time the deceased was taken to the home of Mrs. Wedemeyer his wish was that his relatives should receive his property at his death, and that his intention then was to so provide in his last will.

Without going into further detail as to the inferences that may fairly and reasonably be drawn from the evidence against the validity of the alleged will, it may be said generally that the evidence is pregnant with circumstances from which a jury would be justified in reaching the conclusion that the purported will was not, in truth, the will of the deceased, and that, while it is clear from the evidence that he intended that Mrs. Wedemeyer should be well compensated for her services in caring for him (deceased's statement to Tompkins that she should be given the stock and poultry on his ranch), it is equally clear that the revealed circumstances very strongly indicate that he intended that the residue of his estate should go to his relatives in Ireland.

Our conclusion is that the court should have allowed the case to have gone to the jury on its merits, and that its refusal to so submit it was clearly erroneous.

The judgment is therefore reversed and the cause remanded.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Petition for Rehearing.

Counsel for respondent herein, in their petition for a rehearing, among other things, say: "Consciously or unconsciously, by the decision of this court, rendered in the above-entitled cause, the rules established by the Supreme Court seem to be reversed and set aside, and a new rule, not supported by any authority except this opinion, declared in place thereof." They then cite and quote from the following cases to demonstrate how far wide of the mark our former opinion went in the enunciation of the rules governing the determination of a motion for nonsuit on the close of the case for plaintiff: In *re McDevitt*, 95 Cal. 33, 30 Pac. 101; In *re*

Langford, 108 Cal. 613, 41 Pac. 701; In *re Kaufman*, 117 Cal. 295, 49 Pac. 192, 59 Am. St. Rep. 179; *Estate of Nelson*, 132 Cal. 189, 64 Pac. 294. An examination of the foregoing cases will show that either "consciously or unconsciously," counsel have permitted themselves to be led into what appears to us to be an inexcusable misapprehension of the nature of the question presented by a motion for a nonsuit; for, obviously, the cases cited have no more application to the question decided in this case than the Code of Hammurabi would have to the solution of the much-mooted question whether Peary or Cook was the first to discover the long-lost North Pole. In each of those cases the case had been tried on the merits, a jury having passed upon the facts and the appeal was from the judgment entered upon the verdict or an order denying a new trial or from both, and, of course, the facts could not be reviewed, unless the evidence was of such a character as to present a question of law.

In the case at bar, the complaint of the appellant is based solely upon the ground (and the appeal here could present no other ground for its support) that the court committed an error of law in declaring that, as a matter of law, the facts produced by plaintiff were not of sufficient probative value in the proof of the issues tendered by the contest to justify the submission of the case to the jury. It is elementary, as we tried to show in the original opinion, that a motion for a nonsuit presents a question of law pure and simple. [6] No question of conflict of evidence can arise on such motion, for the facts which appear to have been proved by the evidence must be assumed to be true by the court in deciding the motion, and if, on so viewing the evidence, there appear sufficient facts to make out a *prima facie* case in favor of contestant, the court has absolutely no right to take the case from the jury, even if there is an abundance of evidence tending to sustain the will or disprove the facts established in behalf of contestant. Indeed, the authorities all say that evidence in conflict with testimony favorable to the contestant must be disregarded. We may remark that if, upon the evidence presented by this record, the case had gone to the jury, and a verdict had been returned favorable to the contestee, we are not prepared to say but that the evidence would be sufficient to support the verdict. And in that case only would the cases cited by counsel be in point. But, as stated, the sole question here is: Was the court justified in declaring, as a matter of law, assuming, as it was bound to do, that all the facts in favor of contestant were true, that a *prima facie* case was not made against the validity of the will? An examination of the record can justify no other answer than that given in the decision of the case.

We find it to be true, as counsel contend, that we were not precisely correct in saying in the former opinion that the deceased was

often heard to say that he desired that his sister in Ireland come to his home and take care of him. What he did say was that, should he send for his sister, she would come, but that he "would rather be alone." But the inaccuracy is immaterial, since the only purpose of referring to that evidence was to disclose that he was on affectionate terms with his near relatives living in Ireland. Other testimony given on this point tends to show the fact of the friendly relations between himself and said relatives equally as strongly as the inaccurate version of the testimony as given in our opinion. Indeed, there is an abundance of evidence in the record, independent of that which counsel say we inaccurately quoted, showing that the relations between deceased and his relatives were of the most friendly character at all times.

Counsel further say in their petition: "The statement by the court in the opinion, also, that he (Daly) was but slightly acquainted with Mrs. Wedemeyer, is also contrary to the testimony. *The only testimony relating to this question is that of Mrs. Sanders on page 107 of the transcript, and we submit that this does not sustain the court's conclusion, while Mrs. Wedemeyer's testimony proves that they had been acquainted for some time.*" (Italics ours.) The foregoing only furnishes another illustration of the many to be extracted from their petition of a "conscious" or "unconscious" failure on the part of counsel to distinguish between a review of a judgment on a nonsuit and a judgment on the merits. As we have shown to be elementary as a rule governing the determination of a motion for a nonsuit on the close of plaintiff's case, where there is some testimony in proof of a fact in favor of plaintiff or contestant, such testimony must be assumed by the court to tell the truth concerning such fact. The testimony of Mrs. Sanders was that the deceased had said to her, shortly before he was taken to Mrs. Wedemeyer's, that he had very slight acquaintance with the latter; and it is very manifest, under the rules applicable to motions for a nonsuit made on the conclusion of a contestant's or plaintiff's case, Mrs. Sander's testimony must be accepted on that point, and that of Mrs. Wedemeyer contradictory thereto disregarded.

We may here state that we did not undertake nor pretend to recite all the evidence, or even give the substance of all the evidence, in the opinion originally filed. The record discloses an abundance of circumstances, to which we did not specifically refer, from which the jury would have been justified in finding against the validity of the will. For instance, the witness Kelley, of whose testimony we made no specific mention in the opinion filed herein, said that he had known the deceased ever since he (deceased) located

at Cotati; that the two men often exchanged visits and carried on conversations; that, said the witness, "I think he always was a man of rather weak mind, not strong. During the ten years I knew him, he had the habit of going back and restating his conversations." The fact that deceased was, when making the alleged will, surrounded by persons who were not his close personal acquaintances, is of no small significance in determining, from all the circumstances, whether he was acting on his own independent judgment at that particular time. In short, as the situation, as presented by the record, is well summed up by counsel for appellant, "in the case at bar are found the elements of weak mind, a will made upon a deathbed, surrounded by those having an influence or authority over him, want of independent advice," to which may be added the fact that he made the will at the home of the sole devisee.

We can see no possible ground upon which it may in justice or reason be held that the court did not err in its order granting the motion of the contestee for a nonsuit, and thus precluding a determination of the issues upon the merits of the case.

Rehearing is denied.

I concur: CHIPMAN, P. J.

I concur in the judgment: BURNETT, J.

15 Cal. App. 315

PEOPLE v. MONTGOMERY. (Cr. 141.)

(Court of Appeal, Third District, California.
Feb. 7, 1911.)

1. ASSAULT AND BATTERY (§ 56*)—"ASSAULT WITH DEADLY WEAPON"—UNLOADED GUN.

The pointing of an unloaded gun at another, accompanied by a threat to shoot him, without any attempt to use it otherwise, does not constitute an "assault with a deadly weapon."

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 80, 81; Dec. Dig. § 56.*]

For other definitions, see Words and Phrases, vol. 1, p. 540.]

2. ASSAULT AND BATTERY (§ 92*)—ASSAULT WITH WEAPON—LOADED WEAPON—EVIDENCE.

In a prosecution for assault with a deadly weapon, evidence held to warrant a finding that the gun was loaded when defendant pointed it at prosecutor, and threatened him.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 137-139; Dec. Dig. § 92.*]

3. ASSAULT AND BATTERY (§ 56*)—ASSAULT WITH WEAPON—PROXIMITY OF ACCUSED.

In a prosecution for assault with a deadly weapon, the distance of accused from prosecutor at the time is immaterial, if it is sufficiently near to enable accused to carry out his unlawful intent.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 80, 81; Dec. Dig. § 56.*]

4. ASSAULT AND BATTERY (§ 96*)—ASSAULT WITH WEAPON—EVIDENCE—INSTRUCTIONS.

In a prosecution for assault with a deadly weapon, evidence as to the altercation between

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

defendant and prosecutor before defendant went after the gun with which he was charged to have committed the subsequent assault, while admissible, was not a proper subject of an instruction as to the relative rights and duties of the parties in connection with the subsequent assault.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 142-150; Dec. Dig. § 96.*]

5. CRIMINAL LAW (§ 829*) — REQUEST TO CHARGE—REFUSAL.

It is not error to refuse a request to charge on a subject fully covered by the instructions given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from Superior Court, Humboldt County; Geo. D. Murray, Judge.

Joseph Montgomery was convicted of assault with a deadly weapon, and he appeals. Affirmed.

J. A. Prentice and Henry L. Ford, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

CHIPMAN, P. J. Defendant was informed against for the crime of assault with a deadly weapon, with intent to kill and murder one William F. Freehardt. The jury found the defendant guilty of an assault with a deadly weapon, and recommended the defendant to the mercy of the court. The court sentenced defendant to pay a fine of \$600 and, in default of payment, to be confined in the county jail for the term of one day for each \$2 of said fine, and until said fine is paid. He appeals from the judgment of conviction, and from the order denying his motion for a new trial.

It is urged, as the principal ground for a reversal, that there is no evidence that the gun with which the alleged assault was committed was loaded, that the evidence showed that it was not loaded, and that there is no evidence from which the jury could have inferred otherwise.

[1] It has been held by our Supreme Court that the pointing of an unloaded gun at the prosecuting witness, accompanied by a threat to shoot him, without any attempt to use it otherwise, is not an assault with a deadly weapon, and cannot sustain a conviction for an assault with a deadly weapon for want of a present ability to commit a violent injury on the person in the manner attempted. *People v. Sylva*, 143 Cal. 62, 76 Pac. 814. [2] It is not shown that defendant was, at the time of the alleged assault, near enough to the prosecuting witness, Freehardt, to injure him otherwise than by discharging the gun. The conviction must rest upon evidence from which the jury had the right to infer that the gun was loaded, and that defendant threatened, or that he so conducted himself as would justify the inference that he intended to discharge it at

Freehardt, with the purpose of committing a bodily injury upon him. There was no direct evidence that the weapon was loaded. Defendant claims that there was evidence that it was not loaded. But this evidence was by no means conclusive, unless we are to accept the testimony of the defendant, which the jury discarded.

In common with a very large per cent. of the crimes with which the courts have to deal, this one may be traced to the saloon for its origin, and it is evident that the recommendation of the jury, as well as the lightness of the sentence, is to be attributed to the condition of intoxication to which defendant had brought himself by drink. Freehardt was working in a livery stable at Blue Lake, Humboldt county. About 8 or 9 o'clock of the night of December 11, 1909, one Elkhorn went with defendant to the stable where Freehardt was working "to get a rig" with which to take Elkhorn home; he was very much intoxicated, and Freehardt told him to go and lie down on the cot awhile, and he would take him home. Defendant then spoke up and said he would drive him home. Freehardt told defendant he had orders that defendant was not to have a team at any time, which seemed to offend defendant. Freehardt put Elkhorn on the cot, to which defendant objected, and there followed a somewhat serious altercation between the two men, in the course of which, it was testified, defendant endeavored to assault Freehardt with a knife, and defendant was considerably injured by the blows he received from Freehardt. He went to his home, a short distance away, got a rifle and, after sufficient time had elapsed for him to cool his anger, he returned to the stable and approached the place where Freehardt was harnessing a horse to take Elkhorn home. Freehardt testified: "I think I had the breast strap in my hand when I went in the stall, when I saw him (defendant) with the gun, coming around. Of course, I jumped around. Q. What did he do with the gun at that time? A. He leveled the gun down on me when he saw me; he said, 'I have got you now, you son of a bitch.'" Freehardt ran behind a post, halloed for help, and crossed into a room where there was a telephone and called up the proprietor of the stable, one Worthington. Defendant went out of the stable; Worthington came across the street towards the stable, and he testified that he found defendant crouched behind the public scales not far from the stable, with his gun across his arm, "stooping over and watching the barn." He told defendant he had no business there, and that he had better go home or "he would have the constable take charge of him." Defendant refused to move, and Worthington took hold of him and led him away. He testified: "And just as I got to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

corner as you turn going to Merriam's, we were talking, and I told him if he did not stay away from there I would have him arrested, and he said, 'I will fix the whole bunch of you,' and I went on around the corner." It appeared that defendant found his way home and was in bed when arrested the same night, and the undisputed evidence was that he was very much intoxicated. The foregoing are briefly the principal facts from which the jury were asked to draw and did draw the inference, as we must assume, that the gun was loaded. That defendant was enraged towards Freehardt when he left the barn and went after the gun; that he returned very soon thereafter and accosted Freehardt in a manner to indicate that the gun was loaded, for otherwise his declaration, made at some distance from Freehardt, "I have got you now," would have been meaningless; that he did not leave the premises when he heard Freehardt call for help over the telephone, but took a position near the barn, partially hidden by the scales, and where he could see the door and where he was when Worthington found him with the gun and looking toward the barn; that his anger had not yet cooled, as was indicated by his threat to Worthington that he would "fix the whole bunch"—all these facts and circumstances had a tendency to prove that the gun was loaded, and with it was for the jury to say whether the evidence showed this to their minds beyond a reasonable doubt. The gun was not taken by the officer who made the arrest, but was called for by its owner some days afterwards, and he testified that it was not then loaded. There is testimony by defendant's wife that the gun had rested undisturbed where defendant left it until called for by the owner. She testified that she did not know whether it was loaded, but she was not at their home when defendant returned for it. How much weight the jury attached to her testimony or to defendant's testimony we cannot know, and their right to reject it entirely is beyond dispute. We think there were facts and circumstances sufficient to justify the implied finding that the gun was loaded when defendant said to Freehardt, "I have got you now," and to further justify the verdict rendered.

"An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Pen. Code, § 242. The jury having found that the gun was loaded, the pointing of it towards Freehardt, with the threat shown, constituted, under the circumstances, an assault with a deadly weapon. It was so held in *People v. Wells*, 145 Cal. 138, 78 Pac. 470. [3] In that case the pistol was quite close to the person threatened, but the distance of the assailant from his intended victim is immaterial, if he be near enough to effect his unlawful intent; in the present case the dis-

tance was about 20 feet. Instruction 8 was therefore a correct statement of the law.

[4] Defendant assigns error in giving instruction 10½, p. 16, of the record. This instruction is marked 9½. It deals with the law of self-defense and has reference to the altercation between defendant and Freehardt before defendant went after the gun. We do not see what relevancy the instruction had to the assault which occurred later, and for which defendant was being tried. The evidence in relation to it was material as bearing upon what followed, but no instruction as to the relative rights and duties of the parties in connection with it could affect the responsibility of defendant for his subsequent acts, which were entirely independent of and separated from the first affray. We do not see, however, that the instruction could have prejudiced defendant in any way. We think it did not.

[5] Defendant was denied the following instruction: "I instruct the jury that the pointing of a gun is not an unlawful act, and I charge that the defendant would have the right to take the gun with him on the street and in the Worthington stable, so long as in so doing he did not take it there for the purpose alleged in the information, and did not use it in such manner as to amount to a reckless disregard of human life." The jury were fully and correctly instructed on this point, and defendant was not prejudiced by being denied this instruction.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

15 Cal. App. 264

PEOPLE v. KIRBY. (Cr. 287.)

(Court of Appeal, First District, California.
Feb. 2, 1911.)

1. CRIMINAL LAW (§ 914*)—NEW TRIAL—GROUNDS.

Under Pen. Code, § 1181, authorizing new trials in enumerated cases, the denial of a motion to submit to the jury in advance of the trial the question of accused's present insanity is not ground for new trial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 914.*]

2. CRIMINAL LAW (§ 1028*)—RECORD—QUESTIONS REVIEWABLE.

Where it is clear from the entire record that accused intended and attempted to avail himself of a statutory right, and his intent and attempt were not, and could not have been, misunderstood by the trial court, the court on appeal will not refuse a decision on the point involved solely on technical grounds.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1028.*]

3. CRIMINAL LAW (§ 625*)—PRESENT INSANITY OF ACCUSED—PROCEEDINGS.

Under Pen. Code, §§ 1367, 1368, providing that a person while insane cannot be tried, and requiring the court, if a doubt arises as to the sanity of accused, to order the submission to the jury of the question of sanity, if the court

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

entertains a doubt of the present presumed sanity of accused, it must with a jury specially impaneled for that purpose inquire into the present condition of accused to ascertain whether he comprehends the nature and object of the criminal prosecution pending against him, and is mentally competent to make a defense, but, in the absence of such a doubt, the court need not submit the question of accused's present insanity to a jury in advance of the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1392-1398; Dec. Dig. § 625.*]

4. CRIMINAL LAW (§ 625*)—PRESENT INSANITY OF ACCUSED—PROCEEDINGS.

Where the trial court had ample opportunity to observe the mental condition of accused from time to time prior to the trial on the merits, after the present insanity of accused was suggested, the refusal to submit to the jury in advance of the trial the question of accused's sanity, as authorized by Pen. Code, § 1368, was not erroneous, though an affidavit alleged the insanity of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1392-1398; Dec. Dig. § 625.*]

5. CRIMINAL LAW (§ 969*)—MOTION IN ARREST OF JUDGMENT—GROUNDS.

Under Pen. Code, § 1185, authorizing a motion in arrest of judgment founded on specified grounds, the present insanity of accused is not ground for a motion in arrest of judgment, though under section 1367 an insane person cannot be punished.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 969.*]

6. CRIMINAL LAW (§ 48*)—INSANITY—ISSUES.

The defense of insanity involves only the issue of accused's mental condition at the very time of the commission of the crime charged.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 48.*]

7. CRIMINAL LAW (§ 354*)—INSANITY—EVIDENCE—ADMISSIBILITY.

Evidence of accused's insanity at the time of his trial is admissible to prove prior insanity relied on, but the present insanity of accused cannot be invoked as a complete defense or made the sole basis of an acquittal.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 354.*]

8. CRIMINAL LAW (§ 785*)—INSTRUCTIONS—CAUTIONARY INSTRUCTIONS.

A requested instruction that, if there is any reasonable doubt of the facts on which the opinion of experts is based, the jury should take the same into consideration in weighing the opinion of the experts, embodies no principle of law, and is properly refused.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 785.*]

9. CRIMINAL LAW (§ 391*)—FAILURE OF ACCUSED TO TESTIFY—EFFECT.

That accused, who neglected to testify, acted on the advice of his counsel, is not a matter for the jury's consideration.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 391.*]

10. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—REFUSAL OF INSTRUCTIONS COVERED BY THE CHARGE GIVEN.

It is not error to refuse requested instructions sufficiently covered by the instructions given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

11. CRIMINAL LAW (§ 1036*)—APPEAL AND ERROR—QUESTIONS REVIEWABLE.

An objection to evidence of alienists that no foundation had been laid, not made on the trial, cannot be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2639-2641; Dec. Dig. § 1036.*]

Appeal from Superior Court, City and County of San Francisco; Wm. P. Lawlor, Judge.

Michael Kirby was convicted of manslaughter, and he appeals. Affirmed.

Robert Ferral, for appellant. U. S. Webb, Atty. Gen., C. M. Fickert, Dist. Atty., and Fred L. Berry, Deputy Dist. Atty., for the People.

LENNON, P. J. The defendant was informed against in the superior court of the city and county of San Francisco for the crime of murder, and found guilty of manslaughter. The killing was admitted, and the defense was insanity. This appeal is from the final judgment of conviction, and the order of the trial court denying the defendant's motion for a new trial.

Counsel for the defendant presents to this court three questions for consideration and determination, namely: (1) The refusal of the trial court to submit the question of the defendant's "present insanity" to a jury for determination prior to the trial of the case upon its merits; (2) the refusal of the trial court to suspend the pronouncing of judgment because of the alleged "present insanity" of the defendant; and (3) asserted error of the court in refusing and modifying certain instructions requested upon behalf of the defendant.

The defendant was arraigned on and pleaded "not guilty" to the information on March 3, 1910, and the trial of his case, after several intermediate callings and continuances, was commenced on June 29, 1910. On June 14, 1910, Robert Ferral, Esq., counsel for the defendant, suggested to the trial court the present insanity of the defendant, and thereupon sought and received permission to file with the court in support of the suggestion the affidavit of James M. Kirby, a son of the defendant. The record discloses that "thereupon the defendant interposed a motion in pursuance of chapter 10, title 6, part 2 of the Penal Code." Whereupon the court ordered "that the motion of the defendant herein made in pursuance of chapter 6, title 8, part 2 of the Penal Code, be and the same is hereby denied." No chapters, titles, and parts as designated by counsel and the trial court in respectively making and ruling on the motion in question are to be found in the Penal Code of the state of California. If the defendant be compelled to rest his first point upon the terms of this motion and its denial as presented by the record on

appeal to this court, rather than upon the suggestion of present insanity and the affidavit offered and received in support thereof, it is obvious that the point immediately in question was never directly presented to nor definitely decided by the lower court, and therefore nothing remains to be done or decided in that behalf by this court. However, the defendant included in his motion for a new trial, and as one of the grounds thereof, the statement that "the court erred in denying defendant's motion and application to submit the question of the defendant's present insanity to a jury; said motion being made and based upon a sworn affidavit of his son."

While the subject-matter of the quoted statement is not one of the grounds of a motion for a new trial enumerated by section 1181 of the Penal Code, and therefore could not properly be considered on the original hearing or final review of such a motion, yet it serves to indicate that counsel for the defendant and the trial court moved and acted in the premises upon the assumption that the defendant, through his counsel, intended and attempted to move the court to submit the question of the defendant's present insanity to a jury in advance of the trial. When in a criminal case it is sufficiently clear from the entire record, as it is here, that a defendant intended and attempted to avail himself of a statutory right, and his intent and attempt were not and could not have been misunderstood by the trial court, we are not disposed to refuse a decision of the point involved solely upon technical grounds.

No procedure is provided in our Code for presentation to a trial court of any fact or facts which would be calculated to create a doubt in the mind of the court as to the sanity of a defendant in a criminal case. It is, however, the plain and humane mandate of the law (Pen. Code, § 1367) that no person shall be compelled to defend against a criminal charge while he is insane; and whenever and however up to and including the time of judgment a doubt of the present and presumed sanity of a defendant in a criminal case is created in the mind of the court having him in charge, it becomes the duty of that court, with the aid of a jury especially impaneled for that purpose, to inquire into the then mental condition of the defendant (Pen. Code, § 1368)—this for the purpose of ascertaining if the defendant rightly comprehends the nature and object of the proceedings pending against him, and is mentally competent to make a just and rational defense.

No oral or documentary evidence was presented to the court by the people in rebuttal of the facts alleged in the affidavit referred to. Counsel for the defendant earnestly urges that, in the absence of such rebuttal, the averments of the affidavit must be accepted

as true; and, if true, were sufficient to create and must have created in the mind of the court a doubt of the defendant's present sanity. Doubtless the facts alleged in the affidavit would have been sufficient foundation for a commitment of the defendant to an asylum for the insane upon the theory that he was so far medically insane as to be dangerous to be at large. But "the insanity which demands that a person should be confined in an insane asylum is not the same insanity which bars the prosecution of that person for the commission of a felony." In *re Buchanan*, 129 Cal. 333, 61 Pac. 1120, 50 L. R. A. 378. We are not prepared to say as a matter of law that the affidavit relied upon was sufficient in any one or all of the facts alleged therein to necessarily create a doubt in the mind of the court as to whether or not the defendant was then legally insane in the sense and to the extent that he did not appreciate his situation, and was incompetent mentally to assist in making and presenting a just and rational defense. However that may be, there was, in addition and opposed to the facts stated in the affidavit, evidence before the court on the question of the defendant's sanity. At each of the numerous occasions revealed by the record when the case was called and continued for trial the defendant was personally present in court; and as a matter of course his conduct and appearance on these occasions were in evidence and must have claimed the observation and attention of the court. That counsel for the defendant understood that the trial court's action in the matter was based, in part at least, upon the court's personal observation and inspection of the defendant, is evidenced in counsel's address to the court suggesting the present insanity of the defendant, wherein it was said: "We might have some date this goes over to—might have that as to the present insanity. * * * That is, if your honor thought from the reading of the affidavit and what your honor has learned that there was sufficient reason to believe he is at present insane, or if you have a reasonable doubt as to that." It is fair to assume that the trial court had ample opportunity to, and did, as was its duty, observe and note the defendant's mental condition from time to time, and in particular on the date when his present insanity was suggested. The knowledge thus acquired may have contributed largely towards rebutting any possible inference of present legal insanity which might have been deduced from the facts stated in the affidavit.

Section 1368 of the Penal Code contemplates that the doubt referred to therein must arise in the mind of the court having a defendant in charge (*People v. Hettick*, 126 Cal. 425, 58 Pac. 918; *Webber v. Commonwealth*, 119 Pa. 223, 13 Atl. 427, 4 Am. St. Rep. 634); and, in the absence of such a doubt, the court is not required to submit the

question of the defendant's present insanity to a jury in advance of the trial (People v. Geiger, 116 Cal. 440, 48 Pac. 389). The denial by the court of the motion in question was the equivalent of an express finding that no doubt of the defendant's then mental condition was present in the mind of the court. We are not prepared to say from all of the evidence presented to and before the trial court upon the hearing of the motion that the court abused the discretion vested in it by the provisions of section 1368 of the Penal Code. When the defendant was arraigned for judgment, his counsel interposed a motion in arrest of judgment based solely "on the ground that the defendant is now an insane person." The motion in arrest of judgment was "submitted on the matters already submitted on the motion for a new trial and on the evidence already before the court as taken during the trial." The matters referred to as having been submitted on the motion for a new trial were contained in the conflicting affidavits of counsel for the people and defendant, filed in support of their respective contentions as to the existing mental condition of the defendant. The motion in arrest of judgment was denied, and thereupon counsel for the defendant orally presented to the court a motion that "the defendant be examined * * * or tried on the question of his lunacy or sanity as provided by law." This motion was also denied. "An insane person cannot be * * * adjudged to punishment or punished for a public offense while he is insane" (Pen. Code, § 1367); but the present insanity of a defendant about to be arraigned for judgment upon a criminal conviction is not a ground for a motion in arrest of judgment (Pen. Code, § 1185), and therefore from a technical point of view the motion in arrest of judgment was properly denied. But aside from this, and treating all that occurred at this juncture in the proceedings as an objection to the pronouncing of judgment because of the present insanity of the defendant, the refusal of the court to suspend judgment in the face of the objection was a sufficient indication that the mind of the court was still free from any doubt as to the sanity of the defendant. The evidence submitted in support of the objection was not in our opinion of such a character as would necessarily cause the court to hesitate before pronouncing judgment.

Counsel for the defendant complains that the trial court's modification of defendant's requested instruction No. 52 withdrew from the jury the right to consider the defendant's alleged insanity at the time of the trial as a factor in determining his mental condition at the time of the killing. This instruction as originally presented and requested directed the jury to bring in a verdict of acquittal if the evidence warranted a finding that the defendant was insane at the time of the trial. The court's modification of this instruction required that a verdict of acquittal by rea-

son of insanity should be predicated only upon the insanity of the defendant existing at the very time of the commission of the offense. The special defense of insanity interposed upon behalf of the defendant involved only the issue of the defendant's mental condition at the very time of the commission of the crime charged against him. People v. Coffman, 24 Cal. 230; People v. Lee Fook, 85 Cal. 300, 24 Pac. 654; People v. Schmitt, 106 Cal. 50, 39 Pac. 204; People v. McCarthy, 115 Cal. 263, 46 Pac. 1073. Evidence of the defendant's insanity at the time of the trial was admissible in his behalf for the limited purpose of proving or tending to prove prior insanity. People v. Farrell, 31 Cal. 581; People v. Lee Fook, supra; People v. Zeigler, 142 Cal. 338, 75 Pac. 1090. But in no event, nor in any view of the case, could the present insanity of the defendant in and of itself be invoked as a complete defense to the crime charged, or properly be made the sole basis of a verdict of acquittal. The court of its own motion instructed the jury to consider the mental condition of the defendant before and after the commission of the crime in order to ascertain what his mental condition was at the very time of its commission. The instruction as modified correctly stated the law, and when read and received in connection with the charge of the court as a whole, could not have been understood as withdrawing from the jury the right of considering the defendant's insanity at the time of the trial. People v. McCarthy, 115 Cal. 261, 46 Pac. 1073.

Two witnesses, both medical gentlemen, were called in rebuttal of the case presented upon behalf of the defendant. They, as experts, testified that in their respective opinions the defendant was sane at the time of the trial, and was sane at the time of the commission of the crime charged. The defendant's attorney now insists that the court erred in its refusal to charge the jury, as requested, that, "if there is any reasonable doubt of the facts upon which the opinion is based, the jury should take this into consideration in weighing the opinion of the experts." The equivalent of this instruction is to be found elsewhere in the charge of the court. Moreover, no principle of law was embodied in the subject-matter of the instruction. It would have merely "told the jury to do what they should have done without any instruction upon the subject." People v. Barthleman, 120 Cal. 7, 52 Pac. 112. It was, therefore, neither necessary nor proper to include it in the charge of the court. People v. Methever, 132 Cal. 326, 64 Pac. 481.

The court's modification of defendant's requested instruction numbered 55 did not destroy its effect. The instruction as modified correctly stated the law upon the subject of the defendant's neglect or refusal to offer himself as a witness in the case. That counsel had advised him not to take the witness

stand was not a matter for the jury's consideration.

We have examined the several other assignments of error, predicated upon the court's modification or refusal of requested instructions, and are satisfied that in every instance of modification or refusal the subject-matter of the requested instruction was elsewhere fully and fairly covered by the charge of the court.

Counsel for the defendant devotes the closing pages of his brief to a cursory review of the evidence pertaining to the defendant's mental condition at the time of the commission of the offense. The finding of the jury, implied from the verdict, that the defendant was then sane is not specifically assailed. However, it appears to be counsel's purpose to urge upon this court a review of the evidence, and with that thought in mind we have carefully gone over the entire record. We are impressed with the strength and bona fides of the special defense interposed upon behalf of the defendant; but upon the whole case the evidence—fact, presumptive and opinion—is sufficiently conflicting to preclude this court from forming or expressing any opinion of its sufficiency.

The point incidentally made that no foundation was laid for the expert opinions of the defendant's mental condition at the time of the tragedy was not urged in the form of an objection at the trial of the case, and therefore it cannot be considered here.

The judgment and order are affirmed.

We concur: HALL, J.; KERRIGAN, J.

15 Cal. App. 239

McLAUHLAN et al. v. BONYNGE et al.
(Civ. 833.)

(Court of Appeal, Second District, California.
Jan. 30, 1911. Rehearing Denied by
Supreme Court March 30, 1911.)

1. TAXATION (§ 764*)—TAX DEEDS—DESCRIPTION OF LAND—SUFFICIENCY.

A description of the land in the assessment rolls and tax deed as being "in L. city, in L. county, in Clifton Tr., lots 6, 7, and 8" is insufficient to identify the property sold, and makes the tax deed prima facie invalid.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1519-1522; Dec. Dig. § 764.*]

2. TAXATION (§ 764*)—TAX DEEDS—DESCRIPTION—IDENTITY OF PROPERTY.

The party relying upon an assessment and tax deed containing an insufficient description of the property may supplement such description by other proof, identifying the property as that described, as by reference in the deed to a map, which thereby becomes a part of the description.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1519-1522; Dec. Dig. § 764.*]

3. TAXATION (§ 788*)—TAX DEED—DESCRIPTION—SUFFICIENCY—PRESUMPTIONS.

It cannot be presumed in order to overcome the prima facie insufficiency of the description in a tax deed, describing the land as "in L. city, in L. county, in Clifton Tr., lots 6, 7 and

8," that the map of the Clifton tract referred to existed when the deed was executed and when the assessment was made thereafter, and that the lot was correctly shown thereon, such presumption not being available to divest title by proceedings in invitum, as the map itself is essential with proof that it was the only map of a tract known as the Clifton tract in L. city, and that the lots were correctly shown thereon.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1559-1569; Dec. Dig. § 788.*]

4. TAXATION (§ 800*)—ACTION TO QUIET TITLE—CONDITION OF RECOVERY—TENDER OF TAXES.

Where, in an action under Code Civ. Proc. § 738, to quiet title, the pleadings did not show that defendant claimed the title was based upon a tax deed, plaintiff was not bound to tender any taxes for which the land was sold in order to recover.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1586; Dec. Dig. § 800.*]

5. APPEAL AND ERROR (§ 1137*)—REMAND—GROUNDS FOR DENIAL.

In an action to quiet title, in which defendant, without pleading it, set up a tax title, the appellate court will not, on deciding to affirm the action of the trial court in awarding a new trial to plaintiff, decline to remand the cause on the ground that plaintiff did not tender any taxes on the first trial, since the trial court may impose such tender as a condition of any judgment setting aside the tax title.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4446; Dec. Dig. § 1137.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Fannie C. McLauchlan and husband against W. A. Bonyng, trustee, and others. From an order granting plaintiffs' motion for a new trial, defendants appeal. Affirmed.

Lynn Helm and E. S. Williams, for appellants. O. B. Carter, for respondents.

SHAW, J. Action to quiet title to real estate. The court found in favor of the validity of certain tax proceedings and tax deeds issued thereunder by virtue of which defendants asserted title to the property in controversy, and gave judgment for defendants. Thereafter the court made an order granting plaintiffs' motion for a new trial "because of the insufficiency of description in the tax deeds and assessments." Defendants appeal from this order.

[1] The description of the property as contained in both the assessment roll and deeds under which defendants claim title is as follows: "In Los Angeles city, in Los Angeles county, in Clifton Tr., lots 6, 7 and 8"—the same, however, being separately assessed. It has been repeatedly held that such an assessment is insufficient to identify the property, and hence, standing alone, it is prima facie invalid. Baird v. Monroe, 150 Cal. 560, 89 Pac. 352; Fox v. Townsend, 152 Cal. 51, 91 Pac. 1004, 1007; Houghton v. Kern Valley Bank, 157 Cal. 289, 107 Pac. 113. [2] Notwithstanding the fact that such description is, when considered alone, insufficient, the party relying upon the assessment contain-

ing such incomplete description "may supplement his case by showing that the description in the assessment is in fact sufficient to identify the property." *Houghton v. Kern Valley Bank*, and cases *supra*. "If reference is made to a map, the map thereby becomes a part of the description, and may be read in evidence to identify the land, by showing that it is delineated thereon according to the recital." *Best v. Wohlford*, 144 Cal. 733, 78 Pac. 293. Conceding the description to be *prima facie* insufficient, appellants insist that the evidence introduced was sufficient to overcome the *prima facie* showing of insufficiency, and did clearly identify the property as being the same as that claimed by plaintiffs and described in the complaint as situate in the city of Los Angeles, county of Los Angeles, state of California, and being lots 6, 7, and 8 of the Clifton tract, as per map thereof recorded in book 22, page 68, Miscellaneous Records, in the recorder's office of said county.

[3] No reference was made in the assessment to any map of the Clifton tract and no map thereof was offered in evidence. For the purpose however, of establishing their title to the property, plaintiffs introduced in evidence a deed executed in 1888, whereby the property was conveyed to them and wherein the property was described as set forth in the complaint. Likewise, for the purpose of showing their title, defendants introduced in evidence the deeds under which they deraigned their asserted title, in all of which other than in those made to and by the state, which in describing the property followed the description contained in the assessment roll made in 1894, the property was described as set forth in the complaint.

Appellants insist that, as the deed of 1888 plainly referred to a specified map of the Clifton tract, it will be presumed, in the absence of evidence to the contrary, that such map existed in 1888, and that the lots in question were properly delineated thereon; and, as the contrary is not shown, it must also be presumed that such map was in existence at the time when the assessment was made, which fact, it is claimed, is corroborated in that some of the deeds whereby defendants deraigned title likewise described the property according to such map. In other words, defendants invoke the rule applicable in such cases to ordinary deeds of conveyance from one person to another. This rule has no application to cases where it is sought to divest a property owner of his title by proceedings in *invitum*. *Labs v. Cooper*, 107 Cal. 656, 40 Pac. 1042; *Chapman v. Zoberlein*, 152 Cal. 216, 92 Pac. 188; *Fox v. Townsend*, *supra*. The description according to the specified map in the one case is *prima facie* good; in the other, it is *prima facie* insufficient to identify the property, unless accompanied by evidence which will enable the court to apply the description to some specific portion of land. In the case

at bar, the property is described as certain lots of a larger tract, but, since no reference is made in the description to any map, such description standing alone is meaningless. In order to identify the property by such description, there should be evidence, not only of the existence of a map, but such map itself, with proof that it was the only map of any tract in the city of Los Angeles known as the Clifton tract existing at the time when the assessment was made, and showing that the lots in question were delineated thereon, should be presented to the court. As the validity of defendants' asserted title was based upon the tax proceedings, proof of the existence of a map raised no presumption in favor of its integrity or authenticity. From all that appears in the record, there may have been another map of a tract of land in the city known as the Clifton tract; or, if only one such map was shown to exist, it might under examination have disclosed duplicate numbered lots delineated thereon, or other ambiguities, rendering the description uncertain, and which ambiguities, while not, unless shown, affecting the *prima facie* sufficiency of description contained in the deeds, nevertheless would render it impossible, even with the aid of such map, to identify the property under the description contained in the assessment.

By making the order granting a new trial for the reasons therein given, the court determined that the evidence offered was not of a character to overcome the admitted *prima facie* insufficiency of the description contained in the assessment. We cannot say the court erred in the ruling.

A great part of appellants' argument is devoted to the contention that throughout the record it appears that plaintiffs, by admissions both express and implied, conceded the property described in the complaint to be identical with that referred to in the tax proceedings. We perceive no merit in such contention. Whether it was the same property was the only point in controversy, and the solution of the question depended upon the sufficiency of the description in the tax proceedings, which, as we have seen, was *prima facie* invalid. The record discloses no admissions or concessions on the part of plaintiffs, either express or implied, which could be deemed a waiver of the proof conceded to be necessary in order to apply the description to the lots described in the complaint.

[4] Appellants also insist that the making of the order was erroneous for the reason that plaintiffs did not tender or offer at any stage of the trial to pay the amount of taxes levied against the property and for the non-payment of which it was sold. The action was brought under the provisions of section 738, Code of Civil Procedure, to quiet the alleged title of plaintiffs against the adverse claim of defendants. While the pleadings contain much matter constituting mere sur-

plusage, there is not the slightest reference, either in the complaint or answer to the fact, that defendants' asserted title was based upon a sale of the property for the nonpayment of any tax levied thereon; hence, under the pleadings, plaintiffs were not called upon as a condition of maintaining the action to tender any tax. [5] Assuming, as claimed by appellants, that plaintiffs should pay, or offer to pay, the tax before recovering a judgment herein, the answer is that plaintiffs have recovered no judgment, and we cannot assume in advance that the trial court will not, as a condition of recovery on the part of plaintiffs, if they should recover, impose such terms as the facts disclosed by the trial may warrant.

We find no error in the ruling of the court, and the order granting a new trial is therefore affirmed.

We concur: ALLEN, P. J.; JAMES, J.

15 Cal. App. 294

PEOPLE v. STEVENS. (Cr. 185.)

(Court of Appeal, Second District, California. Feb. 4, 1911. Rehearing Denied March 6, 1911; Denied by Supreme Court April 5, 1911.)

1. ASSAULT AND BATTERY (§ 92*)—PROSECUTION—SUFFICIENCY OF EVIDENCE—CHARACTER OF WEAPONS.

Evidence in a prosecution for assault with a deadly weapon held to sustain a finding that a deadly weapon was used.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 137-139; Dec. Dig. § 92.*]

2. CRIMINAL LAW (§ 823*)—TRIAL—INSTRUCTIONS—WEIGHT OF EVIDENCE—SUFFICIENCY OF INSTRUCTIONS.

In a prosecution for assault with a deadly weapon, the court charged that to convict the state must satisfy the jury beyond a reasonable doubt of the truth of every material allegation, as the law presumed accused to be innocent until he was proved guilty beyond a reasonable doubt, and then instructed as to offenses of a lesser grade than that charged in the information, stating, in connection therewith, that all persons concerned in committing a crime, whether they directly committed the act or aided and abetted therein, were principals, and if another assaulted prosecuting witness with a deadly weapon with intent, etc., or committed any of the lesser offenses named, and accused was present, and aided and abetted therein, he was guilty of the crime committed, and immediately thereafter charged that, if the jury were not satisfied beyond reasonable doubt that accused committed any of the offenses defined, they should acquit. Held, that the part of the charge as to accused's commission of the offense as aider and abettor was not erroneous for not requiring his guilt as such to be proved beyond a reasonable doubt, in view of the other parts of the charge requiring such quantum of proof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995; Dec. Dig. § 823.*]

3. CRIMINAL LAW (§ 806*)—INSTRUCTIONS—SUFFICIENCY—REPETITION.

Each sentence of a charge need not contain all of the limitations contained in other

parts thereof, and a material charge need not be repeated in other parts of the instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1973, 1991; Dec. Dig. § 806.*]

4. CRIMINAL LAW (§ 1137*)—APPEAL—ESTOPPEL TO.

Accused cannot complain on appeal of an instruction given at his request.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3110; Dec. Dig. § 1137.*]

Appeal from Superior Court, Los Angeles County; George R. Davis, Judge.

Charles F. Stevens was convicted of assault with a deadly weapon, and he appeals. Affirmed.

George Appell, Fred J. Spring, and George F. Snyder, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. This appeal is from a judgment following defendant's conviction of the crime of assault with a deadly weapon, and from an order denying a new trial.

There is evidence in the record tending to show that defendant, together with three companions, laid in wait for the prosecuting witness at a point where he daily alighted from the electric cars upon his return from work; that on or about the 19th of September, 1910, at about 6 o'clock p. m. of said day, the prosecuting witness arrived at the station near his home and had proceeded about three blocks therefrom on his way to his residence when an assault was made upon him by defendant and his associates, one of whom hit him over the right eye with something and knocked him into the middle of the street, and while there he was cut in four or five places. One of these wounds was a scalp wound about an inch and a half long, and another about two inches long, at right angles with each other; two cuts in the middle of the forehead, with some bruises behind the left ear and some injuries upon the left wrist, which last-named injuries were evidenced by two round marks, looking as though they had been sunk in with something. After this assault defendant and his companions separated and fled, and the prosecuting witness was taken to his home in a conveyance by friends. Subsequently, on the 24th of September, the defendant was arrested, and his trial and conviction followed.

Appellant presents three reasons why, in his opinion, the judgment of conviction and the order denying a new trial should be reversed; his first contention being that there is no evidence tending to show that the assault was committed by defendant, or that a deadly weapon was employed. That defendant was present and participated in the assault is pretty clearly established; that a deadly weapon was employed is established by the physician's testimony to the effect

that one of the wounds seemed to be a clear cut clear to the bone, and another through to the skull; that they were of such character as might have been caused by the use of a sharp instrument and were so located that death might have ensued. In addition to this, at the time of the trial the wounds had not yet healed; the jury had before them the injured man and the nature and character of the wounds, and, considering all of the testimony, [1] we think sufficient was shown to warrant the jury in concluding that the assault was committed with a weapon as charged in the information. We therefore see nothing in appellant's first contention warranting a reversal.

[2] Appellant's second contention rests upon an alleged error of the trial court in giving the following instruction: "The law provides that all persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission, are guilty as principals in the crime so committed; and should you find from the evidence in this case that some other person, at the time and place mentioned in the information, did willfully, feloniously, and with malice aforethought assault the said Edward C. Hoffman with a deadly weapon, with intent then and there him, the said Hoffman, to kill and murder, or did commit any one of the aforesaid lesser offenses necessarily included in that which is charged; and that the defendant now on trial was present and aided and abetted in the commission of such assault—then under the law this defendant is himself guilty of the crime so committed;" the criticism of appellant being that in such portion of the charge there was omitted therefrom the statement that to establish the defendant's guilt as aider and abettor it must be proven beyond a reasonable doubt. It must be conceded that it is the duty of the trial court to instruct the jury that the burden is upon the prosecution of establishing every element of the crime of which defendant may be convicted beyond a reasonable doubt, but while the court did omit from this particular portion of the charge any statement with reference to the character of proof, yet in another portion of the instructions the court did charge the jury that: "In order to convict this defendant of the crime charged by the information, it is incumbent upon the prosecution to satisfy you beyond a reasonable doubt of the truth of every material allegation thereof. The law presumes him to be innocent of the crime charged until he is proved guilty, beyond a reasonable doubt, by competent evidence." Then following the court charged the jury as to the offenses of a lesser grade than that charged under which a conviction might be had, and in connection with this charged

them: "If, after a full and careful consideration of all the evidence in this case, you are not satisfied beyond a reasonable doubt that the defendant committed any one of the offenses defined in these instructions, then it will be your duty to acquit him;" this last charge being in connection with the one to which exception is urged and which immediately preceded it. [3] When a material charge is once given, it is not necessary to repeat it in a different form. *People v. Jailles*, 146 Cal. 307, 79 Pac. 965. "Each sentence of the charge is not required to contain all the conditions and limitations which are to be gathered from the entire text." *People v. Neber*, 125 Cal. 562, 58 Pac. 133. As said in the last-mentioned case: "It is incredible that the jury, as men of ordinary intelligence, did not understand that the same qualification accompanied the immediately succeeding references to the same circumstance, although the condition was not repeated."

[4] It is unnecessary to comment upon the third point presented, further than to say that it is an objection to an instruction given the jury at defendant's request, and while we do not regard the instruction as open to criticism, having been given at defendant's request, he cannot complain. *People v. Emmons*, 7 Cal. App. 685, 95 Pac. 1032.

We see no prejudicial error in the record, and the judgment and order are affirmed.

We concur: SHAW, J.; JAMES, J.

15 Cal. App. 298

HILBORN v. NYE, Controller. (Civ. 821.)

(Court of Appeal, Third District, California.
Feb. 4, 1911. Rehearing Denied by
Supreme Court April 5, 1911.)

1. CONSTITUTIONAL LAW (§ 26*)—LEGISLATIVE POWER.

The power of the Legislature is unlimited, except by the Constitution, and one challenging the validity of an act must show, either that it is without the province of legislation or that the particular subject-matter thereof has been by the Constitution withdrawn from the Legislature.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 30; Dec. Dig. § 26.*]

2. EVIDENCE (§ 28*)—CONSTRUCTION—LEGISLATIVE INTENT.

While the court will not inquire into the motives of the Legislature in enacting legislation, it will take judicial notice of the existence of an evil which the Legislature in framing a constitutional amendment endeavored to correct.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 28.*]

3. STATES (§ 60*)—LEGISLATURE—OFFICERS—COMPENSATION.

Const. art. 4, §§ 23, 23a, as amended in 1908, authorizing the Legislature to provide for the expenses for officers, employes and attachés of the Legislature, not exceeding \$500 per day for either House at any regular session, etc., prohibits either House, at any regular session, to provide for officers and employes at an expense in excess of \$500 per day, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

either House must make provision for post-session services out of the daily allowance, or such services cannot be paid for from the public treasury.

[Ed. Note.—For other cases, see *States, Cent. Dig.* § 63; *Dec. Dig.* § 60.*]

4. CONSTITUTIONAL LAW (§ 23*)—AMENDMENT—RETROACTIVE EFFECT.

Appropriations made by the Legislature for the payment of officers and clerks of the Legislature prior to Const. art. 4, §§ 23, 23a, as amended in 1908, but not expended until after the amendment, are available only to the extent authorized by the amendment.

[Ed. Note.—For other cases, see *Constitutional Law, Cent. Dig.* § 20; *Dec. Dig.* § 23.*]

Application for writ of mandate by Lewis A. Hilborn against A. B. Nye, as Controller of the State of California, to direct respondent to pay claims of officers and employes of the Legislature. Writ denied.

Kleinsorge & McKisick, for petitioner. U. S. Webb, Atty. Gen., for respondent.

CHIPMAN, P. J. This is an application for a writ of mandate, directing respondent to pay certain claims of certain officers and employes of the Senate and Assembly of the state for their services in connection with the thirty-eighth session of the Legislature. The Attorney General interposed a demurrer to the petition on the ground of insufficient facts to entitle petitioner to the relief claimed.

It appears from the petition that the Legislature convened on January 1, 1909, and on or about that date petitioner was elected secretary of the Senate and J. W. Harper was elected history clerk; that they entered upon and continued in the performance of their duties as such officers until the close of the session, "and thereafter continued in the performance of certain duties enjoined upon them by law and by the order and direction of the Senate," as set forth in the petition. That the Assembly, at or about said date, elected Clio Lloyd to the office of chief clerk, who, by consent of the Assembly, appointed T. G. Walker as assistant clerk, both of whom thereupon entered upon their duties as such officers and continued in the discharge of the same until the close of the session, and thereafter continued in the performance of certain duties "enjoined upon them by law and direction of the Assembly" as in said petition set forth; that "in the manner provided by law, the Senate and Assembly, * * * by appropriate legislation, set apart and established certain funds known, respectively, as the Senate Contingent Fund and the Assembly Contingent Fund, and by law authorized the State Controller to draw his warrant upon said fund from time to time, and for such amounts and in favor of such persons as the Senate and Assembly might determine, and authorized and directed the Treasurer to pay the same; that at all times hereinafter mentioned there

remained, and now remains, in the respective contingent funds of the Senate and Assembly of the state of California, set apart and established as aforesaid, sufficient money to pay each and all of the claims and demands against said respective contingent funds arising as hereinafter set forth."

It is then alleged that, on the 16th day of March, 1909, the Senate passed a certain resolution, which is set forth in the petition. In substance this resolution directs the secretary of the Senate to compile, after final adjournment, a full calendar of the legislative business of the thirty-eighth session, specifically pointing out what this calendar shall contain, and provides for the printing thereof, "such information being prepared, not only for the book, but as a guide for the thirty-ninth session of the Legislature;" the secretary is directed "to mail or express one copy of said calendar to each member of the Senate," and the resolution appropriates \$750 to meet said expenses; "the same payable out of the contingent fund of the Senate."

By a similar resolution, passed on March 17, 1909, the Senate directed the State Printer to print 10,000 copies of Senate Bill No. 18, and to bind 2,000 copies of the same, and directs the secretary of the Senate to mail or express to each senator 30 bound copies and 50 printed copies, and directs the Controller to draw his warrant in favor of the secretary of the Senate for the sum of \$900, "to pay said postage and expressage on same and be properly indorsed."

A third resolution was adopted by the Senate, on March 23, 1909, authorizing the secretary and assistant secretary, at the close of the session, to arrange all bills and papers belonging to the archives of the Senate and deliver them to the Secretary of State, and appropriate \$50 therefor, to be paid out of the contingent fund of the Senate.

A fourth resolution, passed by the Senate on March 23, 1909, instructs "J. W. Harper, history clerk, to complete the final history of the Senate," and appropriates \$100 out of the contingent fund to pay him for said service. It is then alleged that the Assembly, on March 10, 1909, by resolution, directed 300 copies of each and all the chapters of the thirty-eighth session printed and delivered in sets to the chief clerk, within one week after all the bills receiving the Governor's approval shall have been signed by him, and directs the chief clerk to express said chapters to the members, charges prepaid, and appropriates out of the contingent fund \$150 to pay the expense thereof.

A second resolution, passed by the Assembly, March 18, 1909, directing the chief clerk to compile and have printed, after final adjournment, a final calendar, similar to that provided for by the Senate, directs the chief clerk to mail or express to each member of

*For other cases see same topic and section NUMBER in *Dec. Dig.* & *Am. Dig. Key No. Series & Rep'r Indexes*

the Assembly a copy of said calendar, and appropriates out of the contingent fund \$750 for said purposes.

A third resolution was passed by the Assembly, March 20, 1909, directing Thomas G. Walker, assistant to the chief clerk, to assist the chief clerk in preparing and having printed, after final adjournment, a calendar apparently little different from the resolution passed on March 18th, also directing that copies be mailed or expressed to members, charges prepaid, and appropriates \$350 out of the contingent fund to pay for the same.

A fourth resolution was passed by the Assembly, March 24, 1909, directing "the chief clerk and the four assistants to the chief clerk," at the close of the session, to mark, label, and arrange all bills and papers belonging to the archives of the Assembly, and deliver the same to the Secretary of State, and appropriates out of the contingent fund for such services \$50 for each of said officers. It is then averred that the said clerks, each of them, performed the services required of them as aforesaid, and demanded of the Controller that he draw his warrant for the sums each was entitled to in accordance with said resolutions, but the Controller refused and still refuses to do so.

It is admitted by the petitioner that the Senate and Assembly "had each of them expended an average daily sum of \$500 for the compensation of officers, employés, and attachés of the said Senate and Assembly, respectively, for each day of the regular session of the Legislature then ending otherwise or in addition to the amounts specified to be paid" to said claimants by said resolutions; and admits that "during all said times" the said claimants were officers of the Senate and Assembly, respectively, as alleged.

It is further alleged that the work mentioned in said resolutions "was necessary and proper to be done, and that the same could not from its very nature be done during the continuance of said regular session of the Legislature, or until after the adjournment of the Legislature, or until the Governor of the state had performed his constitutional and statutory duties with respect to the various bills awaiting action at his hands upon the adjournment of the Legislature." It is then alleged that certain of said claimants had assigned their said claims to petitioner. The total amount of said several appropriations is the sum of \$3,350.

At the general election held in November, 1908, two proposed amendments to section 23 of article 4 of the Constitution were ratified.

Section 23 reads as follows: "The members of the Legislature shall receive for their services the sum of one thousand dollars each for each regular session, to be paid at such times during the session as may be provided by law, and the sum of ten dollars each, for each day while in attendance at a special or extraordinary session, for a number of days not exceeding thirty; and mile-

age to be fixed by law, all paid out of the state treasury; such mileage shall not exceed ten cents per mile; and each member shall be allowed contingent expenses not exceeding twenty-five dollars per member for each regular biennial session. The Legislature may also provide for additional help; but in no case shall the total expenses for officers, employés and attachés exceed the sum of five hundred dollars per day for either House, at any regular or biennial session, nor the sum of two hundred dollars per day for either House, at any special or extraordinary session, nor shall the pay of any officer, employé or attaché be increased after he is elected or appointed."

At the same election another amendment to the same article was adopted as section 23a. It is identical in terms with the concluding paragraph of section 23.

Petitioner states the single question now presented as follows: "Is the amendment limited in its application to the actual duration of a regular or biennial session, or does the prohibition therein expressed continue beyond the time of adjournment, and forbid the Legislature, and the several Houses thereof, to order certain post-session work to be done, and to provide for the necessary expenses of such work, as well as the compensation of the persons performing it?"

It is claimed by the petitioner that section 31, art. 4, forbidding the Legislature to make any gift, and section 32 of the same article, prohibiting the grant of any extra compensation to any public officer, have no application; hence the argument was confined exclusively to the construction to be given section 23. Petitioner points out certain statutory duties devolved upon the secretary of the Senate and the clerk of the Assembly and their respective assistants, as found in sections 253, 254, 261, and 269 of the Political Code. He also calls attention to certain rules of the Senate and Assembly, prescribing the duties of the secretary of the former and clerk of the latter, respectively, but they do not seem to enlarge the scope of the duties prescribed by statute; and it may be conceded that the duties thus prescribed by statute, and the rules of the two Houses, are broad enough to embrace at least some, if not all, the directions given in said resolutions. [1] The power of the Legislature is omnipotent and unlimited, except as circumscribed by the Constitution. *Kingsbury v. Nye*, 9 Cal. App. 574, 99 Pac. 985; *In re Madera Irr. Dist.*, 92 Cal. 307, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106. In the *Madera Irr. Dist.* case the court said: "It is incumbent upon any one who will challenge an act of the Legislature as being invalid to show, either that such act is without its province of legislation, or that the particular subject-matter of that act has been by the Constitution, either by express provision or by necessary implication, withdrawn by the people from the consideration

of the Legislature. The presumption which attends every act of the Legislature is that it is within its power; and he who would except from the power must point out the particular provision of the Constitution by which the exception is made, or demonstrate that it is palpably excluded from any consideration whatever by that body."

Respondent contends that the amendment of the Constitution referred to has withdrawn from the Legislature the power to expend, directly or indirectly by either House, for officers, employés and attachés, any sum of money whatever, in conducting the business of a regular or biennial session, in excess of \$500 multiplied by the number of days of the session. For example, if the Legislature sits for 60 days and no longer, the extreme limit of its expenditures is the sum of \$1,000 multiplied by 60, or \$60,000.

Petitioner meets this contention in two ways: First, by giving a construction to the words "*at any biennial session*" which makes them equivalent to and intended to mean "*during any biennial session*"—that is to say, that the amendment means that either House of the Legislature shall not expend in excess of \$500 per day during the period of its session, including the day of final adjournment, but may make any necessary provision for continuing the work of its officers and employés thereafter; and, second, that such officers and employés may be paid, in the present case, out of the appropriation made for the contingent fund of the Senate and Assembly, found in the appropriation act of March 22, 1907 (Stats. 1907, p. 859), for the support of the Legislature during the fifty-ninth and sixtieth years. Petitioner calls our attention to many cases, involving human affairs of great variety, where the courts have construed the word "*at*" to mean "*during*," in conformity to the rule that words are to be deemed to have been employed in their natural and ordinary sense. For example, an act required to be done "*at the term of court*" was held to mean "*during the term*," *Lawver v. Langhans*, 85 Ill. 138.

[2] While it is settled that the motives of the Legislature, in enacting legislation, will not be inquired into, yet it is also settled, and petitioner concedes, "that this court has undoubted power to take judicial cognizance of the existence of an evil which the Legislature, in framing the amendment under consideration, and the people in ratifying it, endeavored to correct." Petitioner then states: "This evil was the wasteful expenditure of large sums of the state's money at each session of the Legislature in the employment of persons whose services were not necessary to the transaction of the business of the Legislature, but whose importunities were too insistent to be denied." The evil was more extensive than petitioner has stated, for its influence reached beyond the final adjournment, as is evidenced by the resolutions involving a post-legislative expenditure of nearly \$4,-

000, much of which was obviously unnecessary; and it is needless to add that, if this sum was constitutionally authorized, there is no limit whatever to be placed upon post-session expenditures for like purposes. The construction contended for would stop the flow of money from the treasury through the spigot, but would still leave open the flow at the bung.

The purpose of one of the amendments, as declared in the title, was to limit "the expenses of employés of the Senate and Assembly," and, as declared in the other, to define the "limitation of the expense of the employés of the Senate and Assembly." And these proposed amendments were submitted to the people in response to a universal demand that the expenses of the Legislature, in whatever form incurred, should be definitely limited. The Legislature itself fixed the amount, and we must presume that it carefully considered and determined what amount would cover all legitimate expenses in any way connected with its duties, or the duties of its employés, arising out of its session. By the same amendment the pay of the legislators was fixed at a specified sum for each session, and no limit was placed upon the duration of the session.

[3] It seems to us that, when we consider the evil which it was the aim of the amendment to remedy, it means that either House may at any regular session provide for the employment of help, but in no case shall it provide for an expense for officers, employés, and attachés to exceed the sum of \$500 per day for either House, nor the sum of \$200 per day for either House for any special or extraordinary session. The limitation is of the power to exceed these sums or to authorize in any way any increase of these sums. We cannot accept petitioner's construction that the limitation of the power was confined to expenses incurred during the session, and left open to the Legislature an unrestrained and unlimited power to authorize the payment of post-session expenses independently of the \$500 per day limit to each body. It is true that some work must be done by the officers of each of the bodies after final adjournment, and, clearly, they should be paid for such work. But the Legislature must provide for this necessity out of the \$500 per day given each body to meet its expenses. It is not within the province of the court to point out how this may be done.

We do not attach importance to petitioner's second point. In the general appropriation act for 1907, there were the following items:

For pay of officers and clerks of the senate	\$21,000 00
For pay of officers and clerks of the assembly.....	28,000 00
For contingent expenses of the senate	45,000 00
For contingent expenses of the assembly	52,000 00—\$146,000

[4] These appropriations were made before the Constitution was amended, and were to meet the contingent expenses of the two Houses, under the then existing provision of the Constitution. But by the subsequent adoption of the amendment, before the money thus appropriated was expended, the amounts were available only to the extent authorized by the Constitution.

Turning to the general appropriation act of 1909 (Stats. 1909, p. 1106), it would appear that the Legislature had the amendment of the Constitution in mind, for the appropriation there reads as follows:

For pay of officers and clerks of the senate	\$30,000 00
For pay of officers and clerks of the assembly.....	30,000 00
For contingent expenses of the senate	5,000 00
For contingent expenses of the assembly	7,000 00—\$72,000

This act seems to provide for a 60-day session, and provision is made to pay the officers and clerks \$60,000, or \$500 per day for each House; the intention no doubt being to include the persons mentioned in the amendment of the Constitution, namely, "officers, employés and attachés." But should the Legislature consume this entire amount while in session, and adjourn finally after having expended the full \$500 per day for each House for the entire session, there would be no authority of law to make an appropriation to pay for work done by "officers, employés or attachés" after final adjournment. There being no limitation as to duration of the session, further appropriations may be made to pay for the services of these persons during the session; but the point we wish to make clear is this: That there is no authority of law for paying "officers, employés or attachés" for services to be performed after final adjournment, except it be from unexpended money which had formed a part of the \$1,000 per day provided for the two Houses while in session. Either the Senate or Assembly, or both, must make provision for these post-session services out of this \$1,000 per day, or such services cannot be paid for from the public treasury.

The writ is denied.

We concur: HART, J.; BURNETT, J.

15 Cal. App. 307

HILL v. SUPERIOR COURT OF SACRAMENTO COUNTY et al. (Civ. 822.)

(Court of Appeal, Third District, California. Feb. 4, 1911.)

1. ELECTIONS (§ 270*)—CONTESTS—STATUTES—CONSTRUCTION.

The court in construing statutes regulating election contests must consider that it is the policy of the law to have such contests determined as speedily as possible, so that the rightful claimant may enjoy as nearly as practica-

ble the entire term for which he has been chosen.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 247; Dec. Dig. § 270.*]

2. ELECTIONS (§ 278*)—CONTESTS—STATUTORY PROCEEDINGS.

Code Civ. Proc. § 1115, requiring an elector contesting an election to file a written statement within 30 days after the declaration of the result, except in cases where a contest is brought on specified grounds, when it must be filed within six months after the declaration of the result, and section 1118, as amended by Act March 18, 1907 (St. 1907, cc. 292, 341), providing that, on the filing of the statement, the county clerk must inform the superior court thereof, which shall set a day for the hearing of the contest, and, as amended by Act March 19, 1907, providing that within five days after the end of the time allowed for filing statements the county clerk must notify the superior court of all statements filed, and the court shall order a special session within a specified time to hear the notice, prescribe the time for the filing of statements of contests, and, where a statement of contest and notice to the court and the order of the court for a special session to hear the contest are made within 30 days after the declaration of the result of the election, the court acquires jurisdiction.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 258-262; Dec. Dig. § 278.*]

3. MANDAMUS (§ 31*)—FAILURE OF COURT TO TAKE JURISDICTION—REMEDIES.

Where the trial court acquired jurisdiction of an election contest and of the parties, but erroneously quashed the service of the citation, and refused to hear the contest on the ground that the notice to the court and the order fixing the special session to hear the contest and the issuance of the citation were premature, the court decided erroneously on a preliminary matter, and mandamus would lie to compel it to take jurisdiction and hear the contest.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 74, 75; Dec. Dig. § 31.*]

4. MANDAMUS (§ 31*)—FAILURE OF COURT TO TAKE JURISDICTION—REMEDIES.

Where there is no conflict as to the facts which confer jurisdiction of an inferior court and which make it the duty of such court to proceed with the trial of the cause, mandamus will issue commanding the inferior court to try the case, unless there is other adequate remedy.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 74, 75; Dec. Dig. § 31.*]

5. MANDAMUS (§ 4*)—ADEQUACY OF LEGAL REMEDY.

The remedy by appeal from an erroneous judgment of the court in an election contest resulting in a refusal to hear the contest is not adequate because not sufficiently speedy, and mandamus is the proper remedy to compel the court to proceed to hear the matter.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 9-34; Dec. Dig. § 4.*]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Application for a writ of mandate by J. S. Hill against the Superior Court of the County of Sacramento and another, judge thereof, to compel the court to take jurisdiction of an election contest. Alternative writ made peremptory.

R. Platnauer, for petitioner. A. L. Shinn, for respondents.

BURNETT, J. The undisputed facts are these: At the general election held on the

8th day of November, 1910, petitioner and one R. A. Merkeley were opposing candidates for the office of constable of Riverside township in the county of Sacramento. On the 16th day of November the board of supervisors of said county, after having canvassed the returns, by resolution duly passed and entered on its minutes declared said Merkeley elected to said office. On the 5th day of December following the petitioner filed in the office of the county clerk of said county a written statement of his contest of the right of said Merkeley to said office, the statement being verified and in proper form. On December 9th another contest was filed by one Michael F. Shelley involving a different office and these two were the only statements of contest presented. On December 12th the county clerk notified the superior court that said statements had been filed. On December 15th the court ordered a special session to be held on December 28, 1910, for the hearing of said contests and directing citations to issue. On December 15th said citations were issued by the clerk, and on December 19th they were served by the sheriff on the parties whose right to office was contested. At the time and place appointed for the holding of said special session the court quashed the service of said citation, and refused to hear the contest of petitioner, for the reason that the notice to the court by the clerk was given and the order of the court fixing the special session was made prematurely, and the citation was issued prior to the time fixed by the statute. Upon an application to this court, an alternative writ of mandate was issued, and it is now sought to have it made peremptory upon an answer admitting all the facts set out in the petition. While, technically speaking, the order of the court below simply directed the citation to be quashed, it amounted to a refusal to proceed with the trial of the contest on the ground that the court had no jurisdiction of the person of the contestee by reason of the premature order and service as aforesaid.

The position of respondent involves the construction of section 1118 of the Code of Civil Procedure. Section 1115 of said Code provides that an elector contesting the right of any person declared elected to an office must file with the county clerk a written statement verified by the contesting party, and said section directs what said statement must contain, and that it must be filed "within thirty days after the declaration of the result of the election by the body canvassing the returns thereof, except in cases where the contest is brought on any of the grounds mentioned in subdivision three of section one thousand one hundred and eleven, when it must be brought within six months after the declaration of the result of the election by the body canvassing the returns thereof." Section 1118 is as follows: "Within five days after the end of the time allowed for filing

such statements the county clerk must notify the superior court of the county or city and county of all statements filed. The court shall thereupon order a special session to be held, on some day to be named by it, not less than ten nor more than twenty days from the date of such order, at which session the ballots shall be opened and a recount taken, in the presence of all the parties, of the votes cast for the various candidates in all contests where it appears from the statements filed that a recount is necessary for the proper determination of such contest or contests. The court shall continue in special session to hear and determine all other issues arising in such contested elections and within ten days after the submission thereof, the court shall file its findings of fact and conclusions of law and immediately thereafter judgment therein shall be entered."

The contention of respondent is that the county clerk has no authority to notify the superior court of any statement filed nor the superior court to make the order in reference to the special session until after the expiration of the time in which the statements of contest may be filed. According to this interpretation, these acts must be performed within the period of five days immediately succeeding the expiration of the time for filing the said statements. As contests upon the ground of the violation of certain provisions of the purity of election law may be instituted within six months after the declaration of the result of the election, it would follow that the clerk and the court should have waited until after the 16th day of May, 1911, and within five days thereafter, for said notification and order, whereas, the clerk notified the judge on December 12th—26 days, and the judge made the order on December 15th—29 days after the declaration of the result of the said election.

It is at once apparent that, if the law thus prevents the trial of an election contest until long after the term of the office in controversy has begun, it should be amended by the Legislature before another election takes place. "The investigation proposed is," as well stated in *Minor v. Kidder*, 43 Cal. 237, "one in which the public at large are deeply concerned. It necessarily involves a question of broader import than the mere individual claim of a designated person to enjoy the honors and emoluments of the particular office brought directly in contest. The inquiry must be as to whether or not the popular vote in the selection of officers to administer the public affairs has been in a given instance, or is about to be, defeated or thwarted by mistake happened or fraud concocted. It is therefore not an ordinary adversary proceeding, for, as against this high public interest concerned, there can be no recognized adversary." It is therefore important and undoubtedly is the policy of the law to have such contests determined as speedily as possible in order that the right-

ful claimant may enjoy as nearly as practicable the entire term for which he has been chosen. [1] This consideration should not be laid out of view in the effort to determine the meaning of the Legislature in the enactment of the provision involved herein. [2] Having regard to the occasion and purpose of the statute, it would seem to be reasonably clear that by the language in question it was intended to prescribe the limit of time beyond which the said notification and order should not be permitted. In other words, a statement of contest upon certain grounds must be filed within 30 days and upon other grounds within 6 months after the result of the election has been announced and the time for said notification and order is enlarged 5 days beyond the expiration of this period. This does not necessarily mean that six months and five days constitute the limit in all cases. The more just and reasonable view is that it depends upon the character of the contest, the time being limited to 35 days except in the particular instances referred to when the longer period is allowed. In most cases, it must be assumed, all contemplated contests will be filed within 30 days and this construction of the statute will satisfy the obvious purpose of the law to secure a speedy hearing of all contests and at the same time, if practicable.

The phrase involved in the discussion may not be altogether free from ambiguity and uncertainty, but, without regard to the considerations to which we have adverted, we have given it no strained nor unnatural construction. There seem to be two sections, numbered 1118, of the Code of Civil Procedure as amended in 1907 (St. 1907, cc. 292, 341). Reading them together, as far as necessary to illustrate the point before us, we have the following: "Upon the statement being filed, the county clerk must inform the superior court of the county thereof. * * * Within five days after the end of the time allowed for filing such statements, the county clerk must notify," etc. Substituting for "within" one of its familiar equivalents "not longer than," the direction simply amounts to this: "Upon the statement being filed the county clerk must inform the superior court of the county thereof but it must be not longer than five days after the end of the time allowed for filing such statements."

Or, if we assume that the first section 1118 has been superseded by the second, which was approved one day later, the result is unaffected. Manifestly no notification should be given of the filing until the statement has been actually filed. This latter date is necessarily implied as the initial point, and the later section 1118 simply undertakes to provide that the notification and the order shall not be "later than five days after the end of the time for filing such statement." The identical form of expression has been so construed by the Supreme Court, as pointed out by Chief Justice Beatty

in his dissenting opinion in the case of *Bell v. Staacke*, 137 Cal. 311, 70 Pac. 172, where he says: "The object was to enlarge and protect the right, not to restrict it and involve it in doubt and uncertainty. Having regard, therefore, to the occasion and purpose of the amendment, it is clear that the words 'within one year after the rendition' meant nothing more than if the law had said 'Not later than one year after.' The word 'within' had reference solely to the end of the period prescribed, and not to its beginning. This is a perfectly legitimate sense of the expression, and is the precise sense that has been ascribed to it by the decisions of this court." The cases cited by him are *Los Angeles County Bank v. Raynor*, 61 Cal. 147, and *Janes v. Bullard*, 107 Cal. 132, 40 Pac. 108.

It is true that a different interpretation has been given the language providing for an appeal "within one year after the entry of judgment." It was held in an early case (*McLaughlin v. Doherty*, 54 Cal. 519) that the Legislature intended that the entry rather than the rendition of the judgment should be the initial point for the computation of the time. This conclusion was influenced somewhat by the consideration of prior legislation and of the decisions of the Supreme Court distinguishing between the "rendition" and the "entry" of judgment. The case has been followed since on the question of appeal, but is manifestly not of decisive significance here.

[3] As we view it, then, the trial judge, upon a preliminary matter, decided contrary to the law and the facts that the court had not acquired jurisdiction of the "contestee," and therefore was not authorized to proceed with the trial at the time appointed. Upon our understanding of the statutory provision, the court had and still has jurisdiction of the subject-matter and of the parties, and it was its plain duty to proceed to trial at the time appointed. It could not divest itself of this jurisdiction by an order purporting to quash the citation, nor is there a case presented here of jurisdiction to decide wrong as well as right beyond the reach of the writ of mandate. [4] Where there is no conflict as to the facts and in the judgment of the higher tribunal those facts confer jurisdiction and make it clearly the duty of the lower tribunal to proceed with the trial of the cause, if there is no other adequate remedy, the writ of mandate will issue commanding such action.

[5] Again, conceding, without deciding, that an appeal would lie, it should not be considered a speedy and adequate remedy in election contests in which the public are so largely interested and where the term of office may expire before a final determination of the trial in the appellate courts. The authorities are in line with these reflections, and from a few of the many cases bearing upon the question we make the following quotations:

In *State v. Johnson*, 103 Wis. 623, 79 N. W. 1090, 51 L. R. A. 33, it is said: "Where it clearly appears that discretion has been not merely abused, but not exercised at all or that the action taken by the inferior court is without semblance of legal cause, and no other adequate remedy exists, mandamus will lie to compel the specific action which should have been taken. Such cases are, however, more apparent than real exceptions to the rule, because, when only one course is open to the court upon the facts presented, the pursuance of that course becomes the plain and absolute duty of the court and the refusal becomes in effect a failure to perform a duty within its jurisdiction."

In *Castello v. St. Louis Circuit Court*, 28 Mo. 274, in speaking of the action of the court in determining that a conditional mandamus should be awarded, it is said: "This determination was based upon the principle that where an inferior judicial tribunal declines to hear a case upon what is termed a preliminary objection, and that objection is purely a matter of law, a mandamus will go if the inferior court has misconstrued the law. If the circuit court declined to go into the merits of the case because the party complaining had not given the notice required by the statute, that was a preliminary objection upon a point of law which this court can review upon a writ of mandamus; and, if the circuit court called for a notice which the statute did not require, the mandamus ought to be made peremptory."

Likewise in the Matter of *Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211, the Supreme Court, on a petition for a writ of mandate, directed the circuit court to set aside an order of dismissal and to take jurisdiction of the bill as against the defendant; the court declaring that the reasons stated were "conclusive in favor of issuing a writ of mandamus to the circuit court to set aside the order of dismissal, and to take jurisdiction of the bill as against the defendant corporation, even if the appearance in its behalf in the court had been only a special appearance for the purpose of moving to dismiss the bill for want of jurisdiction."

In *Heinlen v. Cross*, 63 Cal. 44, a writ of mandate was issued directing the judge of the superior court to proceed to hear and determine the issue raised by the return to an order to show cause why a certain party should be not be punished for contempt in disobeying an order of the court. At the time and place appointed for said hearing, the agent of the defendant had appeared and made a certain statement to the court, whereupon the court dismissed the proceedings and discharged the agent on the ground that the process of contempt was a proceeding in the action and that by the appeal all proceed-

ings under the judgment had been stayed. The Supreme Court declared: "Had the action of the court below been in the exercise of a judicial discretion, of course mandamus would not lie to compel the court to proceed in the matter. But it is perfectly manifest that the action of the court in dismissing the proceeding was based on a supposed want of power occasioned by the appeal and the incidental stay of proceedings wrought by the execution of the undertaking on appeal." The court held that the injunction was not superseded by virtue of the appeal, and that it was the duty of the court to inquire into the facts, and this it was commanded to do. In *Temple v. Superior Court*, 70 Cal. 211, 11 Pac. 699, it is said: "The facts stated bring the case clearly within section 1210 of the Code of Civil Procedure and under such circumstances the court cannot, by holding without reason that it has no jurisdiction of the proceeding, divest itself of jurisdiction, and evade the duty of hearing and determining it."

The subject is considered more elaborately in *Scott v. Shields*, 8 Cal. App. 12, 96 Pac. 385, and a conclusion reached therein in harmony with petitioner's contention here. We think the learned trial judge misconstrued the provisions of the statute, and that he should have proceeded with the hearing of the contest. It is directed therefore that the alternative writ be made peremptory.

We concur: CHIPMAN, P. J.; HART, J.

15 Cal. App. 216

SOUTHERN PAC. R. CO. v. REIS ESTATE CO. (Civ. 900.)

(Court of Appeal, Second District, California.
Jan. 27, 1911. Rehearing Denied by
Supreme Court March 28, 1911.)

1. EMINENT DOMAIN (§ 246*)—CONDEMNATION PROCEEDINGS—DISMISSAL AND ABANDONMENT.

In condemnation proceedings, the plaintiff may abandon his claim to the property, and ask a dismissal within 30 days after entry of judgment.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 647-657; Dec. Dig. § 246.*]

2. EMINENT DOMAIN (§ 265*)—DISMISSAL AFTER JUDGMENT—COSTS.

The court, on motion of plaintiff after judgment in condemnation proceedings, "now orders said action to be dismissed on the terms and conditions hereinafter mentioned. Wherefore, by reason of the law and the premises, it is" adjudged that defendant recover costs and specified expenses of preparing for and defending the action, and an attorney's fee stated, and "that this action be and the same hereby is dismissed." *Held*, that the dismissal was absolute and effective immediately, and was not upon terms, so that the award of expenses and attorney's fees was in excess of the amount authorized, which is limited by statute to costs.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 690-693; Dec. Dig. § 265.*]

3. EMINENT DOMAIN (§ 246*)—DISMISSAL AFTER JUDGMENT—GROUNDS.

Where plaintiff in condemnation proceedings moved, after judgment, for dismissal, stating that it would abandon all claim to the property, a dismissal was properly granted.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 647-657; Dec. Dig. § 246.*]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by the Southern Pacific Railroad Company against Reis Estate Company. From a judgment for defendant, plaintiff appeals. Reversed.

Rehearing denied; Beatty, C. J., dissenting.

See 114 Pac. 810.

W. H. Spencer, for appellant. A. E. Campbell and Wm. Shipsey, for respondent.

ALLEN, P. J. The action was one instituted by plaintiff in the exercise of the right of eminent domain. The cause proceeded to a trial before a jury and a verdict fixing the amount of compensation and damages. Within 30 days thereafter, and before any further proceedings were had, plaintiff moved the court to dismiss said action upon the grounds "that the damages and values fixed by the jury were excessive, and a dismissal of the case was an abandonment by the plaintiff of its claim for the property." Defendant objected to such dismissal and moved for a judgment to be entered upon the verdict, but, in the event the same should be denied, asked that the dismissal be ordered upon terms and conditions which involved the payment of costs and defendant's reasonable expenses in preparing for and defending the action, including \$29 for surveying and engineering work and maps thereof, and \$1,000 attorney's fees, and that plaintiff be precluded from hereafter commencing another action to condemn the same strip of land here sought to be condemned, or any strip of land in that vicinity across the land of said defendant. These motions were heard and submitted. The court overruled defendant's objection to a dismissal, and "the court now orders said action to be dismissed on the terms and conditions hereinafter mentioned. Wherefore, by reason of the law and the premises, it is considered, adjudged, and decreed as follows: That defendant Reis Estate Company do have and recover from said plaintiff its costs and disbursements herein, taxed at \$225; also its necessary and reasonable expenses in preparing for and defending this action, namely, \$29 for surveying and engineering work and maps thereof, and \$750 attorney's fees; that this action be and the same is hereby dismissed." Plaintiff appeals from that part of the judgment by which it was and is adjudged that defendant do have and recover from plaintiff its necessary and reasonable expenses in preparing for and defending this action,

namely \$29 for surveying and engineering work and maps, and \$750 attorney's fees.

It is insisted by appellant that, having abandoned its claim to the property within 30 days succeeding the trial, it was entitled to have its action dismissed upon payment of the costs, and that the court was without authority to include in such judgment any penalty or amount in excess of such costs. Upon the other hand, it is respondent's contention that the dismissal was a conditional one, to be made and entered upon payment of the sums ordered by the court, and that such conditional dismissal was within the discretion of the court, and that no abuse of discretion appearing it must be assumed upon this appeal that the same was properly exercised. We think it unnecessary to determine the character of right with reference to dismissal which a plaintiff may possess in proceedings of this character after verdict and before final decree of condemnation. [1] That he is entitled to abandon the claim to the property and ask a dismissal before the expiration of 30 days from the entry of the judgment has been determined in *Pool v. Butler*, 141 Cal. 46, 74 Pac. 444. [2] Assuming, without deciding, that such right of dismissal is within the discretion of the court only, and that in its exercise the court may impose such terms as in its judgment may be proper, and when so imposed will not be disturbed, unless an abuse of discretion is made to appear, nevertheless, it appears from the judgment entered in this case that the same was not upon terms or conditions, but, upon the contrary, was an order of dismissal immediately effective, and in connection with which a judgment for the expenses incidental to the trial was rendered. We recognize a marked distinction between a conditional dismissal, the effect of which is to order a dismissal to be entered upon the performance of certain conditions, and a dismissal ordered as appears by this record. In the first instance, the dismissal is not effective until the conditions are performed; in this case the dismissal was ordered without the performance of the conditions and an effort made to render a judgment for an amount in excess of that which a court is authorized to order upon an absolute dismissal. There is no authority in the statute authorizing a court to render a judgment for attorney's fees in connection with an unconditional order dismissing a proceeding in condemnation, whatever may be its authority in regard to imposing payment thereof as a condition precedent to dismissal.

We are not in sympathy with respondent's contention that the record does not disclose an abandonment of the claim to the property, and such an abandonment as would preclude another action of the same character. [3] We are of opinion that the statement in open court, made by plaintiff in connection with

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

its motion to dismiss, to the effect that if such motion was granted it would abandon all claim to the property, amounted to such an abandonment as would warrant the order of dismissal. In our opinion, therefore, when the court made its order of dismissal, so much of the judgment awarding damages in excess of costs was erroneous.

It is ordered, therefore, that the judgment of the court for \$29 engineering fees and \$750 attorney's fees be reversed.

We concur: SHAW, J.; JAMES, J.

15 Cal. App. 216

SOUTHERN PAC. R. CO. v. REIS ESTATE CO. (L. A. 2583.)

(Supreme Court of California. March 29, 1911.)

In Bank. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

On petition for rehearing. Petition denied. For former opinion, see 114 Pac. 809.

W. H. Spencer, for appellant. A. E. Campbell and Wm. Shipsey, for respondent.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause. It is not decided, and I do not think it ought to be held that, where the whole controversy in a condemnation case is over the compensation to which the landowner is entitled, the plaintiff has the unqualified right to dismiss the proceeding upon payment of costs after he has subjected the defendant to heavy expenses in addition to court costs in the legitimate effort to prove the loss and damage that he will sustain in consequence of the condemnation sought. This was the main question in the case, but it is left undecided because, as the district court holds, conceding the power of the superior court to make the order of dismissal conditional, it has made it unconditional. I do not so construe the order. It was clearly intended to be conditional, and the form in which it was entered does not forbid that construction, or deprive it of that effect, if, as conceded for the purposes of the decision, it was in the power of the court to give it that effect.

(159 Cal. 401)

In re HANSON'S ESTATE.
HANSON et al. v. JORDAN et al.
(S. F. 5,211.)

(Supreme Court of California. Feb. 20, 1911.
On Rehearing March 22, 1911.)

1. APPEAL AND ERROR (§ 863*)—SCOPE OF REVIEW—DECREE IN FORMER PROCEEDINGS.

On appeal from a decree in proceedings to terminate a trust, appellant cannot raise the question of the validity of an order of court in

a former and entirely independent proceeding based on a separate and distinct petition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3487; Dec. Dig. § 863.*]

2. APPEAL AND ERROR (§ 863*)—SCOPE OF REVIEW—APPEAL FROM PART OF JUDGMENT—CONCLUSIVENESS OF OTHER PORTION.

Where no appeal was taken from that portion of the decree adjudging that a trust terminated on a certain day, that portion of the decree was final and conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3450; Dec. Dig. § 863.*]

3. TRUSTS (§ 315*)—ACCOUNTING BY TRUSTEES—CONCLUSIVENESS.

Where trustees in their first account credited themselves with compensation for a certain period, which was allowed by the court and no appeal was taken, such allowance was conclusive.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 315.*]

4. TRUSTS (§ 60*)—DURATION.

Where a will provided that property should be held in trust for five years from the date of the entry of a decree of distribution of decedent's estate, the trust continued five years from the entry of the decree of distribution, though such decree was made several months before entry.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 82; Dec. Dig. § 60.*]

5. TRUSTS (§ 315*)—COMPENSATION OF TRUSTEES—PROVISIONS OF WILL.

Where a will provided that the property should be held by trustees for five years from the entry of a decree of distribution of decedent's estate, and that the trustees should receive compensation of \$500 per month each, their right to such compensation was limited to 60 months, and for any further services by the trust being prolonged their compensation must rest upon an award of court on quantum meruit.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 433; Dec. Dig. § 315.*]

6. TRUSTS (§ 227*)—EXPENSES OF TRUSTEE—ATTORNEY'S FEES—RESISTING TERMINATION OF TRUST.

Where a trust by its terms was not to terminate until a certain time and proceedings were brought before that time to terminate it, the trustees were entitled to an allowance of attorney's fees in resisting the proceedings.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 324; Dec. Dig. § 227.*]

Lorigan, Angellotti, and Sloss, JJ., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Petition by William H. Hanson and another against William H. Jordan and another, as trustees under the last will of Charles Hanson, deceased, for a final account, and for termination of the trust and distribution. From that part of the decree making certain allowances to said trustees, petitioners appeal. Affirmed.

The opinion of Lorigan, J., in department, concurred in by Melvin and Henshaw, JJ., is as follows:

These are two appeals taken from an allowance of certain sums to William H. Jordan and S. G. Murphy, as trustees of a trust created by the last will of Charles Hanson,

deceased, and of which they, together with the appellant H. C. Chesebrough, were the trustees.

Charles H. Hanson died in the city and county of San Francisco on March 31, 1898, leaving a will with an accompanying codicil. He appointed as his executors H. C. Chesebrough and S. G. Murphy, and by the terms of his will created a trust as to certain shares of the capital stock of the Tacoma Mill Company, and appointed said H. C. Chesebrough and S. G. Murphy, together with William H. Jordan, as the trustees of said trust. The will with the codicil was duly admitted to probate, and letters testamentary issued to the executors nominated in the will. The trust clause of the will declared:

"Ninth. I hereby give and bequeath to H. C. Chesebrough, of Oakland, Samuel G. Murphy and William H. Jordan, of San Francisco, all the interest which I may possess at the date of my death in and to the capital stock of the said Tacoma Mill Company, after the payment of all my just debts, funeral expenses and the foregoing legacies, the same to be held by them in trust for the period of five (5) years from and after the date of the entry of this decree of distribution of my estate, or until the death of my son, William H. Hanson, should he die prior to that time."

As to the beneficiaries of the trust, the trust clause provided that, should the testator's son, W. H. Hanson, be living at the expiration of said five years, the trust property should be delivered to him, and thereupon the trust should cease and terminate; that, in the event of his death prior to the expiration of said five years from the date of entry of the decree of distribution, the trustees should deliver all the trust property to the testator's wife, Charlotte Hanson, if then living, or, if she be dead, the said trust property should be delivered to H. C. Chesebrough, and thereupon the said trust should terminate. The trust clause also provided for the manner in which the trust property should be managed, and for the discharge of active duties on the part of the trustees relative to it. It is unnecessary to set forth these provisions in particular, as the conclusion we reach on this appeal makes a consideration of them unnecessary.

In the codicil to his will the testator provided, with respect to compensation to be paid to the trustees for their services as such trustees, as follows: "To H. C. Chesebrough, Samuel G. Murphy, and to William H. Jordan, the sum of six thousand (\$6,000) dollars per annum during the full term of their trusteeship, and that said sum of money shall be so paid to each of said trustees in equal monthly installments."

On February 5, 1903, a decree of distribution of the estate was made, under which there was distributed to the trustees named in the will by virtue of the trust clause re-

ferred to, 3,749 shares of the Tacoma Mill Company stock; this constituting the trust fund to which the trust clause related. The decree of distribution was not, however, in fact entered until June 23, 1903—more than four months after it had been made, but immediately on the making of the decree of distribution the executors delivered the trust funds to the trustees.

Two accounts were filed by the trustees in the matter of the trust prior to June 25, 1908, in which they credited themselves with compensation as such trustees in the sum of \$500 per month from February 5, 1903, to November 5, 1908, which included compensation from the date of the making of the decree of distribution to its entry. These accounts were settled and no appeals taken from the orders of settlement.

The widow of the deceased, Charlotte Hanson, named as one of the beneficiaries of the trust, died prior to the making of the decree of distribution and commencement of the trust term, and, on February 5, 1908, H. C. Chesebrough, another of the beneficiaries (also one of the trustees), relinquished to W. H. Hanson, the only other beneficiary, all his interest in the trust property, thus constituting W. H. Hanson the sole beneficiary of the trust fund.

It appears in a general recital in the decree, from particular portions of which these appeals are taken, that, subsequent to his relinquishment of his interest as beneficiary in favor of Hanson, and some time between February 5, 1908, and June 23d of that year, Chesebrough, as trustee, applied to the court to have the trust declared terminated, which application was denied. Thereafter, and on June 25, 1908, the appellant W. H. Hanson alone, as a sole beneficiary, filed a petition for an order in the matter of said trust, requiring the rendition of a final account of the said trustees; prayed also for a decree declaring the trust terminated as of February 5, 1908, and for a distribution of the trust property to him as the sole beneficiary under the trust.

The answer of the trustees W. H. Jordan and S. G. Murphy to this latter application practically set up the facts as heretofore stated, and alleged that the trust terminated under the terms of the will on June 23, 1908, and not on February 5, 1908, as claimed by the petitioner. In both answers a claim for compensation for trustees from February 5, 1908, to June 23, 1908, was made, and a further claim on the part of W. H. Jordan for the sum of \$500 expended by him for attorney's fees in resisting the application previously made by their cotrustee, H. C. Chesebrough, to have the trust terminated.

The trustee H. C. Chesebrough in his answer joined with W. H. Hanson in his application to have it determined that the trust terminated on February 5, 1908, made no claim for fees after February 5, 1908, and rendered an account of receipts and disburse-

ments, from which it appeared that there was in the hands of the trustees 3,749 shares of the capital stock of the Tacoma Mill Company and \$31,954.23 in cash as the trust fund. The court on the hearing of the petition and answers settled the accounts of the trustees, allowed S. G. Murphy and W. H. Jordan fees as such trustees for the period between February 5, 1908, and June 23, 1908, of \$2,299.88 each, on a basis of \$500 per month or \$6,000 per annum, and allowed trustee W. H. Jordan an additional sum of \$500 for the services of his attorney, as prayed for in his answer, declared the trust terminated as of June 23, 1908, and that the beneficiary W. H. Hanson was entitled to all the trust property.

These appeals are from so much only of the order as allows fees to the trustees S. G. Murphy and W. H. Jordan between February 5, 1908, and June 23, 1908, and allowing an additional sum of \$500 to W. H. Jordan for fees of his attorney, and are taken by both Chesebrough, as one of the trustees, and Hanson as the sole beneficiary.

The first contention of the appellants is that the court erred in denying the original application of Chesebrough as trustee for a decree terminating the trust, which proceeding is referred to in general terms in the present decree. They insist that after the death of Mrs. Charlotte Hanson and the relinquishment to W. H. Hanson of his interest in the trust property by the only other beneficiary, Chesebrough, it was the duty of the court on application therefor to terminate the trust. This proposition is argued at length by counsel for appellants, but we are at a loss to perceive how any such question can be presented or considered on this appeal. All we have in the record as to any proceeding brought for the termination of the trust anterior to the proceeding in which these appeals are taken is a general recital in the decree appealed from that a proceeding of that character was instituted and was unsuccessful. This recital is only made in connection with an allowance by the court to the trustee Jordan of fees to compensate his attorney in resisting that petition for the termination of the trust. If a prior petition for the termination of the trust was made (and the recital in the decree discloses that there was), it was a proceeding independent of the present proceeding, and when denied it was the duty of the petitioner to appeal directly from the order denying that application, if dissatisfied with it. He cannot raise the question of the validity of the order of the court denying his former petition in this proceeding, which is entirely independent of the former one, based on a separate and distinct petition and involving an entirely different decree.

Aside from this, however, the only question which could have been involved in the prior proceeding was whether the trust terminated on February 5, 1908, or June 23,

1908. But that was the precise question which in the subsequent petition by the appellant Hanson, joined in by Chesebrough and culminating in the present decree, was presented to the court for determination; the petitioner and Chesebrough claiming that the trust terminated on February 5, 1908, and the respondents Murphy and Jordan, as trustees, claiming that it terminated on June 23, 1908. On this question the trial court, in the decree from portions of which these appeals are taken, adjudged "that the said trust created by the last will and testament of Charles Hanson, deceased, terminated on the 23d day of June, 1908." No appeal is herein taken from this portion of the decree, and that being true the adjudication by the court that the trust terminated on June 23, 1908, is final and conclusive on that question.

The decree of the court as to when the trust terminated not being open to question, it would appear that the compensation of the trustees as allowed by the court, and the correctness of which appellants question, is in accordance with the express provisions of the trust and the will on the subject. The trust provides that the property shall be held "for the period of five years from and after the date of the entry of this decree of distribution of my estate," and the provision of the will with respect to the trust clause provides that the trustees shall receive as compensation for their services \$6,000 per annum, payable in monthly installments during the full term of their trusteeship. As the trust did not terminate until June 23, 1908, it is quite obvious that the trustees were, by the express terms of the will, entitled to compensation up to that date, and that the allowance for the period of which appellants complain, from February 5, 1908, to June 23, 1908, was in strict compliance with the terms of the trust. This seems so plain as to make further discussion on the subject unnecessary.

Nor could the correctness of the determination of the court be affected by the fact that the trustees took the property and held it as such from the date of the making of the decree of distribution until the entry thereof; the latter date being the time when, by the language of the trust, the trust term created by the testator was to commence. It is not pretended that the delay in entering the decree of distribution was occasioned by any act of either the executors or the trustees. It was the duty of the trustees to accept the trust funds when the decree of distribution was made and the executors prepared to turn them over to them, and to hold them until the entry of the decree, from which date their active duties as trustees were to commence. They were entitled to compensation during that period, and it was proper for the court to make an allowance to them on the basis prescribed by the testator for their compensation during the five years

after the entry of the decree. Anyhow, if there could be a question on this point, inquiry into it would be foreclosed by the order of the court made in the settlement of the first account of the trustees, in which they credit themselves with compensation for that period, which was allowed by the court, and from which order of allowance no appeal was taken.

With respect to the allowance by the court to the trustee Jordan of the sum of \$500 as fees for his attorney in resisting the effort of appellant Chesebrough in the first proceeding to terminate the trust. As by the terms of the trust it was not to terminate until the expiration of five years from the date of entry of the decree of distribution, it was the duty of the trustee to resist any attempt to terminate it before that period. It is well settled by the authorities that in the discharge of such duty a trustee has a right to employ attorneys, and to have an allowance in a reasonable amount made by the court from the trust funds for their compensation. No claim is made that the allowance is unreasonable.

The portions of the order appealed from are affirmed.

Bourdette & Bacon, for appellants. Charles S. Wheeler and R. H. Lloyd, for respondents.

HENSHAW, J. These are appeals taken from the order of court making certain allowances to William H. Jordan and S. G. Murphy, trustees under the will of Charles Hanson, deceased. The appellants are W. H. Hanson, the sole beneficiary of the trust, and the third trustee, H. C. Chesebrough.

By his will, duly admitted to probate, Charles Hanson nominated H. C. Chesebrough and S. G. Murphy executors. They qualified and acted. Their attorney was William H. Jordan. By the will the following trust was declared:

"Ninth: I hereby give and bequeath to H. C. Chesebrough of Oakland, Samuel G. Murphy and William H. Jordan of San Francisco, all the interest which I may possess at the date of my death in and to the capital stock of the said Tacoma Mill Company, after the payment of all my just debts, funeral expenses and the foregoing legacies, the same to be held by them in trust for the period of five (5) years from and after the date of the entry of this decree of distribution of my estate, or until the death of my son, William H. Hanson, should he die prior to that time."

Of the beneficiaries and purposes of the trust no more need be said than that it is conceded that the trust has been executed, and that appellant William H. Hanson is the sole beneficiary thereof, and is now entitled to the full ownership of the trust property, relieved from the trust. By codicil the compensation of the trustees was provided for in the following language: "To H. C. Chesebrough, Samuel G. Murphy, and to William H. Jordan, the sum of six thousand (\$6,000)

dollars per annum during the full term of their trusteeship, and that said sum of money shall be so paid to each of said trustees in equal monthly installments." It is to be noted that two of the trustees were the executors of the estate, and that the third trustee is the attorney for the executors. On the 5th day of February, 1903, a decree of distribution was made and given in the superior court, by which the executors were ordered to distribute to the trustees the property of the trust, which consisted wholly and solely of 3,749 shares, of the par value of \$100 each, of the capital stock of the Tacoma Mill Company. Neither the executors nor Mr. Jordan, their attorney, nor the same persons as trustees, caused this decree to be entered until June 23, 1903, notwithstanding which the executors, upon the advice of their attorney, made over the trust property to themselves as trustees upon the 5th day of February, 1903, and proceeded to administer the trust. The decree was actually entered upon June 23, 1903. Upon the 8th day of February, 1904, the trustees filed their first annual account, and on the 23d day of February, 1904, the account was settled and allowed and has become final. In this account of February, 1904, the trustees credited themselves, as compensation for their services, with the sum of \$500 each, monthly, beginning with February 5, 1903. Following this the trustees made no report or account to the court of their dealings with the trust until after the 5th day of February, 1908, when they presented their report and account for the preceding four years, including their claims for fees at the rate of \$500 a month up to February 5, 1908. This account was allowed and settled and has become final. On the 25th day of June, 1908, William H. Hanson, the sole beneficiary of the trust, filed his petition for an order, citing the trustees to render their final account and show cause why the trust should not be terminated and the property distributed to him. The trustees responded, the trustee Chesebrough disclaiming all compensation from February 5, 1908, the other two trustees claiming compensation at the rate fixed by the will from February 5, 1908, till June 23, 1908; the latter date being five years after the decree of distribution was actually entered. The court found the trust to have been terminated on the 23d day of June, 1908, and allowed this compensation. The correctness of its ruling in this regard presents the main contention upon this appeal.

Under the trust Chesebrough had a contingent interest in its property, depending upon the death of William H. Hanson before the termination of the trust. He released and relinquished all this interest to William H. Hanson immediately after the 5th day of February, 1908, and petitioned the court to have the trust terminated. This was opposed by the other trustees, Jordan and Murphy, and an allowance of \$500 is made to Jordan

as necessary attorney's fees expended in so resisting Chesebrough's application.

Of the trustees, Mr. Murphy was a banker, who spent no small part of the time of the life of this trust in Europe; Mr. Jordan was an attorney at law; and Mr. Chesebrough was the manager of the Tacoma mill, the stock of which constituted the trust property. This property was delivered to and remained entirely in the custody and control of the trustee Chesebrough. He collected the dividends and made the disbursements. At the time of the settlement of the trust, the corpus of the trust consisted of this stock and certain moneys by way of accumulated dividends. One of the purposes of the trust was by the testator declared to be his desire that the stock should be preserved in its integrity, and the interests of the Tacoma Mill Company advanced, as a monument to his memory. What was practically done to this end it would seem was done by Mr. Chesebrough. These considerations are adverted to solely for the purpose of showing that the trust was not of such character as to impose any considerable labor upon the trustees, or to call for much or any care by way of its management. Shares of stock of a milling company were delivered to one of the trustees who was the manager of this company, who alone kept it, received the dividends, made the disbursements to the trustees of their monthly compensation, and placed the rest of the money in bank. Under these circumstances, it is quite apparent that the munificent compensation which the will bestowed on the trustees was in the nature of an honorarium. By the order of the court in probate, there has been allowed to them compensation at the rate of \$500 a month from February 5, 1903, the date of the making of the decree of distribution, to June 23, 1908, five years after the decree of distribution was entered; that is to say, compensation has been awarded for full five years from the date of the entry of the decree, and for nearly five months additional, being the time between the date of the making of the decree and the date of its entry.

We conceive the important question in this consideration to be, not the duration of the trust, but the length of time for which the trustees were to receive the compensation fixed by the will. The will provides for a trust to endure for five full years from the *entry* of the decree of distribution, and it provides that the trustees should receive compensation at the rate of \$500 per month for the full term of the trust. Clearly this means that in the view of the testator the full term of the trust was to be five years; no more, no less. If by accidents or contingencies, as by litigation, which might necessarily prolong the life of the trust, its duration was extended, there is nothing in the will to lead to the belief that the testator contemplated a fixed remuneration at the rate of \$500 a month for any prolonged or

indefinite period. Considering the services rendered, the remuneration was not unlike a bequest to each of \$30,000, payable in monthly installments of \$500. If this was indeed the testator's view, and it may well be said that it was his view, as compared with the other which would subject the trust estate to the enormous drain of \$1,500 a month for an undetermined and indeterminable period—that is, so long as the trust might last—then it follows that under the will the trustees were entitled to a compensation of \$500 a month for 60 months, and that under the will they were entitled to no more. Any other further or additional compensation beyond this must rest, not upon the provisions of the will, but upon the value of the services actually rendered, to be fixed by the court. We are the more confirmed in our view that this is the true construction by consideration of the facts actually presented. It was unquestionably the duty of the executors, who were themselves to be the trustees, and of the attorney for the executors, who was himself to be a trustee, to see that the decree of distribution was promptly entered. Their right in law to act as trustees would be founded upon this entered decree. Their right to compensation should in law have begun from their formal assumption of trusteeship after decree of distribution entered. They, and no one else, failed to have the decree entered, notwithstanding which they made over to themselves the trust property and proceeded with the execution of the trust. They base their claim for compensation, not from the time when, under the will, it was declared the trust should begin, but from the time when they caused it to begin. Under their contention, if by their remissness the decree of distribution had not been entered for 10 years after the date of its making, they would be entitled to compensation at the rate fixed by the will for 15 years. Such a construction would be a plain temptation to the trustees to defeat, to their own advantage, the manifest intent of the testator.

The fact that the court upon the filing of their first account in 1904 allowed them compensation fixed by the will for the time intervening between the actual commencement of the trust and June 23d, when by the will its commencement was contemplated, is in no way determinative of their right to future compensation. For if, as we have said, the will contemplated a compensation of \$500 a month for five years, it was a matter of trifling significance when the trust was finally brought to a close whether they had received any or all of this sum by way of advancement. We hold, therefore, that, as concerns the life of the trust, the controlling consideration under the will was that it should exist for five years after the entry of the decree, though of course it might, by reason of litigation, have been still further prolonged. But we hold as to the compensation

of the trustees that the controlling consideration was not the time after entry, but was the fixed period of five years; that when the trustees had received compensation for the full five years, compensation for any additional term to which the trust may have been prolonged should rest, not upon the terms of the trust, but upon an award of the court in quantum meruit.

The \$500 attorney's fees made chargeable against the trust property for the successful opposition of the trustees Murphy and Jordan to the petition for the termination of the trust are allowed. That judgment having become final, the inquiry here is not open as to its soundness, and notwithstanding that it was an effort by one of the trustees, and not by the beneficiary, to terminate the trust, still the action of the resisting trustees must be held to have been the successful defense of the trust. Their legitimate and necessary disbursements in this regard are therefore chargeable against the trust property.

So much of the order and decree appealed from as allows the trustees compensation under the will after receiving the \$30,000 for the five years as fixed by the will is hereby reversed, with directions to the trial court to allow the trustees compensation for the extended period of the life of the trust over five years in such sum as it shall find merited.

We concur: BEATTY, C. J.; MELVIN, J.; SHAW, J.

LORIGAN, J. I dissent and adhere to the views expressed in the opinion filed on the original submission of the cause.

We concur: ANGELLOTTI, J.; SLOSS, J.

On Rehearing.

BEATTY, C. J., and HENSHAW, SHAW, and MELVIN, JJ. Counsel for respondents in his petition for a rehearing of this cause implicitly concedes that we have given a correct construction to the will of Charles Hanson, but thinks that, in our effort to do what we conceive to be substantial justice, we have violated the rule of *res judicata*—a rule the potency of which, as he says, is sufficient *ex albo facere nigrum, ex nigro album, ex curvo rectum, ex recto curvum*. This criticism is based upon a construction of the decree of distribution, which is at variance with our construction of the will. But we think this supposed incongruity is far from obvious.

If the testator in fixing the commencement of the five-year trust term at the date of the "entry" of the decree of distribution meant the time when the law made it the duty of the clerk to enter the decree in contradistinction to the time to which a careless, incompetent, or corrupt official might postpone the performance of that sim-

ple ministerial and imperative duty; if, in other words, his plain intention was that the commencement of the trust term should coincide with the close of the administration, when the exigencies of the case would require the active duties of his chosen trustees to begin—we see no reason why the language of the will which manifests this intent should receive a different construction when used in the decree of distribution. There is no leaning in favor of the view that a decree of distribution has misconstrued a will, or that it contains provisions which will frustrate the intentions of the testator. On the contrary, the presumption is quite the reverse. That the will not only may be construed as here indicated, but that any other construction would have imperiled one of the most important of its provisions is apparent. The right of the primary beneficiary of the trust, William H. Hanson, the only son of the testator, to take the corpus of the trust estate depended upon his surviving the trust term. If the beginning of the term, and consequently its end, could be postponed by the delinquency of the clerk for nearly five months, it could in the same way have been postponed for five years, and if the son had died within the extended period the corpus of the trust estate must have gone, not to his heirs or devisees, but to the heirs or devisees of the widow if she survived him, or to the heirs or devisees of Chesebrough if she did not. Just suppose, therefore, that William H. Hanson had died between the 5th day of February and the 23d day of June, 1908, leaving a widow and children, and the contest had been between his heirs and Chesebrough under the terms of the will and decree of distribution, would any court say that the testator when he used the expression "entry of this decree of distribution" had in mind the time when a careless, incompetent, or dishonest clerk might choose to enter it, rather than the time when it would be his duty to enter it? We scarcely think so. If this is a correct construction of the will, why should the decree of distribution receive a different construction? It uses the same language that is found in the will, and when it says "entry of this decree" why may we not construe those words as referring to the time when the decree would be entered if the law was obeyed, and why especially should we not give it that construction when both the court who made the decree and the trustees who obtained it, acted upon that construction; the trustees in claiming and receiving, and the court in awarding, the compensation of \$1,500 per month from the date of the rendition of the decree? To answer this question as we have answered it we have only to presume that in framing the decree of distribution the court acted upon the assumption that the clerk would perform his duty, and in approving the accounts of the

trustees it acted upon the equitable maxim that what ought to have been done was done.

The petition for a rehearing is denied.

(159 Cal. 569)

HAESE v. HEITZEG et al. (Sac. 1,813.)

(Supreme Court of California. March 16, 1911.)

1. APPEAL AND ERROR (§ 1071*)—REVIEW—HARMLESS ERROR—IMMATERIAL FINDINGS.

Erroneous findings, if immaterial, are not ground for reversal of a judgment on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.*]

2. JUDGMENT (§ 677*) — CONCLUSIVENESS—PERSONS CONCLUDED—PRIVITY.

In an action to quiet title, defendant claimed title under a sale of the land by an irrigation district for nonpayment of assessments, and it appeared that a previous action had been brought against the district and its board of directors to declare an assessment levied by the district void, and annul its organization, and to declare that the plaintiff sued on behalf of himself and all others similarly situated as taxpayers of the irrigation district, and a delinquent assessment list attached to the pleadings included the name of the defendant, who, however, was not shown to have had notice of or to have taken any part in the proceedings, in which judgment went against the district. *Held*, that defendant was not in "privity" with the parties to the former judgment against the district, and was not estopped in this action from relying on the sale by the district and its deed to him.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062, 1193; Dec. Dig. § 677.*]

3. JUDGMENT (§ 677*) — CONCLUSIVENESS—PERSONS CONCLUDED—PERSONS REPRESENTED BY PARTIES.

Where one plaintiff belonging to a class as creditors, taxpayers, etc., brings action in behalf of himself and all others similarly situated, the judgment rendered is binding on others of the class who accept the representation and connect themselves with the litigation by coming into the suit or seeking to share in the fruits of the judgment; but it can have no binding effect on those who do not participate in the proceedings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1193; Dec. Dig. § 677.*]

4. JUDGMENT (§ 289*) — ENTRY — JUDGMENT ROLL—DATE.

Where a judgment roll shows two judgments and the record is silent in reference to the reason therefor, the latter in point of time must be deemed the true and final judgment in the case.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 570; Dec. Dig. § 289.*]

5. STIPULATIONS (§ 18*) — EFFECT — MATTERS CONCLUDED — STIPULATION AS TO ISSUES AND EVIDENCE.

Defendant in an action to quiet title claimed under a sale and deed from an irrigation district, and the parties stipulated that since a certain date the irrigation district had been and was still acting in good faith and transacting the business and exercising the franchises of an irrigation district. *Held*, that the parties, having stipulated as to the fact of the existence of the district, could not contradict their admissions by means of a judgment, since the stipulation was binding upon the parties for

purposes of the trial, and precluded any finding in opposition thereto.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 41-54; Dec. Dig. § 18.*]

6. JUDGMENT (§ 713*) — CONCLUSIVENESS—PERSONS CONCLUDED.

In an action to quiet title, the defendant claimed under a sale from an irrigation district, and it appeared that the directors of the district pursuant to Irrigation Act (St. 1897, c. 189) § 68, had commenced action to obtain confirmation of proceedings of the district, and that a judgment of confirmation was entered in 1890, and that on a second hearing in 1898 judgment was entered declaring that the district was never validly organized, and that its proceedings for the issuance of bonds were void. *Held*, that defendant was not estopped from relying on his deed from the district by judgment that the issuance of bonds was void, since before the last judgment was rendered the bonds issued by the district might have come into the possession of bona fide holders, by whom they could be enforced.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 713.*]

7. WATERS AND WATER COURSES (§ 230*) — IRRIGATION DISTRICT—BONDS.

Bonds issued by an irrigation district after a decree confirming its proceedings in the issuance of bonds may be held valid in the hands of bona fide holders and enforceable by levy of assessments to pay interest after a later judgment declaring the issuance of bonds to have been void.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 230.*]

8. APPEAL AND ERROR (§ 1071*)—REVIEW—FINDINGS—FINDING OF MATERIAL FACT—FINDING CONTRARY TO STIPULATION.

In an action to quiet title, where the parties stipulated that an irrigation district under deed from which defendant claimed had been at all times since 1889 "and now is acting in good faith, transacting business, performing the functions and duties and exercising the franchises of an irrigation district under the laws of California," a finding of the court "that it is not now a duly organized and existing irrigation district, and that during said time it has not been acting in good faith in transacting business as such irrigation district," is a finding of a material fact, and, since it is contrary to the stipulation of the parties, is a ground of reversal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1071.*]

Department 1. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Charles A. Haese, Jr., against H. C. Heitzeg and others. Judgment for the plaintiff, and from an order granting defendant Heitzeg a new trial plaintiff appeals. Affirmed.

Mr. Zartman, for appellant. C. L. Russell, for respondents.

SLOSS, J. After judgment in favor of the plaintiff the court below granted the motion of defendant Heitzeg for a new trial. From the order granting this motion the plaintiff now appeals.

The action was one to quiet title to a quarter section of land in Tulare county. The defendant Heitzeg (whom we shall designate herein as the defendant) answered, admitting

that plaintiff had been the owner of the premises prior to June, 1900, but claiming that he, the defendant, had succeeded to such title by virtue of two sales (a) for nonpayment of state and county taxes; and (b) for nonpayment of an assessment levied against the land by the Tulare irrigation district.

The court found against both defenses. No serious question is raised regarding the correctness of the finding that the proceedings for the collection of the state and county taxes were irregular to such an extent as to invalidate the tax deeds under which Heitzeg claims. Upon the other defense the court found against the defendant's allegation that ever since the 2d day of September, 1889, the Tulare irrigation district has been, and now is, a duly organized and existing irrigation district, and that during said time it has been acting in good faith and transacting business as such irrigation district. There is a further finding to the effect that on the 23d day of November, 1898, in a matter entitled "In the Matter of Tulare Irrigation District," case No. 2,329, the superior court of Tulare county adjudged and decreed that said Tulare irrigation district never was, and is not now, duly or regularly organized, and that the same is not now a duly or regularly organized irrigation district. There is a finding that said irrigation district caused to be issued its bonds to the amount of \$500,000 as alleged in the answer, but that said bonds were not issued in the manner or form prescribed by law, and that none of them became or constituted an outstanding indebtedness of said district. The property described in the complaint was assessed to plaintiff during the year 1902 by said Tulare irrigation district, but it is not true, finds the court, that said assessment was duly and properly levied according to law, or that said property was equalized by law. The nonpayment, sale, and the execution of a deed to defendant Heitzeg are found as alleged in the answer. The only other finding that need be noticed here is one that "defendant is estopped from claiming any title or interest in or to said premises by reason of judgments numbered 2,329 and 4,467 of the superior court of the said county of Tulare."

One of the grounds upon which the defendant moved for a new trial was that the evidence was insufficient to justify the finding that the Tulare irrigation district has not been since September, 1889, and that it is not now, a duly organized and existing irrigation district, *and that during said time it has not been acting in good faith and transacting business as such irrigation district.* The bill of exceptions shows that in the course of the trial the parties stipulated "that Tulare irrigation district at all times since the 2d day of September, 1889, has been, and now is, acting in good faith and transacting the business, performing the functions and duties, and exercising the franchises of an irrigation district under the laws of the state of California." That the italicized portion of the find-

ing in question is contrary to this stipulation is, necessarily, conceded by the appellant. It is argued, however, that in view of other findings the one in question is immaterial. If this be so, the error in making the finding in question would not furnish ground for a reversal of the judgment on appeal (*Windhaus v. Bootz*, 92 Cal. 617, 28 Pac. 557; *Tuohy v. Woods*, 122 Cal. 665, 55 Pac. 683), and for like reasons would not justify the granting of a new trial.

The claim that the finding in question is immaterial is based on the further finding that the defendant is estopped by judgments of the superior court of Tulare county, numbered 2,329 and 4,467. We think that neither of these judgments was such as to estop the purchaser under proceedings for collection of delinquent assessments from relying on his deed. Judgment 4,467 was in an action brought by B. W. Jauchius against the Tulare irrigation district and its board of directors to obtain a decree that an assessment levied four years prior to the assessment which resulted in the sale to defendant be declared void, that the bonds of the district be declared not an outstanding indebtedness, and that the organization of the district be annulled. The collector was subsequently brought in as a party defendant. The complaint declares that the plaintiff sues "on behalf of himself and all others who are similarly situated as taxpayers of the above-named Tulare irrigation district," and an exhibit attached to his pleading consists of a delinquent assessment list of the district, including among the delinquent assessments one to H. C. Heitzeg, respondent herein, for seven lots. Judgment in the action went in favor of the plaintiff Jauchius, the judgment reciting an appearance on behalf of the plaintiff and no appearance for the defendants. It is claimed that this judgment operates as an estoppel against the defendant Heitzeg on the ground that he, as an owner and taxpayer in the district, was interested in the action and that it was brought on his behalf. But there is no showing that he had notice of the proceedings or that he appeared or joined in them in any way. Jauchius assumed to institute the action on behalf of himself and others similarly situated. This did not, however, require any one having a like interest to come in and join the plaintiff in the action. "Where one plaintiff belonging to a numerous class, as creditors, bondholders, beneficiaries, and the like, brings an action in behalf of himself and all others similarly situated, the judgment which may be rendered is binding on others of the class who accept the representation, and who connect themselves with the litigation, either by coming into the suit or seeking to share in the fruits of the judgment, or by acquiescing in it. But it can have no binding effect on those who do not participate in the proceeding, do not make proof of their claims, or otherwise join in it." 23 Cyc. 1246; *Pomeroys Remedies*, § 400; *Ex parte Howard*, 9

Wall, 175, 19 L. Ed. 634; *Holderman v. Hood*, 70 Kan. 267, 78 Pac. 838. It follows, therefore, that there is nothing to take the case out of the general rule that a judgment in an action in personam binds only the parties and their privies. Heitzeg occupied no such relation to the action of Jauchius against the irrigation district that the judgment rendered in that case could affect him in any way.

The other judgment relied on as an estoppel (No. 2,329) was a proceeding instituted by the board of directors of the district pursuant to section 68 et seq. of the act for the organization of irrigation districts (St. 1897, p. 254) to obtain a confirmation of the proceedings for the formation of a district and the issuance of bonds. The action was commenced in 1890 and judgment confirming all the proceedings was entered in the same year. The record shows that eight years later several landowners in the district filed an answer denying the validity of the proceedings for the confirmation of the district and setting up certain irregularities in the proceedings for the issuance of the bonds. A second hearing seems to have been had and new findings and judgment filed and entered. The second judgment decrees that the Tulare irrigation district was never validly organized, and that its proceedings for the issuance of bonds are void. We may concede, as is contended by the appellant, that where a judgment roll shows two judgments, and the record is silent in reference to the reason therefor, "the later in point of time must be deemed the true and final judgment in the case." *Galvin v. Palmer*, 134 Cal. 426, 66 Pac. 572; *Paige v. Roeding*, 96 Cal. 389, 31 Pac. 264; *Von Schmidt v. Von Schmidt*, 104 Cal. 547, 38 Pac. 361. Even so, however, we think the judgment in question did not bind defendant as against the stipulated and admitted fact that the district had been, in good faith, exercising the powers and franchises of an irrigation district. The stipulation established for the purposes of the trial the fact that the irrigation district was during all the time material to this discussion a de facto corporation. As such its acts regularly performed were valid. *Tulare Irr. Dist. v. Shepard*, 185 U. S. 1, 22 Sup. Ct. 531, 46 L. Ed. 773. The parties, having admitted the fact of the existence of the corporation, could not be permitted to contradict their admission by means of a judgment or otherwise. The stipulation entered into was binding upon the parties for the purposes of the action, and it precluded any finding in opposition to the stipulated facts. Nor could the other element of the decree, namely, the declaration that the issue of bonds was void, in itself estop the defendant from relying upon his deed from the collector of the district. The proceedings for the issuance of the bonds were taken in 1890. The judgment in question was not rendered until 1898. In the interval the

bonds may have passed into the hands of various bona fide holders. In the hands of such holders they would be valid and binding obligations of the district (*Baxter v. Vineland Irr. Dist.*, 136 Cal. 185, 68 Pac. 601), and valid assessments might be levied to raise the annual interest on such bonds. The judgment in case No. 2,329 that the bonds were invalid is therefore not inconsistent with the fact that such bonds might be enforceable obligations in the hands of bona fide holders. The decree in the confirmation proceedings could not affect the rights of such holders. *Tulare Irr. Dist. v. Shepard*, supra. The decree does not purport to question the validity of the proceedings (subsequent to the issue of the bonds) for levy and collection of the assessments, and there is no evidence in the case to overcome the prima facie showing (see section 48 of the irrigation act) of the regularity of such proceedings which follows from the recitals in the certificate of sale and the deed of the collector.

It follows from what we have said that the finding which was attacked on the motion for new trial—i. e., the one that the district had never been acting and transacting business as an irrigation district—was a finding of a material fact, and that, inasmuch as such finding was contrary to the admission of the parties, the court below was warranted in granting the motion for a new trial.

The order appealed from is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

159 Cal. 516

PIERCE et al. v. CITY OF LOS ANGELES et al. (L. A. 2,420.)

(Supreme Court of California. March 14, 1911.)

1. NEW TRIAL (§ 12*)—STAY OF PROCEEDINGS—CONSTRUCTION OF ORDER.

An order of the superior court made after judgment for defendants, restraining all acts by them of the nature complained of until the further order of the court, must be construed as being operative only for such time as the court retained its jurisdiction to vacate or modify the judgment.

[Ed. Note.—For other cases, see *New Trial*, Dec. Dig. § 12.*]

2. NEW TRIAL (§ 12*)—STAY OF PROCEEDINGS—PENDING MOTION.

In a suit by property owners to restrain a city from imposing a penalty for failure to pay assessments for public improvements, the superior court could, in its discretion, after finding for defendant and dissolving an injunction, grant an order in effect staying all acts by defendant to preserve the status quo pending the hearing of the motion for new trial on the ground of newly discovered evidence; the fact that the stay order was termed a "temporary restraining order" being immaterial.

[Ed. Note.—For other cases, see *New Trial*, Dec. Dig. § 12.*]

3. NEW TRIAL (§ 12*)—STAY OF PROCEEDINGS—PENDING MOTION.

Code Civ. Proc. § 526, prohibiting an injunction to prevent the execution of a public

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

statute by officers of law for the public benefit, would not prevent the granting of the order staying further acts by defendant pending the determination of a motion for new trial; the question involved not being the validity of the statute or the right of the city board of works to act thereunder, but the sufficiency of the proceedings for assessing the property for improvements.

[Ed. Note.—For other cases, see *New Trial*, Dec. Dig. § 12.*]

In Bank. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by H. A. Pierce and others against the City of Los Angeles and others. From an order made after judgment for defendants enjoining them from doing the acts complained of pending a motion for a new trial, and from an order refusing to dissolve such injunction, defendants appeal. Orders affirmed.

Leslie R. Hewitt, City Atty., and Emmet H. Wilson, Chief Deputy, for appellants. H. A. Pierce and Ingall W. Bull, for respondents.

MELVIN, J. An appeal is taken from an order of the superior court, made after judgment had been rendered in favor of the defendants. By said order defendants were enjoined from performing the acts complained of pending a motion for a new trial. There is also an appeal from the order refusing to dissolve this injunction. The one question presented is whether or not the superior court has power to preserve the status of the litigants in this way after judgment and until the motion for a new trial is determined.

The action was by certain property owners who prayed for an injunction restraining the city of Los Angeles and its board of public works from imposing any penalty for the failure of plaintiffs to pay certain assessments declared against their land for public improvements, or from doing any acts which would interfere with or constitute a cloud upon the title to the property in question. The findings and judgment were all in favor of the defendants and the restraining orders which had been in force during the pendency of the action up to the time of the rendering of judgment were dissolved. A few days later, and after the serving and filing of notice of motion for new trial, the court, upon the affidavit and motion of one of the plaintiffs, issued the injunction which became the basis of these appeals.

A question very similar to the one here involved has been recently decided and the leading authorities have been cited and reviewed in the opinion in the case of the City of Pasadena v. Superior Court, 157 Cal. 786, 109 Pac. 620. In that case was considered an order made concurrently with the rendition of judgment preserving the status of the parties litigant. In the case at bar several

days elapsed between the rendition of judgment and the granting of the order. We must therefore consider the power of the superior court in the matter of the restraining order made after judgment. When this case was before the District Court of Appeal, that court properly construed the order in question as a preservation of the status of the matters in litigation pending the determination of the motion for new trial. As we agree with the reasoning and conclusions reached, we adopt a portion of the opinion of the district court of appeal prepared by Mr. Presiding Justice Allen:

"In support of the first proposition [i. e., that the court had lost jurisdiction to issue the injunctive order], this court is cited to *Stoddard v. Superior Court*, 108 Cal. 303, 41 Pac. 278, and *Spears v. Mathews*, 66 N. Y. 127, in each of which cases it is established that 'the court has no power, after judgment has been rendered against a plaintiff and pending an appeal therefrom, to grant an injunction in the same action.' In this case, however, no appeal is shown to be pending, simply an application for a new trial, which is one of the steps recognized under our practice as preliminary to an appeal for certain purposes. It may well be conceded that, after an appeal is perfected, the trial court is thereby divested of jurisdiction to make any further order affecting or modifying the judgment appealed from, or to make orders the effect of which would be to stay proceedings connected therewith. And it may also be conceded that a court, having once determined the issues in a case and rendered a judgment based upon findings clearly showing that no right to an injunction exists, and by an appropriate order has dissolved a previous restraining order, could not in the same action, in the face of such findings and judgment, grant thereafter an injunctive order the effect of which could only be to revive a restraining order once dissolved and found by the court to have been improperly issued. But none of these things of necessity determines that the action of the court in this instance was erroneous. The name given an order does not necessarily determine its character. The all-controlling factor in determining such character is its effect. While the order herein granted and from which the appeal is taken is termed a 'temporary restraining order,' in effect it is but an order preserving the status quo of the matters embraced in the litigation pending the hearing of the motion for a new trial. Our Supreme Court in construing section 197 of the practice act (St. 1851, c. 5), substantially re-enacted in section 664, Code of Civil Procedure, determined that under section 197 a motion for a new trial did not stay proceedings, but that the matter of such stay might be regulated by a rule of court, and, in the absence of a rule of court, a party desiring a stay of proceedings

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pending his motion for a new trial might obtain an order to that effect from the court, which the court has jurisdiction to grant unconditionally or upon terms, according to the circumstances of the case; the matter of such stay being wisely left to the sound discretion of the court. *People v. Loucks*, 28 Cal. 70. The authority of the court to grant a stay seems to be recognized by section 681, Code of Civil Procedure. This stay, which by its terms was until the further order of court, must be accepted as extending the stay only for such time as the superior court retained jurisdiction to vacate or modify the judgment. Whatever stay plaintiff would be entitled to have upon appeal must be controlled by the statutes providing for undertakings on appeal and the powers of the appellate court to make an order operating as a supersedeas. We think that pending proceedings leading up to such an appeal the trial court should have the power, in the exercise of a wise discretion, to maintain the status to the end that a party moving for a new trial might, in the event of its determination in his favor, be protected adequately and fully in his rights. To say that a trial court pending a motion for a new trial upon the ground of newly discovered evidence—in which case often considerable time must elapse in order that affidavits may be prepared and presented and the application for a new trial properly heard—has no authority or jurisdiction to stay the hands of the parties until the determination of such motion, would often violate the principle that for every wrong there is a remedy, and would remove from the power of the trial court the right to fully correct any error which it might subsequently determine had been committed upon the first hearing.”

We now come to the consideration of the second ground for reversal urged by appellants. They cite section 526 of the Code of Civil Procedure which provides that an injunction may not be granted “to prevent the execution of a public statute by officers of law for the public benefit,” their contention being, of course, that public officers are immune from injunctive restraint while acting under a statute presumably for the public benefit. Proceedings of the kind which the court has restrained in this action are in invitum, and the very essence of the litigation is whether or not the steps necessary to acquire jurisdiction were followed by the board of works of the city of Los Angeles in the condemnation of land for street purposes and the apportionment of costs therefor. While the statute is in a sense a public statute and the members of the board of works are public officers, the matters here involved are not the validity of the section of the Code or the right of the public officers to act under it, but the court must ultimately determine the

sufficiency or insufficiency of the proceedings by virtue of which the city and the board of works claim jurisdiction to assess costs of improvement and to do and perform the other acts contemplated by them. The statute above cited cannot mean that a court of equity may not, in a case like this, stay the hands of these officers until it is determined finally and judicially whether or not they are seeking to deprive citizens of property without due process of law.

The orders are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.

(159 Cal. 535)

FINNELL v. FINNELL. (Sac. 1,651.)

(Supreme Court of California. March 14, 1911.)

1. MONEY PAID (§ 1*)—RIGHT TO SUBROGATION.

One who is compelled to pay a debt, or whose property is subjected for a debt which another in good conscience should pay, may recover from such other, the amount so paid.

[Ed. Note.—For other cases, see Money Paid, Cent. Dig. §§ 1-16; Dec. Dig. § 1.*]

2. JUDGMENT (§ 112*)—DEFAULT—EFFECT—NOTES.

One sued on a promissory note executed by him, by defaulting, confesses his liability for the indebtedness represented by the note.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 203-206; Dec. Dig. § 112.*]

3. MONEY PAID (§ 1*)—SUBROGATION OR SURETY.

One who purchased land encumbered by a vendor's lien, securing an outstanding purchase-money note, without assuming such indebtedness, and who, upon his vendor's failure to pay the note, is compelled to pay it for his own protection, is entitled to recover the amount so paid from his vendor, being virtually a surety.

[Ed. Note.—For other cases, see Money Paid, Cent. Dig. §§ 1-16; Dec. Dig. § 1.*]

4. SUBROGATION (§ 41*)—REMEDY OF SURETY—CROSS-COMPLAINT.

In an action by a vendor against his vendee on a purchase-money note and against the latter's vendee to foreclose a vendor's lien, the second vendee could file a cross-complaint to have itself subrogated as a judgment creditor of the original vendee in the event of the land being sold to satisfy the judgment against him, since the whole controversy should be settled in one proceeding, all of the parties being before the court.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 109-118; Dec. Dig. § 41.*]

In Bank. Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Williamson Finnell against John Finnell, Jr., as administrator of the estate of John Finnell, deceased, and the Finnell Land Company. From the part of the decree in favor of the Land Company on its cross-complaint against the first-named defendant, and from the order denying his mo-

tion for a new trial, such defendant appeals. Affirmed.

See, also, 156 Cal. 589, 105 Pac. 740.

Charles W. Slack and Walter Perry Johnson, for appellants. Garret W. McEnerney, for respondent.

BEATTY, C. J. On the 18th day of October, 1890, Williamson Finnell, the plaintiff in this action, sold and conveyed to his father, John Finnell, 4,250 acres of land. The whole purchase price of the land was \$127,500, of which sum \$35,500 were paid at the date of the conveyance. For the balance of \$92,000 the plaintiff accepted his father's promissory note, payable on or before October 15, 1900, without other security than his vendor's lien on the land. On the 24th of May, 1900, John Finnell organized the defendant, the Finnell Land Company, a corporation with a nominal capital of \$650,000, divided into 6,500 shares, and on the 28th of the same month proposed in writing to convey to said corporation, free of all incumbrances, said 4,250 acres of land purchased from the plaintiff, together with a large body of other lands, in consideration of the issuance of fully paid shares of its stock as follows:

To John Finnell, Jr.....	10 shares
To James Finnell.....	10 shares
To Simpson Finnell.....	10 shares
To Bush Finnell.....	10 shares
To Geo. E. Goodman.....	2,000 shares
To John Finnell.....	4,460 shares

This offer was accepted by the corporation, and John Finnell executed and delivered to the corporation his grant, bargain, and sale deed of said lands. All the members of the corporation knew at the time of this transaction that the purchase-money note for \$92,000 for said 4,250 acres of land and some accrued interest, was unpaid, but they seem not to have been advised that in law it was secured by a vendor's lien upon the land.

This action was commenced by Williamson Finnell October 14, 1900, against his father, to recover the principal and interest of his note for \$92,000, and against the Land Company to foreclose his vendor's lien. His father defaulted—allowing judgment to go against him for the amount of the note and accrued interest. The Land Company answered contesting the indebtedness and claim of lien, and by cross-bill prayed that in the event judgment should be recovered against John Finnell and the land found subject to the asserted lien and sold to satisfy the judgment, it might be subrogated as a judgment creditor of John Finnell. John Finnell died after the cross-complaint was filed, and his son and administrator, John Finnell, Jr., was substituted in his place. Supplemental and amended pleadings were filed, but these made no material change in the attitude and claims of the parties. The cause was tried by the court, and findings and conclusions filed in favor of the plaintiff against John Finnell, Jr., and the Land Company, and in favor of

the Land Company against John Finnell, Jr., as administrator of his father's estate. It was decreed that the aggregate amount of the judgment against John Finnell, Jr., was a lien upon the land sold by the plaintiff to John Finnell, and in the event that the land should be sold, that the Land Company be instated and subrogated as a judgment creditor of John Finnell, Jr., as administrator of John Finnell, for the amount for which the land might be sold, and that if the Land Company should pay the judgment before a sale of the land then said company should be entitled to the benefit of the judgment and to repayment by John Finnell, Jr., as administrator of the estate of his father, in due course of administration, of the money which might be so paid.

From this decree the Land Company and John Finnell, Jr., took separate appeals. On the appeal of the Land Company the judgment in favor of the plaintiff has been affirmed. 156 Cal. 589, 105 Pac. 740. This is the appeal of John Finnell, Jr., from that portion of the decree in favor of the Land Company, and from the order denying his motion for a new trial. The appellant makes no question as to the facts found by the trial judge, and only contends, in support of his appeal from the judgment, that the cross-complaint of the Land Company does not state facts sufficient to constitute a cause of action, or that, if it does, such cause of action is shown to have been barred by the statute of limitations. In support of this contention he bases his argument upon the mistaken assumption that respondent's action rests for its support upon the implied covenant of John Finnell against incumbrances. This, the respondent shows, is not the theory of its case. It relies upon the offer of John Finnell to convey the land free of all incumbrances, and his deed of grant, bargain, and sale executed in conformity to his offer and its acceptance, only for the purpose of showing that in the purchase of the land it did not assume the indebtedness of John Finnell to his grantor—for the purpose, in other words, of showing that by the decree its land is to be sold, not for the satisfaction of its debt, but for the discharge of an obligation resting primarily upon John Finnell, and as to which it is virtually a surety and nothing more. Upon this ground, and upon this ground alone, it invokes the benefit of the equitable doctrine that one who is compelled to pay a debt, or whose property is made liable for a debt, which another in good conscience ought to pay, is entitled to recover against that other the amount so paid. The soundness of this doctrine has been upheld by innumerable decisions of courts of the highest authority in many jurisdictions, and it is so obviously just and reasonable that it is matter of wonder that it should ever have been called in question. It was applied in this state in favor of the vendee of a mortgagor, suing to recover from

the mortgagee the tax on his interest in the mortgaged premises; which the plaintiff had been compelled to pay to prevent a sale of the land—*San Gabriel Co. v. Witmer*, 96 Cal. 635, 29 Pac. 502 (18 L. R. A. 465, 470), where "the well-settled rule" is stated in these terms: "Where the plaintiff, either by compulsion of law, or to relieve himself from liability, or to save himself from damage, has paid money, not officiously, which the defendant ought to have paid, a count in assumption will be supported." A rehearing was granted in that case—not because any doubt was entertained by any member of the court as to this rule of equity, or of the soundness of the principle upon which it rests, but solely because the court desired to give fuller consideration to the question whether the remedy placed by the Constitution in the hands of the mortgagor himself for the failure of the mortgagee to pay the tax on the mortgage interest was not exclusive of a right of action based upon the equitable doctrine embodied in the rule quoted. After the rehearing a majority of the court adhered to the original opinion, and a careful reading of the several dissenting opinions will show that the dissent was based entirely upon the ground that the constitutional remedy should be deemed exclusive. Aside from this consideration affecting that particular class of cases the equitable rule was expressly approved by six of the seven justices, and not questioned by the seventh. Indeed, there is no question raised by the appellant here as to terms or meaning of the rule. He only contends that this case is not within its terms or meaning. We think, however, that the rule is clearly applicable. That John Finnell was indebted to Williamson Finnell in the amount unpaid of his \$92,000 note is indisputable. He confessed the indebtedness by his default, and aside from his confession the case was clear. He received from the Land Company the agreed value of the land free from incumbrance; the company did not assume the indebtedness, and in equity and good conscience, as between him and the company, it was his duty to pay it. Upon his failure to do so, the company, for its own protection, is compelled to pay. It is not nominally his surety, but virtually it is. Any failure by it to pay the debt will be followed by the same injurious consequences that are incurred by one who has made himself surety for another by express agreement, and equity which regards substance rather than form will accord it the same rights that accrue to a surety who is made to pay the debt of his principal.

In respondent's brief a large number of cases are cited in support of these principles, but we do not deem it necessary to pass them in review, or even to cite more than the following: *Arnold v. Green*, 116 N. Y. 566, 23 N. E. 1; *Hazle v. Bondy*, 173 Ill. 302, 50

N. E. 671; *Hoke v. Jones*, 33 W. Va. 501, 10 S. E. 775; *Nixon v. Julian*, 72 Miss. 570, 18 South. 366. It is clear, we think, that the Land Company, if it pays the debt of John Finnell, is entitled to be subrogated to the rights of Williamson Finnell to enforce payment of the note.

The only remaining question is whether the relief demanded by the cross-complaint, and awarded by the court, can be decreed in this action. The objection to the procedure adopted by the respondent is that it is unauthorized by any provision of our Code. Respondent contends that, if it is not authorized by section 709 of the Code of Civil Procedure, the case is so closely analogous to the case there provided for that it ought to be governed by the same rule. If express statutory authority were needed to sustain the decree in favor of the Land Company it might be difficult to find such authority in the section referred to—but such express authority does not seem to be essential. The right asserted by the respondent is an equitable right arising out of the transaction which was involved in the suit as instituted. The parties were all before the court—and that a court of equity governed by the rule which forbids the settlement of controversies by piecemeal. The course pursued was not without precedent, and was amply justified by considerations of convenience and economy. The decree of subrogation imposes no burden upon the appellant other or greater than he is justly subject to.

The decree in favor of respondent, and the order denying appellant's motion for a new trial are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

(159 Cal. 576)

BIRK et al. v. HODGKINS et al. (L. A. 2,536.)

(Supreme Court of California. March 18, 1911.)

1. BOUNDARIES (§ 3*)—RULES OF CONSTRUCTION — MONUMENTS — COURSES AND DISTANCES.

In the absence of something clearly requiring a different construction, courses and distances named in a description must yield to fixed monuments.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 14-19; Dec. Dig. § 3.*]

2. BOUNDARIES (§ 3*)—RULES OF CONSTRUCTION — MONUMENTS — COURSES AND DISTANCES.

Where the call in a description in a deed is for a line running to a fixed monument, viz., "the intersection of Courthouse street and Flower street being the northwest corner of block V," the line would be carried to this point whether the distance required to do this was more or less than that named in the deed;

hence such description will control the courses and distances as stated in the deed.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 25–29; Dec. Dig. § 3.*]

3. BOUNDARIES (§ 53*)—REVERSAL OF CALLS—SURVEYS.

In attempting to trace descriptions on the ground, the courts will follow the footsteps of the surveyor, rather than take a reverse course.

[Ed. Note.—For other cases, see *Boundaries*, Dec. Dig. § 53.*]

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Susie E. Birk and others against Elizabeth A. Hodgkins and others. From a judgment for defendants and from an order denying a new trial, plaintiffs appeal. Reversed.

H. H. Appel, for appellants. Anderson & Anderson, for respondents.

SLOSS, J. Action to quiet title to lots 1 and 2 of block V of the Mott tract in the city of Los Angeles. Lot 1 lies at the corner of First and Flower streets, and lot 2 adjoins it to the north. Each of the lots, as claimed by plaintiffs, has a frontage of 60 feet on Flower street and a depth of 165 feet. The court found that the plaintiffs Susie E. Birk and Rebecca Lee Dorsey, Jr., are the owners of all of lot 1 and the south 52.72 feet, front and rear, of lot 2, and that the defendant Elizabeth A. Hodgkins is the owner of "the south 45.7 feet of the north 376.19 feet of the east 165 feet of block V"; the property so described including the north 7.28 feet of lot 2 as claimed by plaintiffs. Judgment was entered following these findings. The plaintiffs appeal from the judgment and from an order denying their motion for a new trial.

The facts are undisputed, and the only question is whether the court below was justified in finding that the defendant Elizabeth A. Hodgkins, rather than the plaintiffs, was the owner of the strip of 7.28 feet on the northerly side of lot 2. On December 26, 1878, Prudent Beaudry, who was then the owner of the Mott tract, conveyed to Victor Beaudry lots 1 to 16 inclusive, in block V of said tract, according to a map of the tract recorded in the recorder's office of Los Angeles county. The map designated block V as a parallelogram 480 feet in length by 330 feet in width, bounded on the north by Courthouse street, on the west by Grasshopper street, on the south by First street, and on the east by Flower street. The block is, according to the map, divided into 16 lots. Eight of these, numbered from 1 to 8, have a frontage of 60 feet each on Flower street, and run back 165 feet, or half of the distance to Grasshopper street. Lots 9 to 16 have a like frontage on Grasshopper street and a depth of 165 feet to the rear lines of lots 1 to 8. All of the streets running east and west are shown on the map to have a width of 60 feet, with the exception of First street

which is 68 feet wide. It was stipulated at the trial that the frontage of block V on Flower street, by actual measurement, is 488.91 feet, instead of 480 feet as shown by the map. On March 8, 1886, Victor Beaudry, who by virtue of the deed from Prudent Beaudry had become the owner of the entire block, made a conveyance to M. E. Hodgkins and E. T. Wright of the following property: "That certain piece and parcel of land situated in the city and county of Los Angeles, state of California and more particularly described as follows: Commencing at a point at the intersection of Courthouse street and Flower street, said point being the northeast corner of block 'V' of Mott tract of said county, and running thence along the southerly line of Courthouse street, north 52° 50' west, 253.84 feet, to the intersection of Courthouse street and Pearl street; thence along the easterly side of Pearl street, 57° 12' west, 217.28 feet, to an angle in the easterly line of Pearl street; thence along said easterly line of Pearl street, south 37° 27' west, 292.02 feet, to a point at the intersection of Pearl street and First street; thence along the northerly line of First street, south 52° 47' east, 163.28 feet, to a point in the northerly line of First street; thence north 37° 21' east, 120 feet, to a point; thence south 52° 47' east, 165 feet, to a point in the westerly line of Flower street; thence along said westerly line of Flower street, north 37° 21' east, 376.19 feet, to the place of beginning." On July 10, 1886, Victor Beaudry conveyed to Frederick William Sparr "the following described property, to wit: Commencing at the northwesterly corner of First and Flower streets at the intersection of the westerly line of Flower street and the northerly line of First street; thence north 37° 30' east, 120 feet, to a point; thence north 52° 30' west, 165 feet, to a point; thence south 37° 30' west, 120 feet, to a point; and thence south 52° 30' east, 165 feet, to the place of beginning, being lots 1 and 2, block 'V' Mott Tract." The defendant Elizabeth A. Hodgkins has succeeded to the interest vested in M. E. Hodgkins and E. T. Wright by the first of these conveyances, and the plaintiffs are the successors in interest of Sparr. Since the Hodgkins and Wright deed is the earlier in time, the sole question seems to be whether that deed conveyed the 7.28 feet strip in controversy. If this question be answered in the affirmative, it is of no consequence that the grantor, Victor Beaudry, undertook, on July 10, 1886, to transfer the whole of lot 2, including this strip, to Sparr, for he could not, of course, convey land which he no longer owned.

The street designated as Pearl street in the Hodgkins and Wright deed is the one marked "Grasshopper street" on the map. Its name has again been changed, and it is now known as Figueroa street. As actually laid

on the ground, its course is not a straight line between First and Courthouse streets. After running northerly for over 200 feet from First street, it is deflected at an obtuse angle to the east, thus making the Courthouse street frontage of block V 253.84 feet, and not 330 feet as shown by the map.

The description in the earlier deed begins at the northeast corner of the block, runs thence (1) along Courthouse street to Pearl street (2 and 3), along Pearl street with its angle to First street (4), easterly along First street to a point marking the rear end of lot 1. It then (5) runs into the block on a line parallel with Flower street 120 feet, thence (6) parallel to First street to the westerly line of Flower street, and (7) along said westerly line northerly 376.19 feet to the point of beginning. An addition of the distances contained in the fifth and seventh courses shows that the description was drawn in the belief that the block was 496.19 feet in length along Flower street, whereas its length in fact was and is only 488.91 feet. The third call, therefore, if given the length of 292.02 feet stated in the deed, would run 7.28 feet beyond the northerly line of First street. The appellant claims, accordingly, that inasmuch as the line of First street is a fixed monument (as was conceded by respondents at the trial), and, in construing descriptions, a call for fixed monuments will control courses and distances, the deed should be read as running, in the third call, to the true line of First street; thence along said line to the corner of lot 1; thence at a right angle northerly 120 feet; thence at a right angle easterly to the west line of Flower street, and thence along said line of Flower street to the point of beginning. So read, the description would exclude from the conveyance to Hodgkins and Wright all of lots 1 and 2.

We think this contention must be sustained. The rule that, in the absence of something clearly requiring a different construction, courses and distances named in a description must yield to fixed monuments is thoroughly settled. *Vance v. Fore*, 24 Cal. 435; *Mills v. Lux*, 45 Cal. 273; *Black v. Sprague*, 54 Cal. 266; *Anderson v. Richardson*, 92 Cal. 623, 28 Pac. 679; *Bullard v. Kempff*, 119 Cal. 9, 50 Pac. 780; *Taylor v. McConigle*, 120 Cal. 123, 126, 52 Pac. 159. There is nothing on the face of the deed in question, nor is there evidence of any surrounding circumstances, which could afford any reason why this rule should not be given effect here. The corner which marks the beginning of the fifth call must therefore be taken to be on the line of First street. Following out the description from that point, every call is found to fit the conditions as they exist on the ground, and the description closes perfectly. It is true that the distance named in the last call (376.19 feet) is 7.28 feet longer than the actual distance. But here

the call is for a line running to a fixed monument ("the intersection of Courthouse street and Flower street, being the northeast corner of block V"), and the line would, under the rule above stated, be carried to this point, whether the distance required to do this were more or less than that named in the deed. *Cowles v. Reavis*, 109 N. C. 417, 13 S. E. 930.

The respondents argue that the difference between the actual and the supposed length of the block requires that either the fifth or the seventh call be shortened by 7.28 feet, and that this creates an ambiguity which should be resolved in favor of the grantees under the earlier deed. But, when the description is rightly read, in the light of established rules of construction, and is applied to the topographical conditions shown to exist, there is no ambiguity. In attempting to trace the description on the ground, the court should "follow the footsteps of the surveyor, rather than to take the reverse course." *Blackburn v. Nelson*, 100 Cal. 336, 34 Pac. 775. A following of the calls of the description in their order would clearly exclude from the granted property a piece 120 feet in width by 165 feet in depth. That the fifth call begins at the northerly line of First street must be conceded. The line then runs north 37° 21' east 120 feet to a point. This point is not marked by any monument, and the only way to fix its location is by measuring along the given course for the required distance. So measuring and then following the sixth call to the line of Flower street, we have the final call, bringing us to a fixed monument, the location of which must control any error in distance. The facts presented in *Blackburn v. Nelson*, supra, were in their essence the same as those here considered, and the views we have expressed are in harmony with the conclusion there reached. See, also, *McNairy v. Hightour*, 2 Tenn. 302; *Platt v. Bente*, 49 N. J. Law, 679, 10 Atl. 283.

For these reasons we are of opinion that the main finding attacked is not sustained by the evidence.

The judgment and the order denying a new trial are reversed.

We concur: SHAW, J.; ANGELLOTTI, J.

159 Cal. 559

RIGGINS v. SWEATT et al. (L. A. 2,472.)

(Supreme Court of California. March 15, 1911. Rehearing Denied April 14, 1911.)

1. EXCHANGE OF PROPERTY (§ 5*)—CONTRACT—EFFECT—WAIVER OF CONDITIONS.

Plaintiff and defendant agreed to exchange properties, and their respective deeds were delivered under an escrow agreement which directed the holder to deliver to plaintiff deeds by defendant, together with bills of sale for personalty, upon approval of title and examination of records by the escrow holder, and to deliver to defendant plaintiff's deed, and when

the escrow agreement was executed the parties also executed a memorandum, to the effect that all of the provisions of the original contract had been performed to the satisfaction of the parties. *Held*, that the execution of the escrow agreement and memorandum waived the provision of the original contract of exchange, requiring defendant to furnish an abstract of title showing good title to the land conveyed by him.

[Ed. Note.—For other cases, see Exchange of Property, Dec. Dig. § 5.*]

2. ESCROWS (§ 14*)—DELIVERY BY DEPOSITORY—FRAUD.

The escrow holder was not a lawyer, and plaintiff told him to have a certain attorney approve the title to defendant's land, which he did, and only recorded the deeds after defendant's abstract of title had been approved by such attorney in good faith, and without any fraud between him and the escrow holder. *Held*, that plaintiff was not entitled to have his deeds canceled upon the ground of conspiracy between defendant and the escrow holder in recording the deed, or on any other ground.

[Ed. Note.—For other cases, see Escrows, Cent. Dig. §§ 17-20; Dec. Dig. § 14.*]

3. CANCELLATION OF INSTRUMENTS (§ 55*)—DECREE.

Plaintiff and defendant agreed to exchange properties, and the deeds and bills of sale were delivered in escrow and were recorded by the escrow holder, and plaintiff entered into possession of a part of defendant's property and assumed its management, but afterward sued to have his own deed and bill of sale canceled on the ground that defendant and the escrow holder fraudulently conspired to have the deeds prematurely recorded, but did not ask to have the contract rescinded, nor offer to restore defendant's property. *Held*, that it would be inequitable to cancel plaintiff's deed while he held title to defendant's property and the relief granted should be either a rescission of the contract with an accounting, or a decree limiting the time within which defendant might perform his contract by discharging the excess indebtedness on his property, which plaintiff did not agree to assume, and removing clouds from its title, etc., or a cancellation of the deeds and contract, with an equitable adjustment of the rights of the parties.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 55.*]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by J. W. Riggins against John T. Sweatt and another. From a judgment for plaintiff, the defendant named appeals. Reversed for further proceedings.

Avery & French, for appellant. Morton, Pruitt & Goodrich, for respondent.

HENSHAW, J. This action is for the cancellation of a deed and a bill of sale executed by plaintiff to defendant Sweatt, and placed in escrow in the hands of J. C. Odell, upon the ground that in the consummation of a conspiracy between the defendant Sweatt and the escrowee, the latter prematurely and fraudulently caused the instruments to be recorded. The appeal is from the judgment upon the judgment roll alone.

The findings are voluminous. From them the story of the transactions between the

parties is to be gathered and their legal rights determined. In July, 1908, plaintiff employed Odell to negotiate the exchange of his ranch in southern California and the personal property thereon for a ranch in Ward county, Tex., with the personal property thereon, and six other lots of land, upon one of which was a store, with its merchandise, in the village of Grand Falls, and upon certain others cotton gins. The Texas property was owned by defendant Sweatt and his sons. After negotiation a contract was entered into between Riggins and Sweatt on August 11th. This contract was dictated by Riggins. Riggins' California land, with the personal property thereon, was estimated to be worth about \$140,000 and was incumbered by a mortgage for about \$20,000. Sweatt was to take the California property and assume the payment of the mortgage. Sweatt in turn was to convey the Texas lands, the store, the gins, and the personal property in exchange. It was estimated that the incumbrances upon the Texas property exceeded the incumbrances on the California property by about \$36,000. Riggins was to assume the payment of this excess, and, to protect him in this assumption of excess indebtedness, Sweatt agreed to turn over to Riggins notes and book accounts aggregating \$30,000, the growing crops on the Texas lands, estimated to be worth \$10,000, and further to secure him by an indemnity bond in the sum of \$10,000. Sweatt was to "furnish an abstract of title brought down to date, showing good title to all the land conveyed." This contract of August 11th concluded with the following: "It is understood and agreed that the sole condition of this contract is the inspection, and acceptance or rejection of the same by said Riggins." A few days thereafter Riggins went to Texas, inspected, and evaluated the properties. He was accompanied by Mr. Odell and by a Mr. Ottis, an attorney at law familiar with Texas land titles. Riggins pronounced himself satisfied, and thereupon while in Texas, in writing, proposed a modification of the original contract, which Sweatt accepted. The modification went to certain matters not essential to this consideration; Riggins agreeing to take the crops, notes, and accounts absolutely and to assume \$56,000 of Sweatt's indebtedness as against the assumption by Sweatt of \$20,000 indebtedness on the California property; and Sweatt was released from the necessity of giving any indemnity bond or guaranty for the excess indebtedness. Riggins further stipulated that upon the acceptance by Sweatt of the modified proposition they should "immediately draw up and exchange papers." Thereupon, on the same date, August 18, 1908, at Grand Falls, Tex., deeds and bills of sale from the respective parties were delivered to Odell and the following instrument, designated "Es-

crow Instructions," was executed: "Grand Falls, Aug. 18th, 1908. Mr. J. C. Odell, Grand Falls, Texas—Dear Sir: You are hereby instructed by the undersigned parties hereto to deliver to J. W. Riggins, deeds by Jno. T. Sweatt and Sweatt Bros., of even date herewith, for 2165 more or less, acres of land in Ward county, Texas, together with two bills of sale conveying chattels, etc., upon approval of title and examination of records by J. C. Odell and to deliver to Jno. T. Sweatt a certain deed of 735 acres, more or less, situated in Los Angeles county, California, together with a bill of sale for chattels now upon the premises there. Jno. T. Sweatt. J. W. Riggins. Sweatt Bros., by E. V. Sweatt."

Later, upon the same day after the escrow instructions had been signed, and the deeds and other papers placed in Odell's hands, Riggins himself signed and procured Sweatt to sign a statement prepared by Riggins to the following effect: "It is mutually agreed and understood by and between the parties to the above contract that all of its stipulations and provisions have been performed and carried out in all things to the entire satisfaction of the parties to this contract and consummated by the signing of an agreement hereto attached and signed at Grand Falls, Texas, on the 18th day of August, 1908. John T. Sweatt. J. W. Riggins."

It is to be noted that the escrow instructions call upon Odell to deliver the papers upon his own "approval of title and an examination of records." To this arrangement Odell demurred, saying that he was not a lawyer, but (we quote from the findings) "Riggins told him to go ahead and examine the abstract to be furnished by Sweatt to his land and get the approval of said Ottis, who, it was stated by Riggins in the conversation, was familiar with the titles of land in that vicinity. J. W. Riggins did not tell Odell to employ any lawyer to examine the titles to Sweatt's land, but he did say that it was not necessary to put him to that expense." The next morning the store and its merchandise were turned over to Riggins by Sweatt, with the consent of his sons, Sweatt Bros., who were the owners thereof and who were also the owners of the notes and accounts. Riggins immediately put one White in charge, with instructions to manage the business, collect the accounts, etc. He had White send out, with the consent of Sweatt Bros., a printed notice to all the debtors of Sweatt Bros. to the effect that the business had been sold and transferred to J. W. Riggins, which notice was followed on the same sheet with a letter signed by Riggins, demanding that the debtors come forward at once and pay or make arrangements for the payments of their accounts. The book accounts amounted to about \$15,000 and the notes to about the same sum. Riggins also at this time took charge of the two cotton gins and contracted to have them operated for his account. Mr.

Odell and Mr. Ottis went to Barstow, the county seat, ordered an abstract, and meantime proceeded to examine the records. The court finds that the escrow instructions did not include an examination of the title to the California land, nor to the six lots. It was limited therefore to an examination of the title of the Texas ranch of 2,165 acres. As a result of their examination, Odell and Ottis placed on record the deeds and bills of sale from Sweatt and Sweatt Bros. to Riggins, and Odell returned to his home in California, where he also placed of record the deed and bill of sale of Riggins to Sweatt. The Odell-Ottis examination of the Texas properties at Barstow was made partly from the records and partly from an abstract prepared for them. Ottis O. K.'d and approved this abstract, after which Odell filed the deeds for record. The court, however, finds that they did so with knowledge that there existed upon the records, liens, incumbrances and clouds upon the property to the extent of \$78,000, but this total includes liens, incumbrances, and clouds upon the six lots which were not within the purview of the examination which Odell and Ottis were to make, and includes, moreover, clouds which were without substance, consisting as they did of apparent liens which had been fully paid, but which had not formally been released of record, as to which latter, in several instances, satisfactory evidence of their payment was given to Ottis and Odell. The charge in the complaint, it will be remembered, was of conspiracy between Odell, Ottis, and Sweatt, a conspiracy charged to have been directed against Riggins, but the court finds no such conspiracy to have existed between these men, or any two of them. The verified complaint of Riggins also charged that Mr. Odell had been specially instructed not to approve the title until he had had the abstract examined by a Mr. Starley, an attorney, whom, it was alleged, Mr. Riggins had theretofore selected to pass upon the title. The court finds to the contrary; that Riggins objected to the employment of any attorney, saving Mr. Ottis. The complaint also charged that in furtherance of the conspiracy invalid deeds from Sweatt and Sweatt Bros. were executed and accepted by Odell; Riggins averring that among the deeds were three quitclaim deeds to a large part of the land. The court, however, found against these charges of conspiracy and collusion, declaring the deeds to be sufficient in form; that amongst them were two warranty deeds, one for 1,625 acres from John T. Sweatt and the other for the remaining 540 acres and the six lots from Sweatt Bros., whom the court finds were the owners thereof. The court further finds that all the deeds were delivered to Odell in the presence of Riggins, and are the exact instruments referred to in the escrow agreement as "deeds from Jno. T. Sweatt and Sweatt Bros." In the original complaint Riggins had alleged that Odell

had fraudulently secured possession of his deed to Sweatt. The findings establish that this charge also is unfounded. As to the memorandum which Riggins himself had dictated and secured Sweatt to sign on the 18th of August, and which, as above quoted, is to the effect that the contracts had been fully consummated to the satisfaction of the parties, the court found that this was signed by Sweatt at Riggins' solicitation, but was written only on the copy of the contract which Riggins himself kept, and not upon the copy Sweatt kept, and, notwithstanding that it was signed by both Riggins and Sweatt, Riggins tore it off, without the knowledge and consent of Sweatt, prior to the trial of the action and made no reference to it in his complaint. But the court did find that Odell and Ottis proceeded to carry out the escrow instructions "with the utmost haste." Odell immediately, or very shortly after arriving at Barstow, placed the bill of sale on record from Sweatt and Sweatt Bros. to Riggins, though not the deeds, which were not recorded until after the completion of the examination of title. The court finds that Odell did not act in good faith with Riggins in filing the two bills of sale, in that he filed them before knowledge of the condition of the title to the real property, but in view of the fact that Riggins had immediately taken possession of the store and the gins and was exercising acts of ownership over them, some color, at least, is given to Mr. Odell's explanation that he filed these bills of sale for the protection of Riggins' possession. The court also found, as has been said, that Odell and Ottis approved the title to the land, when the record showed, and they knew, that the records showed incumbrances to the extent of \$78,000, but the abstract which was furnished to them and upon which they acted, and which, in turn, was sent to Riggins, did not show incumbrances to exceed \$65,000, and of these several thousand dollars were mere clouds, since the indebtedness which they represented had been paid, and they had been shown the receipts and canceled notes and other evidences of payment. In its conclusions of law the court declares that "Odell was guilty of a flagrant violation of his escrow instructions and the contracts between J. W. Riggins and John T. Sweatt" in filing for record the deed from Riggins to Sweatt, and the same conclusion of law is declared, touching Odell's filing of the bill of sale from Riggins to Sweatt.

Upon these and other findings hereafter to be adverted to, the court concluded that the deed and bill of sale from Riggins to Sweatt never became operative or binding; that the exchange of the properties between Riggins and Sweatt had never been effectuated or consummated, and entered its decree, canceling the recordation of the Riggins' deed and bill of sale.

The findings in this case deal with two

separate transactions which logically should be separately considered. The first, and the first to invite attention, are those dealing with the violations by Odell of his escrow instructions, by which violations the court finds that the deed and bill of sale from Riggins to Sweatt were improperly placed of record. These findings are based in no small part upon the idea seemingly that Odell was not governed by the escrow instructions alone, but that because he had knowledge of the terms and conditions of the contract of August 11th, modified by the contract of August 18th, he was governed by those terms and conditions also. This argument, however, is not pressed to its logical conclusion, and necessarily could not be, because if Odell were bound to see that the contract of August 11th was carried out before he placed the deeds and bills of sale of record, it became his duty to investigate the title to the six lots which the court finds were not included within his escrow instructions, and it was equally his duty to see that all the promissory notes were delivered by the Sweatts to Riggins, yet it is not contended that such delivery was a condition precedent to his right to act under the escrow instructions. Much stress in this connection is placed upon the fact that the contract of August 11th, as above quoted, provided that Sweatt was to furnish an abstract of title brought down to date, showing good title to all the land conveyed, and by the finding of the court also, as above quoted, that Riggins told Odell "to go ahead and examine the abstract to be furnished by Sweatt to his land." Yet the escrow agreement itself, and the memorandum which Riggins himself procured Sweatt to sign, would seem, if they meant anything, to imply a waiver of the requirement that Sweatt should himself furnish any abstract, since by the terms of the escrow instructions Odell is to deliver the deeds and bills of sale, not upon the approval of any abstract furnished by Sweatt, but upon "his own approval of title and examination of records," and the memorandum agreement which Riggins induced Sweatt to sign expressly declares that the contract of August 11th as to all its stipulations had been performed and carried out "to the entire satisfaction of the parties to this contract and consummated." When it is considered that Odell was not a lawyer, that he was told by Riggins to look to Ottis for the approval of the title to the Texas ranch, that he did look for this approval and filed the deeds for record only after the abstract of title had received Ottis' approval, and that the court distinctly finds that there was no conspiracy to wrong or defraud Riggins in any of the acts of Ottis and Odell, it would be a matter of much difficulty to sustain a judgment ordering a cancellation of the documents upon these findings alone.

But there now come up for review the findings upon the second branch of the case, and

these have to do with a new contract entered into by Sweatt and Riggins after the escrow instructions had been given, and, indeed, after Odell had executed those instructions by placing the deeds and bills of sale of record.

The findings under this second branch of the case are aside from the consideration whether or not Odell obeyed his escrow instructions. They deal with the rights of Sweatt and Riggins under a contract which they entered into on the 28th day of August. From them it appears that Riggins was in Barstow, the county seat, on the 27th day of August and learned that the deeds and bills of sale to him had been recorded, and since it was not to be supposed that the escrowee would execute but a part of his instructions, there was at least notice conveyed to him that his own deed and bill of sale had been or would be recorded in California. Before this date Sweatt had furnished Odell with the abstract and Odell had it in his possession, but it was not delivered to Riggins until the 1st day of September. Riggins, therefore, procured his own abstract, which showed all the incumbrances upon the Sweatt property, and therefrom discovered that the recorded liens exceeded \$56,000. Thereupon he entered into another contract in writing with Sweatt. The previous contracts are referred to, by which the lands and property in Ward county "belonging to John T. Sweatt and Sweatt Brothers" were to be conveyed to him for his California property. The contract then proceeded: "And whereas, it now develops that the said John T. Sweatt owes a further indebtedness in the state of Texas or growing out of his business conducted at Grand Falls, Ward county, Texas, over and above the said sum of fifty-six thousand dollars, and said Sweatt now wants said Riggins to assume said additional indebtedness, and whereas, the said original contract referred to providing that said sales and transfers are made with the understanding and guaranty by each of said parties that the titles to the lands and property conveyed by each are good and valid titles, free of any and all incumbrances except as herein specified: Now, therefore, know all men by these presents, that for the purpose of arranging said additional indebtedness it is hereby agreed as follows: That said Riggins shall assume and pay said additional indebtedness, now estimated by us at the sum of \$6,143.00, and that the said sum or amounts so paid by said Riggins for said Sweatt shall be repaid to said Riggins by said Sweatt as follows: One-half of said amount on January 1st, 1910 and one-half January 1st, 1911, interest from this date at the rate of eight per cent. per annum. The said amounts shall be evidenced by mortgage notes and secured by a proper lien on the said land herein referred to as transferred by J. W. Riggins and situated near Covina, Los Angeles county, California, said lien to be in proper legal and binding

form and second only to an indebtedness now in said property of twenty thousand dollars. Said amounts shall be definitely determined and said lien duly executed within fifteen days after this date. It is further understood and agreed that each party has guaranteed to the other party that the titles to be conveyed by each are good and valid and free from all liens except as on said contract specified, but that the parties hereto have not at this time been furnished with proper abstracts or other evidence of the condition of the respective titles, and that this agreement and the contract referred to are made subject to the validity of said titles as in said original contract provided."

At the time that this contract was entered into both of the parties knew, or at least were chargeable with knowledge, that their respective deeds and bills of sale had been placed of record. Their rights, then, are to be determined by the answer to the question whether the terms and conditions of the agreement of August 28th were performed by Sweatt.

1. Book accounts to the proximate amount of \$15,000 were made over to Riggins, and of the promissory notes to an equal amount, all but \$3,800 of them, properly indorsed, were sent by mail from Barstow by Sweatt Bros. to White (Riggins' agent in charge of the store) at Grand Falls. The rest of the notes, amounting to \$3,800, were on deposit with a bank and a mercantile house as collateral for a part of the debt which Riggins was to assume. Riggins was informed of these facts and told where the notes were on deposit, but they were not formally indorsed to him.

2. It appears that the actual unpaid obligations against the real properties showing of record amounted to about \$59,369, a sum within the limit of \$56,000, and the later \$6,143 which, by the contract of August 28th, Riggins was to assume, but the court finds that there was an additional unsecured indebtedness of \$4,400. This, added to the valid existing claim calculated at \$59,369, would make an excess of \$526 over the total which Sweatt had agreed to assume.

3. In addition to the valid subsisting indebtedness against the properties, there were the clouds of apparent liens standing unreleased on the records. In one instance a debt of \$10,000 secured by a trust deed appeared. The debt had been paid, but the record of the obligation had not been satisfied. There were other instances of like character which it was clearly the duty of Sweatt to have caused to be canceled from the records.

4. As to the land itself, the court found that title to 540 acres was in Sweatt Bros. and not in Sweatt; that there was a suit involving the title to an undivided one-third of 36 acres; and the descriptions of a 2-acre tract and a 64-acre tract were invalid.

No weight can attach to the fact that ti-

title to part of this land stood in the name of Sweatt Bros., the defendant's sons, since the later contracts contemplated deeds from them, and their deeds, sufficient in form and substance, were actually made. We need not stop to analyze the descriptions in the deeds which the court finds were so radically defective as not to convey title, for it is apparent under all the findings, and it is the findings alone which we have before us, that Sweatt had failed to live up to the terms of the last contract of August 28th after specific demand upon him, made by Riggins on September 9th, that he do so.

But in this situation, what is the relief to which Riggins is entitled? He stands as the record owner of all the real and personal property of Sweatt and of the Sweatt Bros., to which reference has been made. He has entered into possession and control of at least a part of that property; has collected debts and made contracts touching its management. He seeks the aid of a court of equity and asks merely that his own deed and bill of sale to Sweatt shall be canceled, and this relief the court accords him. But it is manifestly inequitable that he should thus be restored to everything with which he has parted, while retaining the record title to all of the Sweatt real and personal property. Equity, having acquired jurisdiction, does not do justice by piecemeal. Riggins himself is not seeking to rescind, and seemingly disclaims any desire for a rescission, since he makes no offer to rescind or restore, and yet an equitable decision in a case such as this could only be one of two kinds, either for a rescission with such an accounting as might be necessary to adjust loss or damage, or a decree limiting the time within which Sweatt may fulfill his contract, pay off his excess indebtedness, and discharge the clouds upon his titles, or, upon his failure so to do, a direction for further proceedings looking to a cancellation of the deeds and contracts and an adjustment of the respective rights of the parties.

The judgment is therefore reversed for further proceedings in accordance with the foregoing.

We concur: LORIGAN, J.; MELVIN, J.

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PEOPLE v. WONG LOUNG. (Cr. 1,536.)
(Supreme Court of California. March 14, 1911.)

1. CRIMINAL LAW (§ 855*)—MISCONDUCT OF JURORS—READING NEWSPAPERS.

Reading of newspapers by a juror outside the jury room is as much misconduct as if read therein.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2050; Dec. Dig. § 855.*]

2. CRIMINAL LAW (§ 925*)—MISCONDUCT OF JURORS—READING NEWSPAPERS.

One convicted of murder is entitled to a new trial on a showing that the wife of one of

the jurors on the night before the case was submitted read aloud to her husband a newspaper article stating that accused was a noted highbinder, that he had been convicted of murder, but that he was released on account of the destruction of records.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2233-2247; Dec. Dig. § 925.*]

3. CRIMINAL LAW (§ 956*)—EVIDENCE—PRESUMPTIONS.

In the absence of a showing that a juror did not hear a reading of a newspaper article in his presence, it must be assumed that he heard it where there is uncontradicted evidence that the article was read aloud.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2387-2391; Dec. Dig. § 956.*]

4. CRIMINAL LAW (§ 1163*)—PREJUDICIAL ERROR—PRESUMPTIONS.

The presumption of prejudice to accused arising from a juror's misconduct in hearing a newspaper article read cannot be overcome by a counter conclusion based on the conjecture that the trial court knew the mental and moral characteristics of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3098; Dec. Dig. § 1163.*]

5. HOMICIDE (§ 203*)—DYING DECLARATIONS—OBJECTIONS—SUFFICIENCY.

Decedent's statement reciting that he knew that he was going to die sufficiently shows that it was made in extremis, in the absence of specific objection.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437; Dec. Dig. § 203.*]

6. HOMICIDE (§ 205*)—EVIDENCE—DYING DECLARATIONS—ATTENDING CIRCUMSTANCES.

It was error to admit evidence that, while making a dying declaration, decedent first cursed accused and spat in his face, and that thereupon accused "wiped his face off, and some one removed him to the other corner of the room."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 443; Dec. Dig. § 205.*]

7. CRIMINAL LAW (§ 364*)—EVIDENCE—RES GESTÆ.

Evidence of a conversation between accused and the arresting officers, after the officers had run about a block and apprehended him, was not admissible as part of the res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 816, 817; Dec. Dig. § 364.*]

8. HOMICIDE (§ 174*)—EVIDENCE—ADMISSIONS.

Accused's declaration when arrested that he had not done anything and had no gun was not admissible as indicating consciousness of guilt.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 367; Dec. Dig. § 174.*]

9. CRIMINAL LAW (§ 417*)—DECLARATIONS BY THIRD PERSONS—ADMISSIBILITY.

Remarks of policemen to each other on apprehending accused that he was "the man" were not admissible against accused; he not having acquiesced therein.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 950-957; Dec. Dig. § 417.*]

10. HOMICIDE (§ 174*)—EVIDENCE—CONDUCT IN DECEDENT'S PRESENCE.

It was proper to allow the arresting officers to state what occurred when they brought accused into decedent's presence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 359-371; Dec. Dig. § 174.*]

11. CRIMINAL LAW (§ 359*)—EVIDENCE—RELEVANCY—OTHER OFFENSES.

Evidence of other murders before and after decedent's was not admissible as tending to show that persons other than accused killed decedent where no connection between the other murders and the particular one was shown.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 789, 790; Dec. Dig. § 359.*]

12. CRIMINAL LAW (§ 670*)—EVIDENCE—RELEVANCY.

Evidence, relevancy of which is not disclosed, is properly excluded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1593; Dec. Dig. § 670.*]

13. HOMICIDE (§ 338*)—HARMLESS ERROR—EXTENDING CROSS-EXAMINATION.

Any error in extending cross-examination of a witness for one accused of murder was harmless where the inquiry related to the witness' whereabouts during the shooting.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 709-713; Dec. Dig. § 338.*]

14. CRIMINAL LAW (§ 1153*)—REVIEW—DISCRETION — CROSS-EXAMINING OWN WITNESSES.

Flagrant error must appear before the court will disturb a ruling refusing to permit accused to cross-examine his own witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3064; Dec. Dig. § 1153.*]

15. CRIMINAL LAW (§ 1170½*) — APPEAL—PREJUDICIAL ERROR — CROSS-EXAMINING OWN WITNESSES.

It was not prejudicial error to refuse to permit accused to cross-examine his own witnesses by asking a question which insinuated that witness had testified falsely, seeking information concerning the employment of a special prosecutor and whether witness belonged to a certain society.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3133; Dec. Dig. § 1170½.*]

16. HOMICIDE (§ 174*)—EVIDENCE—ACCUSED'S APPEARANCE WHEN ARRESTED.

In a murder trial the people could show that when apprehended accused was puffing, pale, nervous, and excited.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 361; Dec. Dig. § 174.*]

17. CRIMINAL LAW (§ 1171*)—MISCONDUCT OF PROSECUTOR.

Argument by a special prosecutor insinuating that accused had procured the murder of a witness to prevent his appearance was prejudicial error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3127; Dec. Dig. § 1171.*]

18. CRIMINAL LAW (§ 798*)—INSTRUCTIONS—AGREEMENT UPON VERDICT.

It was error to refuse to instruct that jurors need not surrender their honest convictions in order to agree upon a verdict.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 798.*]

In Bank. Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Wong Loung was convicted of murder in the first degree, and he appeals from the judgment and from an order denying a new trial. Reversed.

Stanley Moore, L. G. Carpenter, and Fred C. Clift (W. H. Orrick, of counsel), for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

MELVIN, J. The defendant was convicted of the crime of murder in the first degree, and was sentenced to death. He appeals from the judgment of conviction and from the order of the superior court denying his motion for a new trial.

Lee Chung, a Chinaman, was shot one evening while he was walking on Harrison street in the city of Oakland, and he died two days later from the effects of his wounds. Two policemen (one a regular and the other a special officer) testified that the shooting was done by three Chinamen, and that the defendant was one of them. The policemen said that the defendant after firing the last two shots at Lee Chung ran into an alleyway, and that they captured him a few moments later at the other end of the alley from that near which the shooting occurred. When they brought the defendant to the place where the wounded Chinaman lay on the sidewalk, the latter, according to the testimony of the officers, identified defendant as one of his assailants.

The wounded man made two statements. Testimony regarding both of these was admitted in evidence by the court on the ground that the utterances were dying declarations. In both statements the defendant was accused by Lee Chung of being one of his murderers. On defendant's behalf several Chinamen stated upon the witness stand that they saw the shooting; that it was done by two men; and that defendant was not one of the assassins. The defendant and one other witness testified that, when the shots were fired, they were on Third street some distance from the scene of the attack on Lee Chung, and near the place where the defendant was subsequently arrested. Defendant stated that he stepped into the alley in which he was captured intending to visit a resort on the upper floor of a building there. His companion (who was not captured at the time of the defendant's arrest) on the trial corroborated him in this account of his movements. Defendant also testified that before the dying man accused him of being one of his murderers, Lee Chung was urged by another Chinaman to make the accusation because defendant was a member of the Hop Sing Tong. He also asserted that a similar incident occurred at the receiving hospital before the first "dying statement" was made.

Alleged misconduct of the jury is the first matter presented by appellant as constituting error of sufficient gravity to demand a reversal. A number of affidavits were made by jurors, in which they deposed that they had read a certain article which had been published in the Oakland Tribune on the day before the case was given to them for decision. According to this offered evidence some of the jurors had read the article in question outside the jury room and others had perused it after the jury had retired to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

deliberate. All of these affidavits were, upon respondent's objection, rejected by the court at the hearing of the motion for a new trial upon the ground that a juror may impeach his own verdict only in those excepted cases specially designated by statute. Appellant concedes that such is the rule with reference to misconduct occurring in the jury room, but insists that it does not apply to occurrences elsewhere. In this behalf his counsel cite the following cases which make the distinction for which they contend: *Hempton v. State*, 111 Wis. 127, 86 N. W. 596, 602; *Heffron v. Gallupe*, 55 Me. 563; *Rush v. St. Paul, etc., Co.*, 70 Minn. 5, 72 N. W. 733; *Peppercorn v. Black River Falls*, 89 Wis. 38, 61 N. W. 79, 46 Am. St. Rep. 818; *Harrington v. Worcester, etc., Co.*, 157 Mass. 579, 32 N. E. 955. In California, however, no such rule has ever been announced, and we cannot see any logical reason for its existence. If considerations of public policy prevent a juror from overturning a verdict by swearing that he or his associates committed some act or acts of misconduct in the jury room, the same reasons should exclude his attempted impeachment of the jury's solemn finding by an affidavit relating to occurrences which may have taken place at his home or elsewhere while the trial was in progress. If a juror reads a newspaper containing some matter prejudicial to a defendant on trial, the injury might be and probably would be as great if his violation of his duty took place at home as it would be if the article were perused in the jury room, and we can see no reason why he should be silenced with reference to misconduct committed at one place and permitted to speak regarding the same sort of impropriety indulged in elsewhere. The ruling excluding the affidavits of jurors was proper. *People v. Azoff*, 105 Cal. 633, 39 Pac. 59; *People v. Soap*, 127 Cal. 411, 59 Pac. 771. But in this case there was an affidavit by Mrs. Lily Bartholomew, the wife of one of the jurors, in which she deposed that on the night before the case was submitted to the jury she read aloud to her husband that portion of the article in the *Oakland Tribune* wherein it was stated that defendant was a noted highbinder and had been tried and convicted in San Francisco for murder, sentenced to 99 years' imprisonment, had been granted a new trial upon appeal, but released afterwards because of the burning of the records. This affidavit was admitted in evidence at the hearing of the motion for a new trial, and no showing of any sort in opposition to it was made by the prosecution. At the hearing it was stipulated that the article in question was one reproduced in the affidavit of John F. Conners, managing editor of the *Tribune*, its text being as follows:

"Highbinder is before Jury.

"Attorney Philip M. Walsh Asks for the Life of a Noted Chinese.

"Won Loung, a noted highbinder of the

Hop Sing Tong is on trial before Judge Ogden and a jury to-day in the Superior Court on a charge of murder, accused of shooting Lee Chung, a Chinese. The case will probably be concluded late this evening.

"Unusual interest has been manifested in the case by the Chinese residents of this city, on account of the record of the defendant. The latter was convicted before Judge Lawlor of San Francisco for the crime of murder and sentenced to 99 years in prison. The Supreme Court granted a new trial owing to errors in the instruction of the court to the jury. Before the defendant could be tried a second time the earthquake and big fire occurred, and the records in the case were destroyed, necessitating the release of the defendant.

"Attorney Philip M. Walsh, of the firm of Allen & Walsh, this morning made the opening argument for the prosecution."

That the article above quoted was one calculated to prejudice the mind of a juror against the defendant there cannot be the slightest doubt. It stated in positive terms that he was a noted highbinder; that he had been convicted of murder; and that after the granting of a new trial because of the court's errors in instructing the jury he was released on account of the destruction by fire of the records in the case. These allegations, even if true, could not have been received in evidence at the trial. Indeed, the mere asking by the district attorney of questions suggesting and insinuating the existence of such a state of facts as that described in the newspaper article would have been misconduct. *People v. Wells*, 100 Cal. 460, 34 Pac. 1078; *People v. Ryan*, 108 Cal. 585, 41 Pac. 451; *People v. Derwae*, 155 Cal. 595, 102 Pac. 266. Coming to the juror as they did, the statements in the newspaper might have been as prejudicial to the defendant's cause as their suggestion or allegation by the district attorney, depending largely, of course, upon the vividness of the impression produced on the juror's mind, and there was the added disadvantage to the defendant that neither the court nor his own counsel knew of the juror's misconduct in listening to the reading of the damaging article. The law has always jealously protected defendants from the prejudicial influence of matters not properly in evidence in the case on trial. No defendant should be convicted "on general principles" or because he is an undesirable citizen. This rule is so perfectly consonant with every rational man's sense of justice as to be axiomatic, and therefore we find that judgments for conviction have been reversed in many cases where evidence of other offenses alleged to have been committed by defendants on trial has crept into the records by statements of attorneys, the reading of newspapers by jurors, or supposed information improperly conveyed to them by persons not in court and under oath. In *People v. McCoy*, 71 Cal. 397, 12 Pac. 273, Mr. Justice McKee,

delivering the opinion of the court said: "There is no doubt, however, that the reading of newspapers by jurors, while engaged in the trial of a cause, is an inattention to duty which ought to be promptly corrected; and, if the newspaper contains any matter in connection with the subject-matter of the trial which would be at all likely to influence jurors in the performance of duty, the act would constitute ground for a motion for a new trial. Jurors in a criminal action are sworn to render a true verdict according to the evidence. They cannot, under the oath which they take, receive impressions from any other source. If it be proved as a fact, or may be presumed as a conclusion of law, that their verdict may have been influenced by information or impressions received from sources outside of the evidence in the case, such a verdict is subject to be set aside on a motion for a new trial. Pen. Code, § 1181, subd. 2." In *People v. Stokes*, 103 Cal. 196, 37 Pac. 208, 42 Am. St. Rep. 102, this language is used: "It is insisted that a new trial should have been granted because of misconduct of the jury after they had retired to deliberate upon their verdict. The misconduct charged consisted in the jury reading from a local newspaper an article containing a report of some of the evidence in the case, given at the trial, which included a matter of evidence the court had rejected as inadmissible, and also contained intimations that two of the jurors had been corrupted. The evidence bearing upon the question was given by the officer in charge of the jury. No contrary showing was made by the affidavits of jurors or otherwise. Indeed, conceding that the article was read by them, they could make no showing that would relieve them of the effects of their own misconduct. A juror is not allowed to say: 'I acknowledge the grave misconduct. I received evidence without the presence of the court, but those matters have no influence upon my mind when casting my vote in the jury room.' The law in its wisdom does not allow a juror to purge himself in that way." See, also, *Wright v. Eastlick*, 125 Cal. 517, 58 Pac. 87; *People v. Chin Non*, 146 Cal. 563, 80 Pac. 681.

It is contended that Mrs. Bartholomew's affidavit is of little value because it does not show what degree of attention her husband paid to her reading. How could it? She says she read the article to him, and he alone could have stated how faithfully he listened. As he was serving on a jury it must be presumed that his hearing was normal. Section 198, subd. 2, Code Civ. Proc. If in fact he did not hear, his affidavit to that effect would have been admissible in support of the verdict. In the absence of such showing we must assume that he heard the reading of the article by his wife.

The Attorney General contends that the court had the right to consider "the conduct, degree of intelligence, and appearance of each

juror, including juror Bartholomew, as witnessed by him throughout the trial, in determining whether the irregularity complained of warranted the conclusion that the accused had been prejudiced in his rights, or whether the showing required that the verdict be set aside and a new trial granted," and he insists that the court's conclusion, based upon such considerations, that "no improper influence had affected the verdict," should stand. We know of no rule of law whereby a court is presumed to make such a study of jurors as would enable the judge to say whether or not any particular trier of a case would be influenced by the reading of any article in a newspaper. In the case at bar, 6 months and 20 days elapsed between the return of the verdict and the argument on motion for a new trial. It would be absurd to presume that the court carried a mental picture of the juror and a close recollection of his demeanor at the trial during all of that time. Upon a showing of misconduct such as was here demonstrated, the law presumes prejudice and this presumption cannot be overcome by a counter conclusion based upon a mere conjecture that the court knew the mental and moral characteristics of the juror. The presumption of injury from such misconduct is so well established in this state as to need citation of but few authorities.

In *People v. Lee Chuck*, 78 Cal. 335, 20 Pac. 726, this language is used: "Section 1181 of the Penal Code, relied on by the respondent, provides (subdivision 3) that a new trial may be granted to the defendant 'when the jury has separated without leave of the court, after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented.' It is urged upon us that the section referred to sets forth and limits the kind of misconduct for which a new trial may be granted, and that, to authorize the setting aside of the verdict, it must affirmatively appear that fair and due consideration of the case is prevented. Such a construction of the statute would compel a defendant in every case of this kind to show affirmatively that he had been actually injured by the misconduct complained of. None of the cases cited go to that extent, and, if they did, we should not be inclined to follow them. That the jury in this case was guilty of misconduct we presume none will deny. The wrongful act committed was one the direct tendency and natural consequence of which was to affect their capacity to perform their duties." In *People v. Leary*, 105 Cal. 490, 39 Pac. 24, Mr. Justice Van Fleet, speaking for the court, said (referring to the reading of newspapers by jurors during the progress of a trial): "If the matter * * * be such as would from its character, or the manner or connection in which it is stated, be calculated to prejudice or injuriously affect the minds of the jury, a presumption of improper influence arises, and a new trial will

be granted, without requiring defendant to show that harm has in fact been done his cause." The same rule is announced in *People v. Conkling*, 111 Cal. 628, 44 Pac. 318, where this language is employed: "Jurors cannot be permitted to investigate the case outside the courtroom. They must decide the guilt or the innocence of the defendant upon the evidence introduced at the trial. It is impossible for this court to say that this outside investigation did not affect the result as to the character of the verdict rendered. For, when misconduct of jurors is shown, it is presumed to be injurious to defendant, unless the contrary appears. *People v. Stokes*, 103 Cal. 193 [37 Pac. 207] 42 Am. St. Rep. 102." There is nothing in the cases of *People v. Higgins*, 9 Cal. App. 269, 98 Pac. 683, nor *People v. Amer*, 8 Cal. App. 137, 96 Pac. 401, cited by appellant, in conflict with the above authorities. We are confronted with an uncontradicted affidavit showing that one of the jurors received out of court evidence which must have been prejudicial to the prisoner on trial, and we feel compelled, both upon principle and the great weight of authority, to hold that the order denying a new trial must be set aside.

Two purported "dying statements" were made by Lee Chung. One of these was given at the receiving hospital in Oakland shortly after the shooting and the other at Providence hospital. The substance of the first statement was reduced to writing by W. J. Hennessey, Esq., deputy district attorney, and was read to the wounded man, who declared that it was correct. This writing was not introduced in evidence by the prosecution, but was used by Mr. Hennessey and Capt. Peterson, chief of detectives of the Oakland police department, as a memorandum while they were testifying. The defendant Wong Loung was present during the taking of this declaration and the prosecution contended that the affirmations of the dying man at the receiving hospital were admissible in evidence, not only as his utterances under a sense of impending death, but also as statements made in the presence of defendant. The declaration of Lee Chung made at Providence hospital was reduced to writing by Dr. Hamlin and read by him to the patient, who said that it was correct and signed it by his mark. This document was introduced in evidence. Dr. Hamlin testified that just before the statement was taken he asked Lee Chung how he felt. The reply was "very weak." The physician then asked him if he thought he was going to die, and the Chinaman answered that he knew he was going to die. The written declaration received in evidence begins: "I know I am going to die. I was shot by Wong Loung between 10 and 11 p. m. last night, September 13, 1907, near the corner of Third and Harrison streets in Oakland." Appellant insists that this statement does not satisfy the rule that such utterances may be recorded and afterwards introduced in evi-

dence at the trial of a person accused of murder only when the speaker was under a full sense of impending and almost immediate death; and he also makes the same contention with reference to the previous declaration made at the receiving hospital. In this connection we may say that defendant's counsel failed to make such objection as called this matter to the court's attention. In the absence of specific objection we must hold that the statement on its face is sufficient. *People v. Ybarra*, 17 Cal. 167. As the case must be tried again, doubtless the district attorney will bring to the notice of the court all the circumstances surrounding the making of the statements by the wounded man. The court admitted evidence of the fact that while making the statement at the receiving hospital Lee Chung raised himself slightly from the operating table, applied a vile name to the defendant, and spat in his face. We can see no theory upon which such matter was allowed to go before the jury. If offered to show the defendant's tame submission to insult, a complete answer is that he was in custody, and that the affront was offered by a wounded man. What action or comment would have been naturally expected from the defendant? And what inference could be drawn from the circumstances that Wong Loung "wiped his face off and some one removed him to the other corner of the room"? We confess that we can find no suitable answer to these questions. Yet we can see how the detailing of this incident to the jury may have been injurious to the defendant. Jurors may well have concluded that such bitter animosity displayed by the stricken man indicated his certainty of the identity of his assailant. The objection to the evidence should have been sustained. During the examination of Capt. Peterson, the district attorney consented that the answer to the question "Why did he shoot you?" be not stated. It appeared, however, in Mr. Hennessey's testimony and was not stricken out, although at a subsequent session of the court the district attorney offered to allow all matters relating to Lee Chung's statement of the reason for the shooting to be eliminated from the record. This offer was rejected by defendant's counsel, and, in view of their attitude, the court permitted the record to remain unchanged. Whether or not counsel's refusal to accept that for which they had previously asked the court would prevent the defendant from taking advantage of the original error in allowing the evidence to go before the jury need not be discussed here as the case must be tried again and the inadmissible matter will doubtless not be offered.

Certain declarations made after the shooting were admitted upon the ground that they were pronounced in the presence of the defendant. Error is assigned relative to the conversation between the arresting officers when they took Wong Loung into custody. One of

them said, "This is the man," or "This is the Chinaman," and the other replied, "Yes; this is him," and the defendant exclaimed, "I haven't anything," or "I haven't done anything. I haven't got any gun." The Attorney General insists that this conversation was a part of the *res gestæ* and properly admitted as such. We cannot agree with that contention. The officers had run some distance from the scene of the crime, turning a corner and proceeding along another street from that upon which the wounded Chinaman fell, and had finally apprehended Wong Loung near the end of an alley. What there occurred was no more a part of the *res gestæ* than it would have been if their pursuit had covered a mile rather than a distance of about a block. Nor can we agree with the conclusion that this matter comes under the rule announced in *People v. Cole*, 141 Cal. 90, 74 Pac. 547, where a denial of guilt was held under the facts of that case to be a circumstance tending to show the defendant's sense of responsibility for the crime just as flight and concealment of a person charged with an offense are interpreted as having that tendency. In this case the only conduct of the defendant attempted to be shown as being exhibited at the time the above-quoted statements were made by the officers was his denial of having done anything. No admission of any kind was proven, nor was there anything about the denial which converted it into a confession or a statement indicating consciousness of guilt. The remarks of the policemen were not properly admissible. Such evidence is only adduced without error when it is admitted by the defendant to be correct, "his acquiescence being indicated by express assent, by his silence or by acts or by conduct on his part which could be fairly construed as assent." *People v. Estrado*, 49 Cal. 173. This well-known rule is also announced and applied in *People v. Ah Yute*, 54 Cal. 89; *People v. Ah Lee*, 60 Cal. 86; *People v. Morton*, 139 Cal. 722, 73 Pac. 609; and *People v. Long*, 7 Cal. App. 31, 93 Pac. 387.

There was no error in allowing the officers to state what occurred when they brought their prisoner to the place where Lee Chung lay on the sidewalk. They asked him if the defendant was the man who shot him, and Wong Loung turned his head away. Nevertheless, he was identified by the wounded man as one of the latter's assailants. Obviously the defendant's conduct under the circumstances was something which might be considered by the jury as indicating a wish on the part of the prisoner to escape identification.

Appellant's next important assignments of error are (1) that the court erred in excluding evidence tending to show that persons other than defendant killed decedent; (2) that the court erred in excluding evidence tending to show motive in the members of the Bing Gong Tong to commit the crime;

and (3) that the court erred in excluding evidence tending to show a consciousness of guilt in members of the Bing Gong Tong. If competent testimony were offered for any one of the purposes mentioned in the above assignments it would have been proper, but in their offers of proof counsel for defendant failed to indicate enough of what they expected to show to enable the court to see the relevancy of the promised evidence. For example, they sought to prove that certain murders had been committed both before and after the killing of Lee Chung, but failed to disclose the logical connection between those homicides and the case which was on trial. The court's rulings excluding the promised proof of these other and distinct crimes were therefore free from error. Without going into a detailed discussion of this branch of the case, we can say that we find no material error in the rulings which appellant attacks.

Dr. Hamlin was asked about the presence of a certain Chinaman, Louis Doon or Tun, at Providence hospital when the decedent was there. Objection that this was not proper cross-examination was sustained. Evidently the question was preliminary in its nature, as it did not refer to the time of the taking of the dying statement which was the only period included in Dr. Hamlin's testimony in chief. The purpose of the question being undisclosed, the ruling was proper.

Complaint is made that the court unduly extended the cross-examination of a witness called by defendant. If error was committed, it was not injurious to defendant as the inquiry related to the whereabouts of the witness during the shooting. One of defendant's counsel was denied the opportunity of cross-examining certain of his own witnesses declared by him to be hostile. Flagrant error must appear in such refusal before this court will interfere with the ruling denying one the privilege of cross-examining his own witness. This is a matter largely within the discretion of the trial court, and we cannot see that this discretion was abused in the present case. A question to which objection was made was one pointedly insinuating that the witness had not told the truth when he testified that he had not said a word to Lee Chung at the receiving hospital. Other questions sought information upon the matter of the employment of Mr. Walsh, the special prosecutor. Others were inquiries whether or not witnesses belonged to a certain tong. None of the rulings concerning these questions were prejudicial to defendant, but, even if they had been, such rulings would have to be upheld as there was no sufficient showing of the hostility of the witnesses whom defendant's counsel desired to cross-examine.

The police officers were allowed to testify over defendant's objection that Wong Loung was puffing, and was pale, nervous, and excited when they captured him. It is well settled that such phenomena as paleness, ex-

citement, intoxication, and the like may be described by a witness. *People v. Lavelle*, 71 Cal. 352, 12 Pac. 226; *People v. Monteith*, 73 Cal. 8, 14 Pac. 373. The reason of this rule is well expressed in *State v. Baldwin*, 36 Kan. 10, 12 Pac. 323, cited by the Attorney General. There the court used this language: "There is another equally well-recognized exception, founded in necessity, under which the opinions of ordinary witnesses are received. Facts which are made up of a great variety of circumstances and a combination of appearances, which, from the infirmity of language, cannot be properly described, may be shown by witnesses who observed them; and, where their observation is such as to justify it, they may state the conclusions of their own minds. In this category may be placed matters involving magnitude or quantities, portions of time, space, motion, gravitation, value, and such as relate to the condition or appearance of persons and things. *City of Parsons v. Lindsay*, 26 Kan. 426; *State v. Folwell*, 14 Kan. 105. On the same principle the emotions or feelings of persons, such as grief, joy, hope, despondency, anger, fear, and excitement may be likewise shown; and hence the testimony objected to was properly admitted." *Lawson's Expert and Opinion Evidence*, rule 64; 2 *Best on Ev.* par. 517. See, also, *People v. Manoogian*, 141 Cal. 595, 75 Pac. 177.

Defendant, as we have indicated previously herein, had introduced evidence which, if true, would show that he was not present at the time of the shooting. His counsel offered an instruction on alibi which was refused and nothing on that subject was said to the jury. The Attorney General maintains that the law applicable to the defense of alibi was covered by an instruction which was given to the effect that, if there was any reasonable doubt as to any one of the facts essential to establish the guilt of defendant, it was the duty of the jury to acquit. The presence of the defendant being one of these essentials, it is argued that the jury would regard proof of his being elsewhere as sufficient to require an acquittal if it should raise a reasonable doubt in their minds regarding the question whether or not he was at the scene of the homicide. As this case must be tried again because of errors heretofore discussed, we need not determine whether or not the court's failure to instruct on this subject of alibi is error requiring reversal of a case like the one at bar. Doubtless at the next trial the lower court will save all question on this matter by fully instructing the jury on the law respecting that defense.

The special prosecutor, Mr. Walsh, in his address to the jury said: " * * * Wong Foon, I think, as was established to your satisfaction, was not there that night, and to-day he is a dead man. Whether killed by a Hop

Sing man or by some other person, it is not necessary at this time to state, but that is the reason why Wong Foon, the interpreter, that the defense attempted to place in the hospital on the night of the 13th, in their endeavor to show that Wong Foon was the one who prepared this dying statement, the reason he is not here is because he met with a sudden death." Mr. Moore for the defense promptly interposed an objection, and asked the court to instruct the jury to disregard the remarks. The court did not do so. This was error. Not only did this part of the argument deal with happenings entirely outside the record, but it really amounted to an insinuation that the Hop Sing Tong had procured the murder of a man to prevent his appearance in the case. Such misconduct is highly prejudicial to a defendant on trial for his life or liberty and should always be overcome, when possible, by an instruction by the court.

The court refused to give the instruction frequently asked for in cases of this sort, and, indeed, in all kinds of criminal cases, to the general effect that jurors are not required to surrender their honest convictions for the mere purpose of agreeing upon a verdict. Under the authority of *People v. Dole*, 122 Cal. 495, 55 Pac. 581, 68 Am. St. Rep. 50, and *People v. Howard*, 143 Cal. 324, 76 Pac. 1116, this instruction should have been given.

From the foregoing it follows that the judgment and order must be reversed, and it is so ordered.

We concur: LORIGAN, J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; HEF-SHAW, J.

159 Cal. 508

Ex parte YUN QUONG. (Cr. 1,633.)

(Supreme Court of California. March 13, 1911.)

1. STATUTES (§ 114*)—TITLE—SUFFICIENCY.

Under Const. art. 4, § 24, requiring every act to embrace but one subject, to be expressed in the title, St. 1909, p. 422, entitled "An act to regulate the sale and use of poisons * * * and providing a penalty for the violation thereof" is sufficient to embrace provisions making it unlawful for any person to have in his possession opium except on the written prescription of a physician, dentist, or veterinary surgeon, unless he is a jobber, wholesaler, manufacturer, retail pharmacist, dentist, or surgeon.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 145-149; Dec. Dig. § 114.*]

2. CONSTITUTIONAL LAW (§ 87*) — POLICE POWER.

The constitutional right to hold and enjoy property is subject to such reasonable regulation as is necessary to conserve the public health and morals and to promote the common good.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 156-171; Dec. Dig. § 87.*]

3. CONSTITUTIONAL LAW (§ 278*)—DUE PROCESS OF LAW—REGULATING USE OF OPIUM—STATUTES—VALIDITY.

St. 1909, p. 422, making it unlawful for any person to have in his possession opium except on the written prescription of a physician, dentist, or veterinary surgeon, or unless he belongs to specified classes, is not unreasonable for the protection of the public from the evils resulting from the use of opium which is an active poison, the unrestricted use of which has a debasing effect, and the act is not violative of the fourteenth amendment to the federal Constitution, protecting the citizen's right to the enjoyment of property.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 762-824; Dec. Dig. § 278.*]

4. HEALTH (§ 21*) — REGULATING USE OF OPIUM—STATUTES—VALIDITY.

The statute means only a conscious and voluntary possession of opium, and it is not unreasonable because it is possible for one to have the possession of opium innocently and without knowledge.

[Ed. Note.—For other cases, see Health, Cent. Dig. § 25; Dec. Dig. § 21.*]

5. CONSTITUTIONAL LAW (§ 38*)—VALIDITY OF STATUTE—EVIL TO BE CURED—ACTUAL EXISTENCE—NECESSITY.

The validity of legislation, which would be necessary or proper under a given state of facts, does not depend on the actual existence of the supposed facts, but it is enough if the Legislature may rationally believe such facts to be established.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 36; Dec. Dig. § 38.*]

In Bank. Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Habeas corpus by Yun Quong for his discharge from imprisonment charged with violating a statute. Writ discharged, and petitioner remanded.

Dougherty & Lacey, Carroll Cook, and Geo. W. Smith, for petitioner. J. A. Bardin, John F. Davis, and P. E. Zabala, for respondent.

SLOSS, J. The purpose for which the writ is sought is to test the validity of a certain statute hereinafter mentioned. Before applying to this court the petitioner had sought relief in the District Court of Appeal for the First appellate district. The justices of that court were unable to agree on the question presented to them, and made an order remanding the prisoner. Accompanying the order were two opinions, one of which, prepared by Mr. Justice Kerrigan, reads as follows:

"Upon the petition of Yun Quong a writ of habeas corpus was issued by this court. Yun Quong was arrested and is now in custody upon a charge of violating the provisions of a statute entitled 'An act to regulate the sale and use of poisons in the state of California, and providing a penalty for the violation thereof' (St. 1909, p. 422), in that the said Yun Quong had in his possession a certain preparation of opium prohibited by the act.

"Section 8 of said statute is attacked by petitioner as being in violation of his rights

under the fourteenth amendment to the federal Constitution. In substance, that section provides that it shall be unlawful for any person to have in his possession 'any cocaine, opium, morphine, etc.,' or any preparation thereof containing more than two grains to the fluid ounce, except upon the written order or prescription of a physician, dentist, or veterinary surgeon licensed to practice in this state, or unless such possession is that of a jobber, wholesaler, manufacturer to pharmacies, retail pharmacy, physician, dentist, or surgeon licensed to practice in the state.

"Before proceeding to a consideration of the constitutional question presented in the briefs, it is proper to observe that, while there have been a number of amendments to the act as originally passed by the Legislature, regulating the use and sale of poisonous drugs (St. 1880, p. 102; St. 1891, p. 86; St. 1893, p. 68; St. 1901, p. 299; St. 1907, p. 124), it was not until the last amendment in 1909 that the mere possession of such drugs (with the exceptions therein specified) was made a crime. Doubtless this amendment was enacted because experience had shown that the statute in force was not sufficient to accomplish the end sought by the law-making power.

"We are not inclined to regard seriously the contention of petitioner that the act also violates section 24 of article 4 of the Constitution of this state, for we believe that its title sufficiently embraces the subject-matter of the act. Ex parte Liddell, 93 Cal. 633 [29 Pac. 251]; Ex parte Hallawell, 155 Cal. 112 [99 Pac. 490].

"Passing to the main point in the case, petitioner contends that opium is property and that the act of the Legislature making the mere possession of it a crime is an infringement upon the rights of liberty and property, and that therefore the act is void.

"The constitutional right to hold and enjoy property is subject to such reasonable regulation as is necessary to conserve the public health and morals and to promote the common good. Touching the subject of the proper exercise by the Legislature of its general police power, the Supreme Court, in French v. Davidson, 143 Cal. 658 [77 Pac. 663], in passing upon the constitutionality of an act requiring the vaccination of school children, employs this language: 'Police regulations generally interfere with the liberty of the citizens in one sense. * * * It is no valid objection to a police regulation that it prevents a person doing something that he wants to do or that he might do, were it not for the regulation. When we have determined that the act is within the police power of the state, nothing further need be said. The rest is left to the discretion of the law-making power. * * *'

"In Ingram v. Colgan, 106 Cal. 113 [33

Pac. 315, 39 Pac. 437, 28 L. R. A. 187, 46 Am. St. Rep. 221], the court said: 'Under the exercise of this general police power, persons and property are subject to restraints and burdens in order to secure the general comfort, health, and prosperity of the state, of the perfect right of the Legislature to do which * * * "no question ever was or upon acknowledged general principles ever can be made, so far as natural persons are concerned. It is coextensive with self-protection, and is often referred to as the law of overruling necessity." It is that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort and welfare of society.'

"Opium is an active poison, and while it has no beneficial use except as a medicinal drug, its unrestricted use would have a debasing effect on the moral and economic welfare of a large portion of our population. We are, therefore, of opinion that its use, possession, and sale may be regulated by the Legislature, and that the act under consideration does not violate the provisions of the fourteenth amendment to the federal Constitution touching the citizen's right to the enjoyment of property. It permits the use and possession of opium under all proper circumstances while otherwise prohibiting it. Hence we have no doubt that the act is within the general police power of the Legislature and is valid.

"The courts have held to be constitutional statutes against carrying concealed weapons (5 Am. & Eng. Ency. of Law [2d Ed.] 729; *English v. State*, 35 Tex. 473 [14 Am. Rep. 374]; *Ex parte Cheney*, 90 Cal. 617 [27 Pac. 436]); acts making it unlawful for one to have in his possession gill nets (*State v. Lewis* [134 Ind. 250, 33 N. E. 1024], 20 L. R. A. 52); or lottery tickets (*Ex parte McClain*, 134 Cal. 110 [66 Pac. 69, 54 L. R. A. 779, 86 Am. St. Rep. 243]; *Ford v. State*, 85 Md. 466, 37 Atl. 173 [41 L. R. A. 551, 60 Am. St. Rep. 337]); or game and fish out of season (*Forster v. Scott*, 136 N. Y. 577 [32 N. E. 976, 18 L. R. A. 543]; *Ex parte Maier*, 103 Cal. 476 [37 Pac. 402, 42 Am. St. Rep. 129]). They have also held that acts limiting the hours of labor in underground mines and in smelting works, being for the preservation of the public health, are not violative of the federal Constitution. In *re Fred J. Martin*, 157 Cal. 51, 106 Pac. 235 [26 L. R. A. (N. S.) 242].

"In *Ex parte Cheney*, supra, an ordinance prohibiting the carrying of concealed weapons was under consideration, and the court said that the unrestricted habit of carrying weapons was the source of much crime; that the majority of citizens had no occasion or inclination to carry such weapons, and that the act in question was for the purpose of preventing breaches of the peace and the commission of other crimes. In the course of its opinion it said (referring to the act): 'By its terms ample provision is made for those whose necessities of life or of occupa-

tion require protection from carrying such weapons, and as the prohibition does not extend to those who come within the exceptions there is no invasion of the rights of the citizen.'

"So it may be said that the unrestricted use of poisonous drugs would be the source of ill health, pauperism, misery, and insanity, the prevention of which must be numbered among the objects of all enlightened government. Most of our citizens have no desire or occasion to use any of the prohibited narcotics, and the rights of those who need them are amply protected by the terms of the act.

"In *Re Hallawell*, 8 Cal. App. 563 [97 Pac. 320], the court in the course of its opinion stated that opium was a medicinal drug of a poisonous nature, the use of which often tends to moral, mental, and physical destruction; and that the Legislature, in the exercise of its police power, could go so far as to absolutely prohibit the use and sale thereof. The Legislature having the power to go to that extent, we can see no reason why it cannot specify all the conditions under which opium may be held and distributed as a medicine, and provide, as it has done, that in all other instances, its mere possession is unlawful.

"In *Luck v. Sears*, 29 Or. 421, 44 Pac. 693 [32 L. R. A. 738, 54 Am. St. Rep. 804], a well-considered case, the precise question was passed upon. There the statute, as here, provided that it was unlawful, with certain specified exceptions, to have even the possession of opium. The court, in considering the same contention that is made here, said: 'The act is not an infringement on the rights of liberty and property, as guaranteed by the fundamental law. The discretion of the Legislature in the employment of means which are reasonably calculated to protect the health, morals, or safety of the public is very great; and so long as it does not infringe upon the inherent rights of life, liberty, and property, either directly or through some limitations upon the means of living, or some material right essential to the enjoyment of life, its determination is conclusive upon the court. * * * The object and purpose of the act is to so regulate the possession, sale, and disposition of a dangerous yet useful drug as to prevent the weak and unwary from using it for their own physical and mental ruin, and to the serious injury of the general public, and, in our opinion, violates no constitutional right.'

"The policy of the federal government on this subject is in harmony with the policy of this state, as is attested by the act of Congress approved February 9, 1909 [Act Feb. 9, 1909, c. 100, 35 Stat. 614 (U. S. Comp. St. Supp. 1909, p. 658)], which prohibits the importation and use of opium for any other than medicinal purposes, and makes the mere possession of this drug sufficient evidence of a violation of the act unless satisfactorily

explained to the jury. Statistics show that the vice of using opium is increasing in this country. It must be conceded that its indiscriminate use would have a very deleterious and debasing effect upon our race, and in order to prevent such a condition, and to make more effectual existing enactments, the Legislature found it imperative to prohibit even the possession of the drug (with the exception above noted).

"Our attention has been called to a number of cases which hold that, although the sale of intoxicating liquors may be regulated or even prohibited, the mere possession of such liquors cannot be made an offense. But liquor is used daily in this and other countries as a beverage, moderately and without harm, by countless thousands (Ex parte Mon Luck, *supra*; Ex parte Yung Jon [D. C.] 28 Fed. 308); whereas it appears there is no such thing as moderation in the use of opium. Once the habit is formed the desire for it is insatiable, and its use is invariably disastrous.

"There is no merit in the argument that the statute is unreasonable, and therefore void, because it is possible for one to have the possession of opium innocently and without knowledge. The act clearly means a conscious and voluntary possession. Ex parte McClain, *supra*.

"The writ is denied."

In distinguishing the case from those in which it had been held that the mere possession of intoxicating liquors cannot constitutionally be made a crime, the learned justice, in the foregoing opinion uses this language: "It appears that there is no such thing as moderation in the use of opium. Once the habit is formed the desire for it is insatiable, and its use is invariably disastrous." We do not understand this to have been intended to declare an established or conceded fact. So interpreted, the expression would be, perhaps unduly sweeping. But the validity of legislation which would be necessary or proper under a given state of facts does not depend upon the actual existence of the supposed facts. It is enough if the law-making body may rationally believe such facts to be established. If the belief that the use of opium, once begun, almost inevitably leads to excess may be entertained by reasonable men—and we do not doubt that it may—such belief affords a sufficient justification for applying to opium restrictions which might be unduly burdensome in the case of other substances, as, for example, intoxicating liquors, the use of which may fairly be regarded as less dangerous to their users or to the public. Assuming, as we must, that the Legislature acted upon some such view, the restrictions upon the right to possess the drugs named in the act cannot be said to be clearly unreasonable or unnecessary for the protection of the public from the evils

against which the legislation in question is aimed.

With such modification as may be implied from what we have just said, we are entirely satisfied with the opinion in question, and adopt it as the opinion of this court.

The writ is discharged and the petitioner remanded.

We concur: ANGELLOTTI, J.; SHAW, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.

(159 Cal. 484)

TITLE INS. & TRUST CO. v. CALIFORNIA DEVELOPMENT CO. (DUNCAN, Intervener). (L. A. 2,791, 2,792.)

(Supreme Court of California. March 13, 1911.)

1. APPEAL AND ERROR (§ 66*)—DECISIONS REVIEWABLE—INTERLOCUTORY ORDERS.

In the absence of statutory authority no appeal lies from an interlocutory order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 329-343; Dec. Dig. § 66.*]

2. APPEAL AND ERROR (§ 113*)—DECISIONS REVIEWABLE—MOTION TO VACATE AN ORDER.

Where an order is not appealable, it is not reviewable on appeal from an order denying a motion to set it aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 758-785; Dec. Dig. § 113.*]

3. APPEAL AND ERROR (§ 71*)—DECISIONS REVIEWABLE—INTERLOCUTORY ORDERS.

While Code Civ. Proc. § 963, authorizes an appeal from an interlocutory order appointing a receiver, it does not authorize an appeal from an order refusing to vacate such an appointment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 386-401; Dec. Dig. § 71.*]

4. APPEAL AND ERROR (§ 78*)—DECISIONS REVIEWABLE—INTERLOCUTORY ORDERS—COLLATERAL MATTERS.

Where an interlocutory order with reference to a receivership requires the payment of money by the one complaining or the doing of an act by or against him, it is in effect a final judgment, and may be reviewed as such by a direct appeal, but if before execution or enforcement it is subject to further action by the court, it is not a final judgment, and cannot be reviewed by direct appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 464-483; Dec. Dig. § 78.*]

5. APPEAL AND ERROR (§ 78*)—DECISIONS REVIEWABLE—INTERLOCUTORY ORDERS—RECEIVERSHIP.

Interlocutory orders directing a receiver to issue receiver's certificates secured by a first lien upon the property in his hands and to apply the proceeds thereon, and pay them with the revenues collected, are not appealable as final judgments.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 464-483; Dec. Dig. § 78.*]

In Bank. Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the Title Insurance & Trust Company, as trustee in a deed of trust, against the California Development Compa-

ny, in which Boaz Duncan intervened. From certain interlocutory orders, the intervener appeals. Appeals dismissed.

Valentine & Newby, for appellant. O'Melveny, Stevens & Millikin, for respondent.

SLOSS, J. Motions to dismiss appeals. This action is one to foreclose the lien of a mortgage or deed of trust executed by the California Development Company to plaintiff as trustee to secure the payment of bonds of said Development Company. The complaint was filed on December 12, 1909, and on the same day the court below made and entered an ex parte order appointing W. H. Holabird receiver of the property conveyed as security. On January 15, 1910, an order was made by the superior court permitting Boaz Duncan to intervene in the cause, and he at once filed his complaint in intervention asserting rights as the holder of a large number of the bonds issued by the Development Company. On March 4, 1910, he made a motion for an order setting aside the order theretofore entered appointing the receiver. This motion was on the 6th day of April, 1910, denied by the superior court. Within sixty days thereafter he served and filed his notice of appeal from the last-mentioned order denying his motion. On April 6, 1910, the superior court made and entered an order authorizing the receiver to issue receiver's certificates to the amount of \$80,000, to dispose of the same at their face value and spend the proceeds for labor and material and other necessary expenses in the construction of a restraining levee, and to apply revenues resulting from his carrying on of the business of the California Development Company to the payment of such certificates which, by the terms of the order, are declared to be a first lien on the property in his possession. On the same day a second order of like purport was made, authorizing the receiver to issue certificates to the further amount of \$216,100 for construction and repair work and general expense. The intervener Duncan promptly served and filed his notices of appeal from both these orders. The plaintiff and respondent now moves to dismiss the three appeals upon the ground that none of the orders sought to be reviewed is an appealable order.

1. The appeal from the order denying the intervener's motion to vacate the order appointing a receiver. It is well settled by the decisions of this court that no appeal can be taken from an interlocutory order unless the order be designated by statute as one of those from which an appeal may be taken. Such was the rule under the Constitution of 1849 and the Practice Act (Allender v. Fritts, 24 Cal. 447; Myers v. Mott, 29 Cal. 359, 89 Am. Dec. 49), and the same conclusion has been reached in cases arising since the adoption of the Constitution of 1879 and the enactment of the Code of Civil Procedure.

Thus, in *Illinois Trust & Savings Bank v. Alvord*, 99 Cal. 410, 33 Pac. 1133, the court said that "the only interlocutory or intermediate orders from which a separate appeal can be prosecuted are those enumerated in subdivision 3 of section 939 of the Code of Civil Procedure." See, also, *Rochat v. Gee*, 91 Cal. 356, 27 Pac. 670. Upon the same ground it was held that, prior to the amendment of 1897 to said section 963 of the Code of Civil Procedure (St. 1897, p. 209), there was no right of appeal from an interlocutory order appointing a receiver. *French Bank Case*, 53 Cal. 495; *Emerie v. Alvarado*, 64 Cal. 529, 622, 2 Pac. 418. In the case at bar the appellant seeks to appeal from an order (made before judgment) refusing to vacate a prior order appointing a receiver. An order appointing a receiver is, since the amendment of 1897 (St. 1897, c. 151), to section 963 of the Code of Civil Procedure, the subject of direct appeal. The statute does not, however, authorize an appeal from an order refusing to vacate the appointment of a receiver. It would seem clear, therefore, that the attempted appeal now under discussion does not come within the terms of the statute and that, if the appellant has any right to a review of the order complained of, it must be by means of an appeal from such final judgment as may hereafter be entered in the action. Code Civ. Proc. § 956. The appellant seeks to avoid the effect of this reasoning by a reference to the decisions of this court holding that an appeal from an order refusing to vacate an appealable judgment or order may be permitted where the party appealing was, without fault on his part, unable to take an effective appeal from the original judgment or order. *People v. Grant*, 45 Cal. 97; *San Jose v. Fulton*, 45 Cal. 316; *Green v. Hebbard*, 95 Cal. 39, 30 Pac. 202; *Pignaz v. Burnett*, 119 Cal. 157, 51 Pac. 48; *Elliott v. Superior Court*, 144 Cal. 501, 77 Pac. 1109, 103 Am. St. Rep. 102; *Tattenham v. Superior Court*, 155 Cal. 205, 100 Pac. 248. These cases merely declare an exception to the general rule that an order refusing to vacate a prior order is not itself appealable. Where the original judgment or order is not the subject of appeal it cannot be made reviewable by the device of moving to set it aside and appealing from the order denying the motion. *Estate of Keane*, 56 Cal. 407; *Harper v. Hildreth*, 99 Cal. 265, 33 Pac. 1103. And even where there is a right of appeal from a judgment or order, a party cannot ordinarily take an appeal from a subsequent order denying a motion to vacate the judgment or order complained of. *Holmes v. McCleary*, 63 Cal. 497; *Reay v. Butler*, 69 Cal. 572, 11 Pac. 463; *Larkin v. Larkin*, 76 Cal. 323, 18 Pac. 396; *Goyhinech v. Goyhinech*, 80 Cal. 409, 410, 22 Pac. 175; *Harper v. Hildreth*, supra; *Sutton v. Symons*, 100 Cal. 577, 35 Pac. 158; *Kent v. Williams*, 146 Cal. 3, 79 Pac. 527. The cases last cited are

based upon the ground that an order denying a motion to set aside a former order amounts to no more than refusal by the court to reconsider an action already taken, and that the appeal should be from the original order. *Henly v. Hastings*, 3 Cal. 312. This is a mere rule of practice established by this court without the aid of any statute. As above stated, there have been cases recognizing an exception to the rule. The circumstances which will authorize an appeal from an order refusing to vacate are that the appellant was not a party to the proceeding resulting in the original judgment or order, and for that reason could not appeal therefrom, or that such original judgment or order was made *ex parte*, and the party complaining did not have notice in time to appeal, or had no opportunity to make a bill of exceptions or other record which would present his real grounds of objection. But in every case where this course has been allowed, the order from which an appeal was sought to be taken was within the class of orders made directly appealable by the terms of section 963 of the Code of Civil Procedure. In *People v. Grant*, *supra*, *San Jose v. Fulton*, *supra*, *Green v. Hebbard*, *supra*, *Pignaz v. Burnett*, *supra*, and *Elliott v. Superior Court*, *supra*, the order refusing to vacate was an order made after final judgment, and was, therefore, within the terms of subdivision 2 of section 963. In *Tattenham v. Superior Court*, *supra*, the original order complained of was one granting an injunction *pendente lite* and an order refusing to dissolve the injunction would have been subject to direct appeal. Code Civ. Proc. § 963, subd. 2. In each of these cases, therefore, the court was permitting a direct appeal in a case where such appeal was authorized by the provisions of the Code and was merely relieving the appellant from the rule of practice theretofore established to the effect that an order refusing to vacate a prior appealable order, although described as appealable by the statute, could not be made to take the place of an appeal from the original order.

The only theory upon which the court could entertain an appeal from an order refusing to vacate, where such order is not made the subject of direct appeal, would be that the order refusing to vacate is identical with the original order. Such theory is, however, not tenable in reason, and is inconsistent with the rulings of this court. In *Credits Commutation Co. v. Superior Court*, 140 Cal. 82, 73 Pac. 1009, the court below had made an order settling a receiver's account and directing him to pay certain claims. Thereafter, the petitioner moved the court to vacate the order, which motion was denied. From the second order the petitioner appealed, filed a \$300 undertaking, and claimed that this undertaking stayed the execution of the order directing the payment

of the claim. His claim was denied by this court upon the ground that the undertaking had reference only to the order appealed from and not to the prior order which it sought to vacate. See, also, *Reay v. Butler*, *supra*; *Weldon v. Rogers*, 154 Cal. 632, 98 Pac. 1070.

The view that an order refusing to vacate cannot under any circumstances be made the subject of direct appeal, unless it itself be one of a class of orders designated by the Code as appealable, finds further support in *Estate of Cahill*, 142 Cal. 628, 76 Pac. 383, where an attempted appeal from an order denying a motion to vacate an order setting apart a homestead was dismissed upon the ground that the order sought to be appealed from was not included within the terms of section 963 of the Code of Civil Procedure. It is said that the case last cited was a probate matter and it is sought to draw a distinction on the ground that under the Constitution this court is given appellate jurisdiction only "in such probate matters as may be provided by law," whereas the like jurisdiction extends to "all cases in equity." But as we have seen, the grant of appellate jurisdiction in all cases in equity does not authorize the court to entertain direct appeals from interlocutory orders in equity cases, the appellate jurisdiction as to such orders being no wider than that permitted in probate cases. Interlocutory orders in equity cases, like all orders in probate, may be made the subject of direct appeal only when such appeal is authorized by the statute.

2. The appeals from the orders authorizing the issuance of receiver's certificates, to dispose of the same and expend the proceeds in the construction of a restraining levee, etc.

Whether these orders may be reviewed on appeal from the final judgment in the action is not here in question. The only point made by the respondent is that such review may not be had on direct appeal from the orders complained of. The orders are not specified in section 963 of the Code of Civil Procedure as orders before judgment from which an appeal is authorized, nor are they special orders made after final judgment. It is claimed, however, by the appellant, that each order is, in its nature, a final judgment in a collateral proceeding arising out of the action, and that a direct appeal may, therefore, be taken as from such final judgment. In order to determine the character of the orders in question, it may be well to briefly review the decisions of this court dealing with similar questions. In *Rochat v. Gee*, 91 Cal. 355, 27 Pac. 670, it was held that a direct appeal could not be taken from an order before judgment approving the account of a receiver. In *Illinois Trust & Savings Bank v. Alvord*, *supra*, an action to foreclose a mortgage on the property of a street railway company, the court dismissed an appeal from

an order declaring certain indebtedness contracted by the receiver in the same action and a receiver in another action a lien prior and paramount to any of the liens in litigation. The opinion states that the enforcement of the order directing the payment of the contested claims out of the first proceeds of the sale of the mortgaged property could not be had until the entry of a final decree directing such sale, and that the appellants could preserve all their rights by an appeal from such final decree. In *Grant v. Superior Court*, 106 Cal. 324, 39 Pac. 604, the petitioner sought a writ of prohibition restraining the superior court from making an order fixing the compensation of a receiver in an action pending before it. The petition was denied, this court saying: "The only order which the court proposes to make is one fixing the amount of the compensation. Such an order cannot by itself injure anyone; but if in addition to the order fixing the amount the court should order it paid out of the fund in the receiver's hands, such order, under whatever name it might be designated, would be a final judgment upon a collateral matter arising out of the action, and would be appealable by any party interested in the fund." *Grant v. L. A., etc., Ry. Co.*, 116 Cal. 71, 47 Pac. 872, was an appeal from an order such as the one referred to in *Grant v. Superior Court*, fixing the compensation of the receiver, taxing such compensation as costs against all the parties, and directing the receiver to apply towards its payment the balance of a fund remaining in his hand. Motion to dismiss the appeal was denied upon the ground that such order was, in legal effect, a final judgment upon a collateral matter arising out of the action. *Los Angeles v. Los Angeles Water Co.*, 134 Cal. 121, 66 Pac. 198, involved an appeal from an order settling the account of a receiver and directing the payment of his compensation by one of the parties. It was held that this was, in effect, an appeal from a final judgment, and that the appeal might be taken within six months after the entry of the order. In *Free Golding Mining Co. v. Spiers*, 135 Cal. 130, 67 Pac. 61, the order authorized a receiver in charge of mining property to purchase and install a cyanide plant and to pay for the cost of such purchase and installation out of any funds that might come into his hands. This was held to be not subject to direct appeal. Finally, in *Anglo-Californian Bank v. Superior Court*, 153 Cal. 753, 756, 96 Pac. 803, it was held that an order requiring the petitioner, not a party to the suit, to pay money to the receiver of an insolvent bank, notwithstanding the fact that a part of the money was claimed by third parties, was a final adjudication of the rights of the parties, and might be made the subject of direct appeal.

From these decisions the following rules are clearly deducible. Where the order re-

quires the payment of money by the party complaining (*Los Angeles v. Los Angeles City Water Co.*, supra; *Anglo-Californian Bank v. Superior Court*, supra), or the doing of an act by or against him, the order is in effect final as against such party and may be appealed from by him. If, on the other hand, the order be in its nature such as to be subject, before enforcement or execution, to the further action of the court, either by decree or subsequent order (*Rochat v. Gee*, supra; *Illinois Trust & Sav. Bank v. Alvord*, supra; *Grant v. Superior Court*, supra), the order complained of is not final, and review must be sought by means of appeal from the decree or order subsequently entered.

There remains, however, a third class of cases, i. e., those of orders requiring a receiver to make expenditures out of the funds in his hands. It seems difficult to reconcile the decisions dealing with this question. In *Grant v. Railway Co.*, supra, an order directing the receiver to apply the funds in his hands toward the payment of his compensation was held to be a final judgment. On the other hand, the appeal dismissed in *Free Gold Mining Co. v. Spiers*, supra, was from an order authorizing the receiver to pay the cost of installation of a cyanide plant out of the funds coming into his hands as a receiver.

The question involved is to some extent one of convenience and policy. Where a court has taken possession and control of property through a receiver, the preservation and proper management of such property can best be effected by permitting the trial court, pending a final hearing of the cause, to direct the receiver in the disposition of the funds coming into his hands, without having its supervisory action subject to the delay and inconvenience incident to repeated and successive appeals from separate orders. This consideration seems to have been the basis of the decision in *Free Gold Mining Co. v. Spiers*, supra, where the court said: "The receiver is but the hand of the court to aid it in preserving and managing the property involved in the suit for the benefit of those to whom it may ultimately be determined to belong. Any order that the court may make upon his application for such direction, whether for the expenditure of money or for the performance of any duty, may, if erroneous, be reviewed upon proper exceptions thereto after final judgment has been rendered, or, in exceptional cases, after the settlement of the final account of the receiver. Such orders usually depend upon the discretion of the court, to be exercised according to the necessities of the case, and require immediate execution in order to be of any avail; but if every order which the court might make for the preservation or proper management of the property in its custody is subject to a direct appeal therefrom, not only would the court be greatly hampered in

its efforts to preserve the property, but the interests of all the parties interested might be greatly prejudiced." Similarly, in *Heinze v. B. & B. Consolidated Min. Co.*, 129 Fed. 337, 64 C. C. A. 15, the United States Circuit Court of Appeals for the Ninth Circuit said: "If such an order be held appealable, it follows that every order directing the action of the receiver in the disbursement of any portion of the funds in his hands, and each order approving his monthly accounts, may be made the subject of an appeal, and the matters involved in the receivership may be brought into this court piecemeal. In a receivership such as this, extending over a long period of time, such a rule would involve burdensome litigation. * * *" These expressions were used in reference to an order confirming eight monthly reports of the receiver. In speaking of a further order directing the receiver to pay counsel fees out of the funds in his hands, the court said: "We are unable to see that it stands on different ground from the other appeal. It is true that if the money be paid to the receiver's attorney under the order of court, it is a final disposition of the sum so paid. But the court thereafter still had the receiver's account under its control. If the sums so paid were improperly disbursed, the error in its payment may be reviewed in adjusting the receiver's final account. * * * The argument that the money so paid is a final disposition of so much of the funds in the receiver's hands applies with equal force to any item of the current expense account of the receiver. In each case the money paid is a final payment out of the fund in the receiver's hands. * * *" If the holdings in *Grant v. Superior Court*, supra, and *Grant v. Los Angeles, etc., Ry. Co.*, supra, are in conflict with these views, those cases must, to the extent of such conflict, be regarded as overruled by the later decision in *Free Gold Min. Co. v. Spiers*, supra.

Applying the foregoing principles to the case at bar, we find that the orders complained of do not direct the payment of any money by the appellant Duncan, nor do they direct the performance of any act by or against him. In so far as they authorize the receiver to sell receiver's certificates, which are to be a paramount lien on the property, they are not distinguishable from *Illinois Trust & Savings Bank v. Alvord*, supra. In so far as they authorize the receiver to apply the revenues resulting from his carrying on of the business of the defendant corporation to the payment of such certificates, the case presents the same question that was decided in *Free Gold Mining Company v. Spiers*, supra. Under the doctrine of the cases cited, the orders are not to be regarded as final judgments.

For the foregoing reasons, it must be held

that none of the three orders in question is appealable. The appeals are dismissed.

We concur: ANGELLOTTI, J.; SHAW, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.

(159 Cal. 541)

REGENTS OF UNIVERSITY OF CALIFORNIA v. TURNER et al. (Sac. 1,710.)

(Supreme Court of California. March 14, 1911.)

1. EXCEPTIONS, BILL OF (§ 58*)—AMENDMENTS—OMISSION—ENGROSSED BILL—FAILURE TO SERVE.

Where it did not appear that the respondent proposed any amendments to appellants' original bill of exceptions, appellants' omission to serve the bill on respondents after a certification as required by Code Civ. Proc. § 650, as amended by St. 1907, c. 379, did not invalidate the bill.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 100-105; Dec. Dig. § 58.*]

2. JUDGES (§ 42*)—INTEREST—DISQUALIFICATION—LETTERS OF ADMINISTRATION—JUDGE AS CREDITOR.

Code Civ. Proc. § 170, provides that no judge shall sit or act as such in any action or proceeding to which he is a party or in which he is interested. Section 1430 declares that no letters of administration shall be granted before any judge who is interested as next of kin to the decedent, or is in any manner interested or disqualified from acting. Section 1495 provides that any judge of the superior court may present a claim against the estate of a decedent for allowance to the executor or administrator, and if the claim is allowed, the judge must designate some other judge of the superior court in the same or an adjoining county, who, on the presentation of such claim to him is vested with power to allow or reject it. *Held*, that the fact that a superior court judge was a creditor of a decedent's estate did not disqualify him to appoint an administrator; the judge being disqualified only to act on the allowance of his own claim.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 190-200; Dec. Dig. § 42.*]

In Bank. Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by the Regents of the University of California against Elizabeth Turner, as administratrix of the estate of W. C. Turner, deceased, and another. From a judgment denying plaintiffs' motion for a new trial, they appeal. Affirmed.

F. A. Cutler, for appellants, Edward F. Treadwell and J. W. Knox, for respondents.

SHAW, J. Appeal by plaintiff from the judgment and from an order denying its motion for a new trial. The plaintiff sues to foreclose a mortgage on real estate and to obtain judgment upon the note given for the debt secured thereby. The note and mortgage were executed by W. C. Turner. The Merced Security Savings Bank is the owner of a part of the mortgaged premises by title

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

acquired after the execution of said mortgage. The defendant bank answered that the action was barred by the provisions of sections 318, 319, 337, 343, 1493, and 1500, of the Code of Civil Procedure. The administratrix alleges that it is barred by sections 337, 338, 339, 343, 353, 1493, and 1500, of said Code. The court found that the action was barred by the provisions of sections 318, 319, 337, 343, 1493, and 1500 of said Code. It made no express finding as to section 353. The facts to which that section relates are found, however, and the question whether the action is barred thereby is presented by the finding. Judgment was given for the defendants. The principal question is whether or not the evidence sustains the findings on the subject of the statute of limitations. Sections 318, 319 and 343 do not apply to the case. Sections 337 and 353 are the only ones necessary to be considered.

The respondent makes the preliminary objection that the bill of exceptions containing the evidence cannot be considered a part of the record on appeal, because it was not served on the respondents after it was engrossed. It was settled in 1903, while the provision of section 650, Code of Civil Procedure, as amended in 1907, was in force, providing that a bill of exceptions after being settled and engrossed, must be presented to the judge to be certified, "and upon being certified must within five days thereafter be served upon the adverse party." St. 1907, p. 715. It is sufficient to say upon this point that the bill appears to have been duly settled by the judge, and that there is nothing in the record to show that any amendments to the original bill of the plaintiffs were ever proposed, in which case it could have been settled without notice or engrossment, and the provision above quoted would not be applicable. The contrary will not be presumed. We are not to be understood as intimating that the provision is other than directory, or that the failure to serve such engrossed bill, when certified, would preclude its use on appeal.

The note and mortgage sued on were executed on February 28, 1889, and became due on February 28, 1892. If Turner, the mortgagor, had lived, the four years' limitation prescribed by section 337, Code of Civil Procedure, would have expired on February 28, 1896. Turner died on February 14, 1894. The present action was begun on July 18, 1904, more than eight years after the period of limitation had run. Section 353, Code of Civil Procedure, provides that if a person against whom an action may be brought die before the period of limitation has run, the action may be begun against his personal representative, after the expiration of the time limited, and within one year after the issuing of letters testamentary or of administration. Plaintiff contends that the extension of the time thus provided had not expired when the action was begun.

The record of the proceedings in the administration of the estate of Turner shows that one W. W. Gray was appointed administrator of his estate, that letters of administration thereon were issued to him on April 7, 1894, and that he continued to act as administrator thereof from that time until his death, which occurred on April 12, 1902. The giving of notice to creditors of the estate to present their claims, was completed on May 26, 1894. The plaintiff presented to him for allowance its note and it was allowed by him on September 13, 1894. The mortgage was not included in the claim so presented. See *Estate of Turner*, 128 Cal. 392, 60 Pac. 967. On August 30, 1898, plaintiff moved the court for leave to amend said claim, by including the mortgage therein. This motion was denied and plaintiff's appeal therefrom was dismissed. *Estate of Turner*, 139 Cal. 86, 72 Pac. 718. During his administration of the estate, Gray filed three accounts current which were duly settled by the court. The plaintiff caused him to be cited to render an exhibit as provided in section 1622, Code of Civil Procedure. He received and allowed a large number of claims against the estate. He filed a petition, in which plaintiff joined, for an order to sell the land covered by plaintiff's mortgage, the order was made, the land was offered for sale, and plaintiff purchased it. Plaintiff applied to the court to have its claim accepted as payment on the purchase price of the land, under section 1570, Code of Civil Procedure, which was refused. Plaintiff appealed, and on appeal the refusal was held to be correct, for the reason that the allowance of plaintiff's claim did not include the mortgage, and did not establish the claim as a mortgage lien. *Estate of Turner*, 128 Cal. 388, 60 Pac. 967. This decision on appeal was made on April 14, 1900. Up to this time plaintiff, as shown by the facts we have recited, had recognized Gray as the lawfully appointed administrator of the estate, dealt with him as such and participated in the proceeding for administration. Thereafter it claimed, and it now claims, that there was no administration of the estate until Elizabeth Turner was appointed, after the death of Gray, and that the statute of limitations was suspended, as provided in section 353, Code of Civil Procedure, for the entire period from 1894 to 1902, during which Gray was acting as administrator, and until one year after the appointment of Mrs. Turner. If this point is not sustained it is obvious that the extension of the period of limitation, provided by section 353, had run before the action was begun, or rather that it did not become operative at all, and that the action is barred.

The order appointing Gray administrator of Turner's estate was made by Hon. J. K. Law, as judge of the superior court of Merced county. Judge Law was a creditor of the decedent, upon a note executed by

Turner to him for \$3,419.07. His claim thereon was afterwards duly presented and allowed by Gray as administrator and by the judge of the superior court of the adjoining county. Respondent argues that the evidence does not show that Law was the judge who appointed Gray, but, while the language is not very definite, we think that fact was, in effect, stipulated upon the trial. The theory of the plaintiff is that Judge Law, as a creditor of the estate, was interested therein, and that, in consequence thereof, he was not qualified or competent to act in the matter, and that the appointment of Gray and all proceedings thereafter had in the administration of the estate are invalid and void, and must, in law, be considered as not having occurred.

Section 170, Code of Civil Procedure, declares, among other things, that no judge "shall sit or act as such in any action or proceeding to which he is a party, or in which he is interested." Section 1430, Code of Civil Procedure, provides as follows: "No will shall be admitted to probate, or letters testamentary or of administration granted, before any judge who is interested as next of kin to the decedent, or as legatee or devisee under the will, or when he is named as executor or trustee in the will, or is a witness thereto, or is in any manner interested or disqualified from acting." It has been held that an order extending time in a civil action, made by a judge who is disqualified by relationship, is absolutely void. *Johnson v. German A. I. Co.*, 150 Cal. 339, 88 Pac. 985. The authorities of other states are to the effect that if a judge is a creditor of the decedent he is interested in the matter of the appointment of an administrator and in all other proceedings in the administration, within the meaning of similar statutes, and that if he assumes to make such an order it will be void. *Sigourney v. Sibley*, 21 Pick. (Mass.) 104, 32 Am. Dec. 248; *Hall v. Thayer*, 105 Mass. 222, 7 Am. Rep. 513; *Aldrich's Case*, 110 Mass. 193; *Coffin v. Cottle*, 9 Pick. (Mass.) 292; *In re Cottle*, 5 Pick. (Mass.) 483; *Thornton v. Moore*, 61 Ala. 354; *Succession of Payne*, 32 La. Ann. 355; *Succession of Rhea*, 31 La. Ann. 323; *Burks v. Bennett*, 62 Tex. 278; *Moody v. Looscan*, (Tex. Civ. App.) 44 S. W. 624; *Bedell v. Bailey*, 58 N. H. 62. In some of these cases the matter was presented on direct appeal, but in others the order was held to be void on collateral attack. The only authority that such an interest does not disqualify the judge, except in matters where he acts directly upon or in respect of his claim, is *State v. Woody*, 14 Mont. 457, 36 Pac. 1043. The question has not heretofore arisen in this court. If the foregoing sections are to be given the same construction as similar statutes have received in other states, it must be admitted that the interest of a judge as a creditor of the decedent will disqualify him to act as judge in proceedings for the

administration of the estate. There is another section of the Code which must be considered and which we think shows that the Legislature did not intend to disqualify a creditor judge to act generally in proceedings for administration, but only where the act directly affects his claim. Section 1495, so far as material, is as follows: "Any judge of a superior court may present a claim against the estate of a decedent for allowance to the executor or administrator thereof, and if the executor or administrator allows the claim, he must, in writing, designate some other judge of the superior court of the same or an adjoining county, who, upon the presentation of such claim to him, is vested with power to allow or reject it."

Under sections 170 and 1430, if the interest of the judge as a creditor of the decedent disqualified him to act, the only method to pursue would be to transfer the matter to some other county, if there was only one judge in the county, or to some other department of the court, if there were more than one. Code Civ. Proc. §§ 397, 398. In such a case, there would be no necessity for any provision for the designation of another judge to allow or reject his claim, for the entire proceeding would be had before some other judge. The purpose of section 1495 evidently was to provide for the case of the judge who is in charge, so to speak, of the proceedings in administration and who is a creditor of the decedent, and to afford means whereby he may obtain the allowance or rejection of his claim. It refers to that judge alone. It implies that the administration proceedings are pending before the judge who has the claim against the estate, that he has acted in the other matters of the administration, including the claims of other creditors, and that it is necessary to provide a special mode of passing upon his debt because as to that he is disqualified by the other sections of the Code above quoted. The necessary inference from its enactment is that he is not, by reason of being a creditor, necessarily disqualified in other proceedings in the same estate, except where his debt gives him a direct interest in the matter to be done. Our conclusion is that the several provisions of the Code on the subject, when considered in connection with each other, are not to be construed to provide that the interest of a judge as a creditor of the decedent necessarily disqualifies him to act in other matters in the proceeding, and that they do not forbid him to act in granting letters, or make his order to that effect necessarily void or voidable.

Possibly if a creditor applied for letters, the judge, being equally interested and equally entitled, might be deemed to be directly interested in that application, and therefore disqualified. Perhaps, also, the fact that the judge was a creditor, taken in connection with the solvency or insolvency of the particular estate, its condition and other facts,

might establish bias or prejudice, or an actual personal interest in the appointment which would disqualify him under subdivision 4 of section 170, but that objection would be waived if not made at the time. We do not express any opinion as to either of these contingencies, for the appointment of Gray was a preferred one, he having been appointed as the nominee of the widow, under subdivision 1 of section 1365. If he was a competent person, the judge had no right of discretion to do otherwise than appoint him. In such a case, at least, the interest of the judge as a creditor, should not disqualify him, or render that and subsequent proceedings absolutely void.

We are led to this conclusion the more readily by a consideration of the consequences that might ensue if it were held that the fact that the judge who appoints an administrator was a creditor of the decedent, would render all proceedings void, and that it could be shown collaterally, even after the administration was closed, to invalidate all that had been done, including final distribution. We have no information as to the usual practice or custom, but the fact that the judge acted in the estate of Turner, although a creditor, and that he continued to act for several years after his relation as a creditor was known to all parties concerned in a large estate, without any objection or protest ever having been made by any one, justifies the inference that there are frequent instances of the same kind. It might easily happen that a judge having a small debt against a decedent would not recall the fact at the time. One may, indeed, become a creditor of another without being aware of the fact at the time, as, for example, a creditor of a corporation, is a creditor of each stockholder, although he may not know one of them.

The claim might be presented in the name of another person, although owned by the judge. If the fact alone disqualifies the judge and renders all proceedings void, it need not appear in the record. No person whose title to property was obtained through probate proceedings could regard his title as secure or safe against such an impeachment. While there might be rare instances in which, because of such interest, a judge would act unfairly or unjustly in such matters, it is apparent that the injustice from that cause would be very slight as compared with that which would ensue if the rule was that such interest made the entire administration void.

Having reached this conclusion the necessary consequence is that the action was barred, under any theory of the case. Defendants further contend that inasmuch as the letters to Elizabeth Turner were issued on June 23, 1902, and the plaintiffs presented their claim to her on May 5, 1904, and began

this action on July 18, 1904, the action was again barred after the issuance of such letters. Plaintiff, in answer to this, shows that on August 19, 1902, it appealed from the order of June 23, 1902, appointing Elizabeth Turner administratrix, which appeal was pending until April 20, 1904, and, upon that fact, it is claimed that the issuance of the letters to her did not take effect until the appeal was determined, and that therefore the year from such issuance had not run when the action was begun. We find it unnecessary to decide as to this controversy, since the action was barred before the death of Gray.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

to the whole record of the inferior court and to the evidence, where necessary to determine the jurisdictional fact.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 33, 41, 174, 175, 183, 184; Dec. Dig. §§ 28, 64.*]

3. INJUNCTION (§ 27*)—APPEAL—JURISDICTION.

Where a superior court has no jurisdiction of an appeal from a justice's court because of defects in the appeal, the superior court may be restrained from proceeding to hear and determine the case.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 51–53; Dec. Dig. § 27.*]

4. JUSTICES OF THE PEACE (§ 159*)—APPEAL—REQUISITES.

The superior court acquired jurisdiction on appeal from a justice's court under Code Civ. Proc. §§ 974, 978, 978a, authorizing appeals from justice's courts within 30 days after judgment by filing notice of appeal with the judge and serving a copy, and by filing an undertaking within five days after the filing of the notice of appeal, and providing for notice of the filing of the undertaking, and authorizing the adverse party to except to the sufficiency of the sureties within five days after the filing of the undertaking, where the party aggrieved complied with the statute within 30 days from the rendition of the judgment, though he did not give notice of the filing of the undertaking within five days thereof; the adverse party not complaining that he had no opportunity to except to the sureties.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 550–578; Dec. Dig. § 159.*]

5. MANDAMUS (§ 31*)—COMPELLING INFERIOR COURT TO ACT.

Where the superior court acquired jurisdiction on appeal from a justice's court, but erroneously determined that it was without jurisdiction, mandamus would lie to compel it to proceed to a trial of the action.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 74, 75; Dec. Dig. § 31.*]

Petition by the Golden Gate Tile Company against the Superior Court of State of California in and for the City and County of San Francisco and another for a writ of review. Writ of mandate issued.

Fisher Ames and Ames & Manning, for petitioner. L. P. Dunkley and Henry C. Schaefer, for respondents.

MELVIN, J. Petitioner asked for a writ of review, directed to the superior court of the city and county of San Francisco and Hon. Thomas F. Graham, one of the judges thereof. Upon reading and considering said petition, this court, being of the opinion that the appropriate remedy under the facts stated was an alternative writ of mandate, such writ was accordingly issued.

There is no controversy respecting the facts alleged in the petition, which, briefly stated, are as follows: On October 27, 1909, judgment was entered for the plaintiff in the justice's court of the city and county of San Francisco, in the case of *H. S. Ripley v. Golden Gate Tile Co.*, a corporation. On November 3, 1909, defendant regularly served

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GOLDEN GATE TILE CO. v. SUPERIOR COURT OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 5,509.)

(Supreme Court of California. March 13, 1911.)

1. MANDAMUS (§ 31*)—COMPELLING ACTION BY INFERIOR COURT.

Mandamus lies to compel an inferior court to act when it has neglected or refused to act.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 74, 75; Dec. Dig. § 31.*]

2. CERTIORARI (§§ 28, 64*)—REMEDY—EXCESS OF JURISDICTION BY INFERIOR COURT.

A writ of review is proper when an inferior court exceeds its jurisdiction, and, while not a writ of error or appeal by which the mere manner of conducting the proceedings, the rulings of the court on questions of evidence, and other matters within the jurisdiction involving the merits can be reviewed, it is the means by which the power of the court can be inquired into, and for such purpose the review extends

and filed its notice of appeal from said judgment and on the same day an undertaking on appeal was duly filed. On the 24th of November, 1909, notice of the filing of said undertaking was duly served on plaintiff's attorneys and filed. It will be seen that all of these transactions occurred within a period of 28 days. Subsequently a motion to dismiss the appeal was made, and after a hearing by the court was granted. The ground of the motion was that the appellant had not complied with the provisions of section 978a of the Code of Civil Procedure.

The first question which we shall determine is this: Conceding that the superior court's finding that it was without jurisdiction to consider the case on appeal was erroneous, may this court by a writ of mandamus compel it to proceed to a trial of the action? For a long time this court held that, where a superior court erroneously concludes that it is without jurisdiction to try a cause appealed from a justice's court, its action in dismissing the appeal cannot be disturbed. That the court now inclines to a different doctrine is evidenced in the granting of the alternative writ herein, as well as in making peremptory by an order from the bench a similar writ in the Matter of R. B. Vinson, S. F. No. 5,472.¹ The facts in that case were as follows: A notice and an undertaking on appeal were filed, but the sureties having failed to justify after exception, a second motion was filed and all the steps required to perfect the appeal were taken within the time prescribed by law. This court held that the first attempted appeal was ineffectual for any purpose; that the other appeal was properly perfected; and that the superior court should proceed to try the cause. In the Matter of Vinson, application for a writ had been made to the District Court of Appeal of the First appellate district. Being unable to agree, the justices of that court filed separate opinions, setting forth their views.

Mr. Justice Kerrigan, in his opinion, while conceding that the case of Buckley v. Superior Court, 96 Cal. 119, 31 Pac. 8, was opposed to petitioner's contention, called attention to the fact that a later decision had thrown doubt upon the correctness of the rule announced in that case. In an elaborate opinion he reached the conclusion that a writ of mandate should issue. That portion of his opinion applicable to the case at bar is hereby adopted. It is as follows:

"Mandamus lies to compel an inferior court to act when it has neglected or refused to do so. 19 Am. & Eng. Ency. of Law (2d Ed.) p. 827. A writ of review is the proper remedy when such a court has acted, but in acting has exceeded its jurisdiction. Spelling on Injunctions and other Extraordinary Remedies, vol. 2, § 1958.

"Where a superior court has no jurisdiction of an appeal from a justice's court, because, for example, of some defect in the appeal, the superior court may be restrained from proceeding to hear and determine such a case. Swem v. Monroe, 148 Cal. 741, 83 Pac. 1074; Crowley L. & T. Co. v. Sup. Ct., 10 Cal. App. 342, 101 Pac. 935; S. P. R. R. Co. v. Sup. Ct., 59 Cal. 471; Rickey v. Sup. Ct., 59 Cal. 661; Lewis v. Sup. Ct., 11 Cal. App. 483, 105 Pac. 763. And it would seem that the converse of this proposition must be true, and that where a court has jurisdiction of a cause, it should not be permitted, by an arbitrary or erroneous order, to divest itself of jurisdiction, but it should be compelled to proceed with the case to judgment. Under the circumstances mentioned, it has been held that either writ is proper. Snover v. Tinsman, 38 N. J. Law, 210. One line of cases holds that, where a court has jurisdiction, but determines that it has not, and for that reason dismisses the appeal, thus depriving a party of a hearing, such court may be required to vacate the order dismissing the appeal and to proceed with the trial of the cause; that such a dismissal of the appeal is nothing more or less than a refusal to proceed in the action, and comes within the general rule that, when a court having jurisdiction refuses to act on the ground that it has not jurisdiction, it may be compelled to do so.

"In the case of Washington v. Hunter, 3 Wash. 92, 27 Pac. 1076, the superior court had erroneously dismissed an appeal from the justice's court on the theory that there was a defect in the appeal, and that therefore it was without jurisdiction. Mandamus was there held to be the proper remedy to compel the superior court to proceed with the cause.

"Merrill on Mandamus, after reviewing the authorities on the question whether mandamus lies in case of the erroneous dismissal of an appeal by an inferior court, says (at pages 256 and 257, § 205): 'The weight of authority seems to be that a writ of mandamus will lie in all cases to compel the reinstatement of an appeal, except when another remedy * * * is provided by statute.' Again in section 203 he says: 'When a court refuses to proceed to try a cause, erroneously deciding that it has no jurisdiction, it will be compelled by the writ of mandamus to assume jurisdiction and proceed with the cause.' See, also, section 206.

"In the case of State ex rel. v. Philips, 97 Mo. 331, 10 S. W. 855, 3 L. R. A. 476, after citing and quoting from a great many cases, the court says (at page 346): 'The weight of authority, and certainly of reason, would seem to say that, if the lower court has plainly erred on a point of practice, either by misapprehending its own rules or a plain rule of law, and in consequence has dismissed an appeal, mandamus will lie to correct

¹ No opinion.

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and remedy the erroneous or arbitrary exercise of its discretion, notwithstanding it has acted.'

"And in *Re Parker*, 120 U. S. 737, 7 Sup. Ct. 767, 30 L. Ed. 818, the superior court of Washington Territory had decided upon a hearing that the appeal had not been properly taken, that it had no jurisdiction, and therefore dismissed it. But the Supreme Court of the United States, by a writ of mandate, compelled the superior court to reinstate the case and to proceed to trial.

"Again, in *Harrington v. Holler*, 111 U. S. 796, 4 Sup. Ct. 697, 28 L. Ed. 602, it was held that a dismissal was a refusal to hear and decide a cause, and that mandamus was the proper remedy to compel the court to entertain the case and to proceed with its determination. See, also, *Hollon Parker*, Petitioner, 131 U. S. 221, 9 Sup. Ct. 703, 33 L. Ed. 123; *Ex parte Bradstreet*, 7 Pet. 634, 8 L. Ed. 810; *State ex rel. v. Laughkin*, 75 Mo. 358; *Fabretti v. Superior Court*, 77 Cal. 305, 307, 19 Pac. 481; *People ex rel. v. Scates*, 3 Scam. (Ill.) 351, cited in *Avery v. Superior Court*, 57 Cal. 249. This is the doctrine in Alabama and Michigan.

"Under the authorities just referred to, it not only appears that under circumstances such as are present here the aggrieved party is entitled to relief, but also that mandamus is the appropriate remedy. However, according to another view, a writ of certiorari is the proper remedy. But the pleadings are in such shape here that I think that the petitioner is unembarrassed by the question of remedy. The petition in this proceeding sets forth that the superior court refused to proceed with the trial of the case, and a writ of mandate is prayed for; and, if it were not for certain allegations in the answer of respondent, the petitioner would fail or succeed as he is entitled or not to a writ of mandate. But the undenied facts set forth in the petition, with the allegations of the answer and the exhibits attached, show a sufficient application for a writ of review. The two pleadings embrace all the matters and things that would be required in such an application. It is true that the petitioner prays for a writ of mandate, but, notwithstanding this, or what he may denominate the proceeding, he may be granted the relief to which the admitted facts show him entitled. Perhaps, when respondent drew his answer setting forth the record of the proceedings in the lower court, he was in the same frame of mind as at the time of the oral argument before this court when, in effect, he waived any objection to the remedy.

"With the exception of the case of *Buckley v. Sup. Ct.*, 96 Cal. 119, 31 Pac. 8, and a few cases in this state following it, and a case in Utah (*Crooks v. District Court*, 21 Utah, 98, 59 Pac. 529), which also follows it, and which like it was decided by a divided court, I have been unable to find any authority holding, as those cases seem to hold, that

neither the writ of mandate nor the writ of certiorari will lie to review the erroneous dismissal of an appeal from an inferior court. No doubt in some jurisdictions in such a case it would be held that the court had acted, and that therefore certiorari, and not mandamus, is the proper remedy. Such was the determination of the court in *Levy v. Sup. Ct.*, 66 Cal. 292, 5 Pac. 353, where, for a supposed insufficiency in the undertaking, a justice's court appeal was dismissed. The court held that mandamus was not the appropriate remedy, and said: 'A mandate that the superior court proceed to a hearing of the appeal on the merits, or to a retrial of the issue, would not annul, but simply ignore, the order dismissing the appeal. The order must first be annulled by a direct proceeding; that is, by certiorari. Such is the remedy when a court has entered a judgment or made an order in excess of its jurisdiction.' The court also said: 'That court can neither give to itself jurisdiction by holding an insufficient undertaking sufficient, nor divest itself of jurisdiction by holding a sufficient bond insufficient.'

"In *Hall v. Superior Court*, 68 Cal. 24, 8 Pac. 509, through a mistaken conception of the law a justice's court appeal was dismissed, and an application for a writ of certiorari was granted. See, also, *Hall v. Sup. Ct.*, 71 Cal. 550, 12 Pac. 672; *Carlson v. Sup. Ct.*, 70 Cal. 628, 11 Pac. 788.

"In *Myrick v. Sup. Ct.*, 68 Cal. 98, 8 Pac. 648, the justice's court upon motion dismissed the action on the ground that the complaint had not been indorsed 'Filed' as required by law. An appeal was taken upon questions both of law and fact to the superior court, and over an objection the superior court tried the case upon those issues and rendered a judgment. There it was held that the superior court had exceeded its jurisdiction; that the judgment was void and should be annulled.

"In *Null v. Superior Court*, 4 Cal. App. 207, 87 Pac. 392, it was held that the superior court having improperly tried an appeal *de novo* from a justice's court, and rendered judgment thereon, such judgment will be annulled upon certiorari.

"If an inferior court should make a finding in favor of its jurisdiction, basing the finding on conflicting evidence, it must be conceded that such a determination would be conclusive upon this court; but where there is no conflict in the evidence, thus presenting a clear question of law only, and an inferior court holds that it has jurisdiction when under the uncontradicted evidence it has not, then its judgment may be annulled on writ of review. 'While a writ of review is not a writ of error, and is not a means by which, as upon appeal, the mere manner of conducting the proceedings, the rulings of the court upon questions of evidence, and other matters within the jurisdiction, involving the merits, however erroneous they

may be, can be reviewed, it is nevertheless a means by which the power of the court in the premises can be inquired into; and for this purpose the review extends, not only to the whole of the record of the court below, but even to the evidence itself, where necessary to determine the jurisdictional fact.' *Schwartz v. Sup. Ct.*, 111 Cal. 106, 43 Pac. 580; *Whitney v. Board of Delegates*, 14 Cal. 479.

"In many cases jurisdictional facts may not appear of record, either by failure of the inferior court or officer to follow the requirements of the law and make them of record, or because the law does not require it to be done. In such cases this court, and all other courts having jurisdiction to review and correct the proceedings of inferior courts, would be powerless, unless it can compel the inferior tribunal to certify to this court, not only what is technically denominated the record, but such facts, or the evidence of them, as may be necessary to determine whatever questions as to the jurisdiction of the inferior tribunal may be involved, and the grossest abuses of power, to the great reproach of the law, might be perpetrated with impunity and without the possibility of a remedy.' *Blair v. Hamilton*, 32 Cal. 49. See, also, 6 Cyc. 827; *Stumpf v. Board of Supervisors*, 131 Cal. 364, 63 Pac. 663, 82 Am. St. Rep. 350; 4 Ency. of Plead. & Prac. 262; *Los Angeles v. Young*, 118 Cal. 295, 50 Pac. 534, 62 Am. St. Rep. 234.

"The case of *Buckley v. Sup. Ct.*, 96 Cal. 119, 31 Pac. 8, is opposed to this doctrine, but the views expressed in the dissenting opinion, concurred in by Beatty, C. J., are warranted, it would seem, by examination of the authorities. Prior to that decision, the Supreme Court of this state had held that the erroneous dismissal of a justice's court appeal was subject to review. *Levy v. Sup. Ct.*, supra; *Hall v. Sup. Ct.*, supra; *Carlson v. Sup. Ct.*, supra. In *Bergevin*, etc., *Co. v. Wood*, 11 Cal. App. 643, 105 Pac. 935, it is said that the rule laid down in the *Buckley* Case is 'liable to be pressed so far as virtually to destroy the operation of the writ of review in relation to the proceedings of the superior court.' And the same court in another case (*Pacific Window Glass Co. v. Smith*, 8 Cal. App. 762, 97 Pac. 898) decided that certiorari would lie to annul the wrongful dismissal of an appeal from the justice's court. In the case of *Laws v. Troutt*, 147 Cal. 174, 81 Pac. 401, this question, it appears, was again presented, but the case was decided upon another point; nevertheless in referring to the *Buckley* Case it is intimated by the court that the correctness of that decision is doubtful.

"The function of the writs of mandamus and review is often much the same; yet, under circumstances such as prevail here, and leaving out of consideration the California cases hereinbefore referred to which

were reversed by the *Buckley* Case, the writ of mandamus has been invariably granted, and when not granted it has generally been because there was another remedy by writ of error or by appeal. *Merrill on Mandamus*, § 205 et seq. Here the appeal was perfected, and the superior court had jurisdiction, and it should have proceeded to entertain and decide the cause. Entertaining these views, it is my opinion that the writ of mandamus should issue as prayed for."

We now come to the discussion of the merits of the question whether or not the superior court obtained jurisdiction of the appeal. This involves an examination of sections 974, 978, and 978a of the Code of Civil Procedure. The first-named section provides that the aggrieved party may appeal at any time within 30 days after the rendition of judgment, and that "the appeal is taken by filing a notice of appeal with the justice or judge and serving a copy on the adverse party." Section 978 is to the effect that an appeal from a justice's court is ineffectual for any purpose without the filing of the undertaking therein prescribed. Section 978a is as follows: "The undertaking on appeal must be filed within five days after the filing of the notice of appeal and notice of the filing of the undertaking must be given to the respondent. The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given."

Respondents contend that under the section last quoted the notice of the filing of the undertaking on appeal must be served at the time of such filing, so that the adverse party may have five days after the filing and notice in which to except to the sureties. The statute does not so provide. While the undertaking on appeal must be filed within five days after the filing of notice of appeal, no time is specified during which notice of the filing of the undertaking must be given to the respondent. It is contended, however, that as respondents' five days within which exception to the sureties may be taken runs from the filing of the undertaking, and not from the notice of such filing, appellant might deprive his adversary of the right of questioning the sufficiency of the sureties by the simple device of waiting more than five days before giving notice—that the very object of the Code section is to save a successful litigant from the trouble of daily inspection of the justice's record to learn whether or not the losing party has filed an undertaking. Perhaps that was the purpose of the Legislature in enacting said section 978a, and perhaps, in a case where that question was involved, we might determine that the period of five days allowed respondent for

exception to the sureties begins to run only after the service of notice upon him. Such construction would be reasonable, and would be just as readily reached under the language of the statutes as one requiring almost contemporaneous filing of an appeal bond and service of notice on the opposite party. But, without reading anything into any of these Code sections, we find, first, that appellant has 30 days from the rendition of judgment within which to appeal; second, that his first step is the filing of a notice of appeal and service thereof on the adverse party (Code Civ. Proc. § 974); third, that to make his appeal effectual he must file the required undertaking (section 978, Code Civ. Proc.); fourth, that said undertaking on appeal must be filed within five days after the filing of the notice of appeal; fifth, that respondent must be given notice of the filing of the undertaking (section 978a). All of these things were done by appellant within 30 days after rendition of judgment. Respondent is not here complaining that he had no chance to except to the sureties. Practically he wishes us to add the word "immediately" at the end of the first sentence of section 978a, Code of Civil Procedure, so that the latter part of that sentence would read, "and notice of the filing of the undertaking must be given to the respondent immediately." He asks us to interpolate a word in this section that the Legislature did not put there, and, after doing so, to declare that jurisdiction of the appeal was never obtained by the superior court, because appellant did not supply the missing word and act upon its direction. We cannot agree with any such contention. The necessary steps to give the superior court jurisdiction of the appeal were all taken. The said appeal was regularly and properly before that court, and petitioner is therefore entitled to a writ of mandate.

Let the writ issue accordingly.

We concur: HENSHAW, J.; ANGELLOTTI, J.; SHAW, J.; SLOSS, J.; LORIGAN, J.

(159 Cal. 599)

SESSIONS et al. v. SOUTHERN PAC. CO.
et al. (S. F. 5356.)

(Supreme Court of California. March 23, 1911.
Rehearing Denied April 21, 1911.)

1. APPEAL AND ERROR (§ 339*)—TIME TO APPEAL—APPEAL FROM JUDGMENT.

The Supreme Court has no jurisdiction of an appeal from a judgment taken more than six months after entry thereof.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 339.*]

2. TRIAL (§ 358*)—SPECIAL INTERROGATORIES—INCONSISTENT ANSWERS.

Special findings of the jury in reply to interrogatories which are in direct conflict with

other special findings and with the uncontradicted evidence must be disregarded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 856; Dec. Dig. § 358.*]

3. CARRIERS (§ 282*)—INJURIES TO PASSENGERS—TRESPASSER—FRAUD OF PASSENGER—"PASSENGER WITHOUT REWARD."

A person who obtains free passage on a passenger train from the conductor by means of fraud or misrepresentation, or with knowledge of the want of authority on the part of the conductor to allow such free passage, is not a lawful passenger without reward within Civ. Code, § 2096, requiring ordinary care and diligence for his safe carriage, but is a mere trespasser, entitled only to demand that he be not willfully or recklessly injured.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1107, 1108, 1115, 1116; Dec. Dig. § 282.*]

4. CARRIERS (§ 318*)—PASSENGERS—TRESPASSERS—EVIDENCE.

In an action for the negligent killing of a person in a rear end collision between defendant's trains, evidence held to show that decedent took passage on the train pursuant to an arrangement with the conductor for free passage, and knowing that the conductor had no right to allow him to ride free, rendering him merely a trespasser on the train, to whom the carrier was not liable for injuries, unless willfully or wantonly inflicted.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 318.*]

Department 1. Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Ella A. Sessions and another against the Southern Pacific Company and another. From a judgment for plaintiffs, and an order denying a new trial, defendants appeal. Appeal from judgment dismissed, and order denying a new trial reversed.

Frank McGowan and McGowan, Squires & Westlake (Wm. F. Herrin and P. F. Dunne, of counsel), for appellants. W. B. Rinehart and Welles Whitmore, for respondents.

SHAW, J. This is an action to recover damages arising from the death of Charles A. Sessions, alleged to have been caused by the negligence of defendants. The plaintiffs are, respectively, the widow and the only child of the decedent. They recovered judgment for \$5,000 in the court below. In addition to the general verdict the jury made answer to certain questions of fact. The defendants moved the court under section 663 of the Code of Civil Procedure for judgment in their favor upon the answers to these questions. The court denied the motion. The defendants' motion for new trial was also denied. From the judgment and from these orders the defendants appeal. The verdict and judgment were against the Southern Pacific Company alone. It would seem, therefore, that the defendant Cole is not aggrieved and has no right of appeal, but, as the objection is not raised, we will not consider the question. [1] The appeal from the judgment was taken more than six

months after it was entered. This court therefore has no jurisdiction thereof, and that appeal must be dismissed.

In support of the appeal from the order denying the motion for a new trial, it is contended that the verdict is not sustained by the evidence, and that the court erred in giving and refusing instructions and in rulings upon the admission of evidence. In view of our conclusion as to the sufficiency of the evidence to sustain the general verdict and one of the special findings, it will be unnecessary to consider the appeal from the order refusing to enter judgment for the defendants or the rulings upon instructions and upon the admission of evidence.

The defendant company was operating a railroad running from the Oakland mole in Alameda county, through the city of Fresno to Los Angeles. At the time of his death, December 20, 1902, Sessions was on board one of the company's passenger trains known as the "Owl" on a trip from Oakland to Fresno. At Byron station another train operated by the company ran into the rear coach of the "Owl" train, and Sessions was killed by the collision. The complaint alleges that Sessions had paid for his passage, and was riding as a passenger on said train. The principal controversy at the trial and upon this appeal is over the question whether he did sustain that relation to the company or was a trespasser on the train. [2] In answer to interrogatories the jury found that Sessions did not purchase a ticket for the trip, nor pay any money or other consideration therefor, and that he accepted free passage on the train by invitation of the conductor in charge thereof. In answer to other interrogatories, the jury found that Sessions was not riding on the train by invitation of the conductor or with the understanding between him and the conductor that he should ride without paying fare, but, as these findings are inconsistent with the findings first above stated, and are also contrary to the undisputed evidence, they will be disregarded. The evidence, without substantial conflict, showed the following facts. A man named Teeple had been running the "Owl" train as conductor from Oakland as far as Fresno for about two weeks prior to the day of the accident, in place of one Dolan, the regular conductor, who had been sick. On that day, in Oakland, an hour or two before the train left the mole, Teeple arranged with Sessions to carry Sessions on the "Owl" train from the Oakland mole to Fresno and back to Oakland without charge and as his guest; it being arranged that Sessions was to take the train at the mole. When Sessions arrived at the mole, Teeple had learned that Dolan had resumed work, and would take out the "Owl" train on that trip. Teeple then gave Sessions an old and expired trip pass running to Teeple and told Sessions to hand it to the conductor, Dolan,

when he came to collect tickets on the train, and that Dolan would punch it and hand it back to him. Teeple then saw Dolan and arranged with him to punch the pass as if it were a ticket, and allow Sessions to ride on the train free in pursuance of the agreement he, Teeple, had made with Sessions. Under this arrangement, Sessions entered the train and began the trip. When Dolan came around to collect the tickets, Sessions handed him the pass and Dolan took it, punched it, and handed it back to Sessions, as Teeple had directed. Thereafter Sessions continued on the train until the collision occurred. A rule of the company forbade the carrying of passengers without payment of fare.

There is some conflict in the authorities with respect to the degree of care due from a carrier to a passenger who does not pay fare for his passage and is carried free. In this state, however, the question is settled by sections 2096 and 2100 of the Civil Code, which are as follows:

"Sec. 2096. A carrier of persons without reward must use ordinary care and diligence for their safe carriage."

"Sec. 2100. A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill."

Both parties devote much space in their brief to a discussion of the questions whether or not the company under the circumstances was bound to use the utmost care and diligence for the safe carriage of Sessions or only ordinary care to that end, and to the question whether or not the conductor of a train is presumed to have authority to carry a passenger free or is presumed not to have such authority. We do not find it necessary to consider at length these propositions. One of the propositions of the appellant is that the company never made any lawful contract to carry Sessions as a passenger or at all, that he rode on the train by means of a fraudulent contrivance with the conductor, and that his status was that of a trespasser toward whom the company owed no duty except to avoid doing him a willful or wanton injury. There is no evidence sufficient to show that the collision which caused the death of Sessions was due to the willful or wanton negligence or recklessness of the company. This being the case, it follows that if the decedent was, at the time of the collision, a trespasser on the train, the company is not liable in damages for his death. [3] It is well settled by the authorities, and in fact it is not controverted by the plaintiffs, that if a person obtains free passage on a passenger train from the conductor by means of fraud or misrepresentation, or with knowledge of the want of authority of the conductor to allow such free

passage, such person does not become a lawful passenger without reward under section 2096 aforesaid, but is a mere trespasser, entitled only to demand that he be not willfully or recklessly injured. *Condman v. Chicago, etc., Co.*, 67 Fed. 522, 14 C. C. A. 506, 28 L. R. A. 749; *McVeety v. St. Paul, etc., Co.*, 45 Minn. 268, 47 N. W. 809, 11 L. R. A. 174, 22 Am. St. Rep. 728; *Louisville, etc., Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120; *Purple v. Union, etc., Co.*, 114 Fed. 123, 51 C. C. A. 564, 57 L. R. A. 703. Many other decisions could be cited to the same effect. It is not necessary to extend the list. The jury found specially that Sessions did not accept free passage on that trip with the intent to defraud the defendant company. [4] This finding is clearly contrary to the evidence above related. The arrangement which was made by Teeples and Dolan to allow Sessions to ride on the train without payment of fare was sufficient to inform him, or at least to give him good cause to believe, that the conductor of that train had no authority to carry him without charge. The very terms of the agreement and the manner in which it was to be carried out, of all of which he was fully aware, were sufficient to cause him, as a reasonable man, to believe that it was contrary to the rules of the company to allow him free passage. The obvious purpose in giving him the expired pass to be handed to the conductor to be punched and returned as if it were a ticket was to prevent any agent of the company or any person who might inform the company of the fact from discovering that the conductor was allowing Sessions to ride without presenting a ticket. There is no other reasonable explanation of the device. It was a plan designed and carried out to conceal the evasion of the payment of fare, and the only fair inference from the making of it would be that the conductor was required by the company to exact payment of fare or a ticket from every person riding on the train. The decedent was thereby charged with knowledge of this lack of authority to pass him free. He was in collusion with the conductor to defraud the company of the amount of his fare. Under the authorities cited, his status was that of a trespasser, and not that of a passenger. The special finding was therefore contrary to the evidence, and the defendant was not liable in damages for causing his death unless it had been guilty of willful or wanton injury which the evidence does not show. The court should have granted the motion for a new trial.

It is ordered that the appeal from the judgment be dismissed, that the judgment be vacated, and that the order denying a motion for a new trial be reversed.

We concur: SLOSS, J.; ANGELLOTTI, J.

159 Cal. 581

ROBISON v. MITCHEL et al. (L. A. 2,595.)
(Supreme Court of California. March 20, 1911.)

1. MECHANICS' LIENS (§ 132*)—NOTICE OF COMPLETION OF WORK—STATUTES.

Under Code Civ. Proc. § 1187, as amended by Laws 1897, c. 141, requiring the owner within 10 days after the completion of the work to file a notice of the date of completion, or he will be estopped from maintaining a defense to liens on the ground that they were not filed within the statutory time, an owner who recognizes the actual completion of the work must give the statutory notice, or he will be estopped in an action to foreclose liens from defending that the lien was not filed in the statutory time, but where he gives the notice the contractor and materialmen must file their liens within the statutory time.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 190-207; Dec. Dig. § 132.*]

2. MECHANICS' LIENS (§ 132*)—NOTICE OF COMPLETION OF WORK—STATUTES.

Code Civ. Proc. § 1187, as amended by Laws 1897, c. 141, requiring the owner within 40 days after cessation from labor on any unfinished contract or unfinished structure to file a notice of cessation, giving the date on which cessation actually occurred, etc., relates to structures on which work ceases while in an unfinished condition, and continuous cessation from labor for 30 days sets in motion the requirement of notice, and where the owner files the notice of cessation the original contractor and other lien claimants have specified times within which to file their claims of liens.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 190-207; Dec. Dig. § 132.*]

3. MECHANICS' LIENS (§ 132*)—NOTICE OF COMPLETION OF WORK—STATUTES.

Code Civ. Proc. § 1187, as amended by Laws 1897, c. 141, providing that any trivial imperfections in the construction of work contracted for is not such a lack of completion as to prevent the filing of a lien, and in all cases the occupation of the work by the owner or his acceptance thereof, and cessation from labor for 30 days on any contract or any work, shall be equivalent to completion thereof for the purposes of the chapter relating to the enforcement of liens, deals with cases of apparent completion of the work which may not prove to be actual completion, and cases of apparent incompletion which may prove actual completion, and unfinished structures are not deemed constructively completed where there has been cessation from labor for 30 days, and the owner to set the time running for the filing of liens, must file his notice of cessation, and occupancy or acceptance must be coupled with cessation from labor for 30 days on the structure before constructive completion is established, and the time set running for the filing of liens, and constructive completion by way of occupation or acceptance, applies to all cases, whether the work has been performed under contract or not.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 190-207; Dec. Dig. § 132.*]

4. MECHANICS' LIENS (§ 132*)—NOTICE OF COMPLETION OF WORK—STATUTES—"CESSATION FROM LABOR."

In Code Civ. Proc. § 1187, as amended by Laws 1897, c. 141, requiring the owner to file a notice after "cessation from labor upon any unfinished contract or upon any unfinished building," and providing that all cases of the

occupation of the work contracted for or acceptance thereof by the owner, and "cessation from labor for 30 days" on any contract or on any building, shall be deemed equivalent to the completion thereof for the purposes of the chapter relating to the enforcement of liens, the quoted phrases mean cessation from labor on the work by the contractor, and an owner who, on the contractor abandoning the work, proceeds therewith as authorized by the contract, or without such authorization, must give the statutory notice of cessation from labor.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 190-207; Dec. Dig. § 132.*]

5. STATUTES (§ 205*)—CONSTRUCTION—LEGISLATIVE INTENT.

The court in construing a statute must resolve the meaning of obscure language thereof to reach the true legislative intent by a consideration of the whole statute, in view of the end sought to be attained.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 282; Dec. Dig. § 205.*]

6. COURTS (§ 90*)—DECISIONS—CONCLUSIVE-NESS.

Where a decision of the Supreme Court in bank was overruled by a decision in department, and there was no petition for rehearing, so that the case was not called to the attention of the full bench, and no rule of property was involved, the Supreme Court in bank could adhere to its former decision.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 313-321, 351; Dec. Dig. § 90.*]

7. MECHANICS' LIENS (§ 277*)—ENFORCEMENT—ISSUES.

Where the complaint to foreclose a materialman's lien alleged that the contractor abandoned the work on October 18th because of the refusal of the owner to perform his contract; that the owner on November 19th undertook to complete the work and proceeded to do so until June 15th following, at which time the building was completed; and the answer alleged that the contractor abandoned the work on October 18th, and that on November 19th the owner filed his notice of cessation, and that after October 18th the contractors never did any work on the building—the question whether there had been a cessation of labor for 30 days within Code Civ. Proc. § 1187, as amended by Laws 1897, c. 141, was not in issue, and a finding in conflict with the admissions of the pleadings could not be considered.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 546-554; Dec. Dig. § 277.*]

8. MECHANICS' LIENS (§ 132*)—MATERIAL-MAN'S LIEN—ENFORCEMENT.

Where a contractor abandoned the work, and the owner, who undertook to complete the work as authorized by the contract, filed within 40 days after the abandonment the notice of cessation required by Code Civ. Proc. § 1187, as amended by Laws 1897, c. 141, a claim of a materialman's lien must be filed within 30 days after the filing of notice of cessation, or the claim of lien could not be sustained.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 190-207; Dec. Dig. § 132.*]

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by J. W. Robison against J. Burris Mitchel and another, partners, under the name of J. Burris Mitchel & Co., and others. From a judgment for plaintiff and from an

order denying a new trial, defendant Joseph W. Fawkes appeals. Modified and affirmed.

Gray, Barker, Bowen, Allen, Van Dyke & Jutten, for appellant. C. M. Stephens and Kendrick, Knott & Ardis, for respondent.

HIENSHAW, J. This action was by a materialman to foreclose his lien upon the property of defendant Fawkes for material furnished in the construction of a frame dwelling. Judgment passed for plaintiff, awarding him a lien, and from that judgment and from the order denying his motion for a new trial, the defendant Fawkes appeals.

The contractors for the construction of the building were copartners, doing business under the firm name of J. Burris Mitchel & Co. Their contract with appellant was in writing and valid. It contained the usual stipulation for partial payments, and provided that, if at any time during the progress of the work the contractors should refuse or neglect, without fault of the owner, to supply a sufficiency of material and workmen to complete the contract within the time limited, for the period of more than three days after having been notified by the owner in writing to furnish the same, the owner should have power to furnish and provide the material or workmen to finish the work, and the reasonable expense thereof should be deducted from the contract price. It also provided that, if the owner should delay a progress payment for more than five days after the date when such payment became due, at the option of the contractor this should be held to be a prevention by the owner of performance of the contract by the contractor.

It was over these provisions of the contract that difficulty arose. Work had progressed and progress payments had been made until the time came when the frame was up, and there became due under the terms of the contract a payment of \$800. This payment the owner refused to make upon the ground of faulty and imperfect construction. The contractors refused to proceed until payment was made. The owner thereupon gave the notice contemplated by the contract, calling upon the contractors to continue with the work, and upon the contractors' failure and refusal so to do for a period of more than three days the owner proceeded with the construction and completed the building. It will thus be seen that the contractors' position was that the contract was violated by the owner in his unwarranted refusal to make a proper payment when it became due. Upon the other hand, the owner's position was that the payment was not due because of faulty construction, and that the contractors' refusal to proceed with the work after notice given justified him, under the contract, in pushing the work to completion. The court found, in effect, that the contractors had not violated

the contract, that the refusal of the owner to make the payment was unwarranted, and consequently that the contractors had been unlawfully prevented by the acts of the owner from prosecuting the contract, and the owner's completion of the building was not, therefore, in conformity with the terms of the contract, but in violation thereof.

The owner's notice to the contractors to proceed with the work was given upon October 15, 1906. Upon November 19, 1906, the owner filed for record his verified notice of cessation, as contemplated by the opening paragraph of section 1187 of the Code of Civil Procedure. Therein he declared that J. Burris Mitchel & Co. had abandoned work, that the abandonment occurred upon the 18th day of October, 1906, and that since the abandonment, and for more than 30 days and less than 40 days, the contractors had done no work upon the building and improvements under the contract, and that the owner is now proceeding to complete the building. It is a fact that the contractors ceased labor from the date mentioned and never resumed labor upon the building, but the court found that there was no cessation from labor upon the unfinished building, under the belief that the owner himself undertook the completion of the building before there had been a cessation of labor thereon for the period of 30 days. The finding to this effect is attacked and will require examination. But for the present, considering the case made by the findings, it appears that the contractors ceased work under circumstances which the court finds justified their doing so, and the owner, before there had been a cessation from labor upon the unfinished contract or upon the unfinished structure for the period of 30 days, undertook the work of completion.

The lien in this case was admittedly filed within time after the actual completion of the building, but was not filed within time, if the notice of cessation and abandonment filed by the owner upon November 19, 1906, set running the statutory time for the filing of the lien.

The case thus demands a consideration and an analysis of section 1187 of the Code of Civil Procedure, as amended in 1897 (Laws 1897, c. 141). That section deals:

(1) With the situation presented by actual completion recognized as such by the owner. [1] In such a case the owner must within 10 days after such completion file in the office of the county recorder of the county, a notice setting forth the date of completion, etc. If he does not do this, he is estopped, in any action brought to foreclose a lien upon his property, from maintaining as a defense that the lien has not been filed within the time prescribed by law. If he does do this, then the original contractor has 60 days after the filing of the notice, and other lien claimants have 30 days after the filing of the notice, within which to file their claims of lien, provided, however, that if the lien sought be for

labor performed in a mining claim it must be filed within 30 days after the performance of the labor, without regard to the filing by the owner of any notice of completion, which, because of the character of the work, is in this instance unnecessary, if not impossible. It is further provided in this connection "that in any event all claims of lien must be filed within ninety days after the completion of said building, improvement or structure, or the alteration, addition to or repair thereof." This would seem to fix a time limit within which all liens must be filed, regardless of whether the owner has filed his notice of completion or not, and it gives rise to the question whether the statute which forbids the owner, who has failed to file the notice of completion, to make the defense that the lien has not been filed within the time provided by the chapter means to forbid him to make that defense in every case, or only in those cases where liens have been filed within 90 days after completion. But this question it is not necessary here to resolve.

(2) The section next takes up the reciprocal rights and duties of the owner and lien claimants, where for any cause there has been for 30 days "a cessation from labor upon any unfinished contract, or upon any unfinished building," etc. It is here to be noted that the continuous cessation from labor for 30 days, and this alone, is sufficient to set in motion the requirements of the statute. [2] Nothing less than cessation from labor for 30 days will meet the statutory exaction, and nothing more than a cessation from labor for 30 days is required. When there has been such cessation, it becomes the duty of the owner within 10 days thereafter to file the required notice of cessation or abandonment of work under the penalty above set forth for his failure so to do, namely, that he shall not be permitted to maintain a defense based on the ground that any lien has not been filed within the time provided. If, however, he does duly file the notice of cessation of labor, the original contractor has 60 days after the date of its filing, and all other persons 30 days after the date of the filing, within which to file their claims of lien; the exception to this being, as above, the case of labor bestowed upon a mining claim, where, without regard to the notice, the laborer must file his lien within 30 days after the performance of his work. These two provisions, grouped together in the language of section 1187, are for convenience of construction here separated. They have to do, first, with the building actually completed, and, second, with structures upon which work ceases while they are still in an unfinished condition.

(3) But it yet remained for the Legislature to make provision for that class of cases where the owner might not regard the building as completed, and yet where, for the purpose of protecting lien claimants and enabling them to enforce their liens, some time

should be fixed without regard to the owner's views of completion. Therefore provision was made for what may be termed "constructive completion." Up to 1897, when section 1187 was amended to read as it now does, the law in this regard declared (a) that the occupation or use of the building by the owner or his representative, or (b) the acceptance by the owner or his agent of the building, should be deemed conclusive evidence of completion, whether the building was actually completed or not, and (c) that cessation from labor for 30 days upon any unfinished contract or upon any unfinished building should be deemed equivalent to a completion thereof. [3] In 1897 this section was again amended and remodeled to its present form. The changes which were made were the following: The owner was required to file a notice of completion or a notice of cessation of labor, requirements not in the earlier section. Cessation from labor upon any unfinished contract or structure for a period of 30 days was no longer to be "deemed equivalent to a completion," as in the earlier section, but provision was made that after any such cessation it became the duty of the owner to file a notice to that effect. If he did so, the time for filing liens began to run. If he did not do so, the time for filing liens was not set in motion. Another change was also made in the matter of constructive completion. The earlier section, as has been shown, made either one of three things evidence of constructive completion, namely, acceptance, occupation, or cessation from labor for 30 days. The amended section, the section as it now stands, makes different provision. It had already met the case of cessation from labor for 30 days upon an unfinished contract or structure. When it came to deal with constructive completion, it was no longer necessary for it to provide for the cases of unfinished buildings, but it was called upon to deal with those cases where there was apparent completion which might not in fact prove to be absolute completion, and cases where there was apparent incompleteness which might prove to be actual completion. It provided, first, after declaring that trivial imperfections should not avail to avoid completion, that the occupation or use of a building, improvement, or structure by the owner or his representative, together with cessation from labor for 30 days upon it, or, second, the acceptance by the owner or his agent of the building, together with cessation from labor for 30 days upon it, should, for the purposes of lien claimants, be deemed equivalent to a completion. Thus, while under the old law unfinished structures were deemed constructively completed when there had been cessation from labor for 30 days, under the present law they are not deemed constructively completed, and the owner to set the time running for the filing of liens must first file his notice of cessation. Again, while under the old law, either occupation or

acceptance was deemed a completion which set in motion the time for filing liens, under the present law either or both the occupation and the acceptance must be coupled with cessation from labor for 30 days upon the structure before the constructive completion is established and the time set running. Also, under the present law, constructive completion by way of occupation or acceptance is made to apply to *all* cases, whether the work has been performed under contract or not, whereas, under the old law, such constructive completion was declared to apply only "in case of contracts." *Marble Lime Co. v. Hotel Co.*, 96 Cal. 332, 31 Pac. 164.

[4] (4) One final matter in the construction of section 1187 demands consideration; that is the meaning of the phrases "cessation from labor upon any unfinished contract or upon any unfinished building," etc., found in the earlier part of the section, and "cessation from labor for 30 days upon any contract or upon any building," etc., found in the latter part of the section. Historically the first use of this language is in the amendment of 1887, which provided as follows: "And in case of contracts, the occupation or use of the building, improvement, or structure by the owner, or his representative, or the acceptance by said owner or his agent of said building, improvement, or structure, shall be deemed conclusive evidence of completion; and cessation from labor for thirty days upon any *unfinished contract or upon any unfinished building*, improvement, or structure, or the alteration, addition to, or repair thereof, shall be deemed equivalent to a completion thereof for all the purposes of this chapter." The most obvious and natural construction of this language would seem to be that the Legislature decreed that occupation or acceptance by the owner should be held conclusive evidence of completion in all cases where the work was done under contract, and that cessation from labor for the period of 30 days in all cases, whether the work was done under contract or not, should be deemed equivalent to a completion. That the language was not happily chosen to express this idea may be conceded. It is not an apposite use of words to speak of a "finished" or "unfinished" contract or to speak of cessation from labor upon a finished or unfinished contract. Apart from its context, the labor of "finishing" a contract means the labor of the contracting parties in agreeing upon its terms, and the labor of the scrivener in reducing those terms to writing after a meeting of the minds of the contracting parties. But, of course, in its context, an "unfinished contract" means that the terms, conditions, and requirements of one or the other party—the moving consideration—has not been accomplished or performed. [5] This instance is taken from the statute under consideration in exemplification of the fact that strict legal accuracy in terms and phrase is not to be expected in every legislative en-

actment, and that the courts will, and frequently must, resolve the meaning of obscure language to reach the true legislative intent. They do this through a consideration of the whole enactment, in view of the end sought to be attained.

In this case there can be little doubt that under the amendment of 1887 the dominant idea was to declare that cessation from labor for 30 days upon any unfinished work should be made the equivalent of an actual completion for the purpose of filing claims of lien, that the author of the bill had in the previous sentence declared that occupation or acceptance should be deemed completion only in the case of contracts, and that when next he came to treat of cessation from labor for 30 days he meant merely that cessation from labor for that period should be deemed a completion, whether the work was being prosecuted under a contract or not. It is not to be believed that the Legislature sought to indulge in overrefinements and to distinguish cessation from labor under a contract and cessation from labor where there was no contract, distinctions which could but lead to difficulty and confusion and to the frequent loss of just liens. To illustrate, take two cases in each of which the original contract between the owner and the contractor is valid. The one contains provision that in case of the abandonment by the contractor the owner may complete the work under the contract; the other does not. In each case the contractor gives notice to the owner of abandonment. In each case, before a cessation of labor for 30 days, or, indeed, without an hour's cessation from labor, the owner employs the same foreman, who in turn employs the same laborers, and completes the work himself. No notice is conveyed to the materialmen, or even to the subordinate employes, that there is any change at all in the nature or character of their employment. Under the view which we have given of the meaning of section 1187, no difference would result in the rights of any lien claimants. There having been no cessation from labor, the time for filing liens would not commence until after completion. But if it is to be held that cessation from labor upon an unfinished contract, without regard to the question whether or not there shall have been actual cessation from labor upon the work, is the controlling factor, then, of course, where the contract provided that the owner might continue the work *under the contract* there would have been no cessation from labor under the contract for 30 days, and lien claimants would have the time allowed for filing their liens after the owner had completed the structure. Whereas, in the other case, identical in all respects so far as outward appearances can go, the work would not have been done by the owner under the contract, there would have been a cessation from labor under the unfinished contract for a period of 30 days, and the lien

claimants (under the earlier law) would forever have lost their liens, if they were not in some way able to discover the fact that the owner was prosecuting it, not under, but after abandonment of, the contract, because their time for filing liens would have begun 30 days after this undisclosed cessation from labor upon an unfinished contract.

That such was the original interpretation of this court may be gathered from a reading of *Mill & Lumber Co. v. Olmstead*, 85 Cal. 80, 24 Pac. 648; *Willamette, etc., Co. v. College Co.*, 94 Cal. 229, 29 Pac. 629; and *Marble Lime Co. v. Hotel Co.*, supra. [6] Subsequently this court, in the case of *Johnson v. La Grave*, 102 Cal. 324, 36 Pac. 651, declared that, though there was no cessation from labor on the structure for the period of 30 days, where there was cessation from labor upon an unfinished contract, even though labor on the building continued, there was a constructive completion which required the filing of lien claims after 30 days. This case, however, was decided in department. The case of *Marble Lime Co. v. Hotel Co.*, supra, which it overruled (see note to *Goodman v. Baerlocher*, 43 Am. St. Rep. 902) was a decision in bank. It was not mentioned in the department opinion, nor cited in the briefs. There was no petition for a rehearing in *Johnson v. La Grave*, so that it was not called to the attention of the full bench, nor in any subsequent case was its interpretation affirmed or challenged. For these reasons, since no rule or property or of property rights can have arisen under it, no embarrassment or hardship will result from this present declaration of what we conceive to be the true construction. In this connection it should be added that, if the case of *Baker v. Lake Land C. & I. Co.*, 7 Cal. App. 482, 94 Pac. 773, shall be thought in any respect to be at variance with the views here expressed, to that extent it must be considered superseded and overruled.

Making application of the construction thus given to the facts in the present case, we have a notice of cessation of labor filed by the owner, with a finding by the court that this cessation of labor did not continue for a period of 30 days. If this finding be within the issues and supported, plaintiff is entitled to his lien. In his attack upon this finding, appellant contends, first, that it is without the issues and contrary to the admissions in the pleadings, and, second, that it is unsupported by the evidence. [7] The first of these contentions is all that requires consideration, for an examination of the pleadings discloses that appellant's position is well founded. The complaint itself charges that the contractors "proceeded in the erection of said building upon said premises and continued in the said construction of said dwelling until about the 18th day of October, 1906; that on or about the last-mentioned date, according to plaintiff's information and belief, defendant Fawkes re-

fused to carry out his said agreement with said defendants J. Burris Mitchel & Co., and thereafter, on or about the 19th day of November, 1906, undertook the completion of his said dwelling and proceeded to complete the same until the 15th day of June, 1907, at which time said structure was by said defendant Fawkes completed." The answer contains no denial of this allegation. To the contrary, it reaffirms it, alleging that the contractors abandoned their work on or about the 18th day of October, and that on the 19th day of November the defendant filed his notice of cessation; that after the 18th day of October the contractors never did any work upon the building, and after filing the notice of abandonment on the 19th of November, "and not before, this defendant undertook the completion of said work." It is apparent therefore that the question whether or not there had been a cessation of labor for a period of 30 days was not an issue in the case, and that the finding here made, in conflict with the admissions of the pleadings, cannot be considered. [8] It results, then, that there was a cessation from labor upon the unfinished structure for a period of 30 days; that appellant's notice of cessation was filed within 10 days thereafter as required by law, and that plaintiff's claim of lien, not having been filed within 30 days after the filing of such notice of cessation, is too late. Consequently the judgment of the trial court was erroneous in decreeing plaintiff a lien and in directing a sale of appellant's property to satisfy the same.

The trial court is therefore directed to modify its judgment in accordance with the foregoing.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; MELVIN, J.; SLOSS, J.

159 Cal. 592

LOGAN v. GUICHARD et al. (S. F. 5,462.)
(Supreme Court of California. March 21, 1911.)

1. WATERS AND WATER COURSES (§ 152*)—APPROPRIATION—DIVERSION—INJUNCTION—SUFFICIENCY OF EVIDENCE.

Evidence in a suit to abate a water ditch over plaintiff's land which defendant claimed the right to maintain by prescription as well as the right to divert water through it held not to show the quantity of water which defendant had diverted.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 157; Dec. Dig. § 152.*]

2. WATERS AND WATER COURSES (§ 143*)—PRESCRIPTION.

In order to support a prescriptive right to take water from a stream at a point on another's land, the claimant must show that they have taken some definite quantity of water therefrom in the past; it being insufficient merely to show that they have taken some water.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 152; Dec. Dig. § 143.*]

3. WATERS AND WATER COURSES (§ 138*)—ADVERSE POSSESSION—PERMIT OF USER.

Defendant by agreeing at plaintiff's request that he and his wife surrender all their rights as riparian owners in a creek except those exercised by a certain ditch to get his wife, in whose name the property stood, to waive such rights, did not amount to an acknowledgment of plaintiff's right to prevent the diversion of water through such ditch so as to prevent defendant from claiming a prescriptive right to maintain the ditch.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 150, 151; Dec. Dig. § 138.*]

4. WATER AND WATER COURSES (§ 138*)—RIPARIAN RIGHT—PRESCRIPTION.

That another landowner permitted defendant to construct a ditch across his land to a stream because he believed that defendant as riparian owner could condemn a right of way over his land for taking water would not prevent defendant from subsequently acquiring the right to maintain the ditch over such land by prescription.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 138.*]

5. ESTOPPEL (§ 93*)—ESTOPPEL BY CONDUCT—KNOWLEDGE.

Defendants by permitting plaintiff without objection to construct a dam and flume to divert the waters of a stream did not estop themselves from asserting their water rights in the stream where they had no reason to believe at the time that plaintiff intended to divert water to which they were entitled.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 275; Dec. Dig. § 93.*]

Department 1. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by J. H. Logan against D. R. Guichard and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded for new trial.

H. A. Van C. Torchiana and W. P. Nether-ton, for appellant. Harry J. Bias and Cassin & Lucas, for respondents.

ANGELLOTTI, J. This is an appeal by plaintiff from a judgment given in an action brought by him to obtain the abatement of a water ditch about 1,000 feet long, constructed and maintained by defendants Guichard (husband and wife) over a portion of his land to a point on Alba creek located on such land, and used by said defendants in diverting and carrying to their land water from said creek, an injunction restraining the defendants from conducting or maintaining any ditch or flume on said land or from maintaining any flow or diversion of water from the waters of said Alba creek on said plaintiff's land, and for \$500 damages.

Alba creek runs for about 4,000 feet through plaintiff's land, and thence for about 60 or 70 feet through one corner of a small parcel of land owned by the Guichards, lying south of plaintiff's land. Mr. Guichard put his acreage at 43 acres, and 90 per cent. of his 43-acre tract as being within the watershed of Alba creek. The Guichards have lived on this land ever since 1894, using the same continuously for growing "strawberries

and garden truck." To accomplish this, water from Alba creek has at all times been necessary for the irrigation of the lands. It is not questioned that the Guichard land is riparian to Alba creek. Ever since 1897 the Guichards' point of diversion has been at a point on plaintiff's land some 800 feet from their own land. In that year the Guichards constructed the ditch complained of, commencing at such point of diversion and running over plaintiff's land, then owned by one Grover, plaintiff's predecessor in interest, to their land, and have ever since used the same for conducting such water as they have taken from Alba creek. Although some of plaintiff's land is also riparian to Alba creek, water therefrom has never been used thereon. In 1907, plaintiff, at a point on the creek above the Guichards' point of diversion, constructed a dam and a flume leading therefrom over a well-defined ridge and divide to his land in the place known as the village of Brookdale, and by means thereof has diverted water to supply the inhabitants of Brookdale with water for domestic purposes and with electricity for lighting purposes. Brookdale is not riparian to Alba creek. The amount so diverted by plaintiff was the whole of the water of said creek when there was less than eight inches under a four-inch pressure flowing therein, which was the situation at times. The result was that the Guichards' supply was at times entirely cut off and at other times materially reduced, causing failure of their crops, injury to their stock, and permanent injury to their land; the damage alleged and found being \$500.

By their pleadings, including a cross-complaint, the Guichards set up the alleged facts upon which they base their claim of right by prescription to maintain their ditch over plaintiff's land and to divert by means thereof to their land the amount of water they have diverted and used ever since the construction of said ditch. Certain special issues were submitted to an advisory jury. The answers of the jury upon these submitted issues and the findings of the trial court upon all the issues were in favor of the Guichards.

By the judgment the defendants Guichard are decreed to be the owners of the right to maintain the ditch over plaintiff's land and to keep the same in repair, and also of the right to divert from Alba creek through the ditch for use on their riparian land "waters to the extent of three inches." Plaintiff was enjoined by the judgment from taking any of the waters of said creek to any lands apart from the watershed belonging to and draining into Alba creek, and the Guichards were awarded \$500 damages.

[1] Regardless of other questions involved, it is clear that the judgment must be reversed because of the absolute want of showing of the amount of water which the Guichards are entitled to divert by means of their

ditch from Alba creek on plaintiff's land. As we have seen, the provision of the judgment in this regard is simply "water to the extent of three inches." There is nothing else in the judgment that goes to the question of the amount of water to which the Guichards are entitled. The expression quoted is meaningless, unless we are to assume that miners' inches are meant. With such an assumption, the expression might be certain and definite enough, in view of the act fixing and defining a miner's inch of water, approved March 23, 1901. St. 1901, p. 660. It is there provided: "The standard miner's inch of water shall be equivalent or equal to one and one-half cubic feet of water per minute, measured through any aperture or orifice." The statements in the findings as to the amount of water the Guichards have been diverting and are entitled to continue to divert are the same as in the judgment, viz., "waters to the extent of three inches," and these statements correspond with those in the pleadings of the Guichards. According to their answer and cross-complaint, they have diverted and used under claim of right "water to the extent of three inches," and are the owners of the right to divert "waters to the extent of three inches." It may be doubted whether we may assume that such an expression, especially when contained in a judgment purporting to determine conflicting rights in water, should be assumed to mean miners' inches. But, if we do so assume, the evidence is entirely insufficient to show that the Guichards have ever diverted any such amount of water, and insufficient to furnish the data upon which the amount of water diverted can be ascertained. The evidence was such as to furnish no basis for an adjudication as to the amount of water they were entitled to take on plaintiff's land from Alba creek by means of their ditch, except as such basis was furnished by evidence of the amount that they had actually diverted. The only evidence in this behalf was given by Mr. Guichard, and was as follows: "I would estimate the amount of water which flows from Alba creek and has been accustomed to flow from Alba creek, through my ditch, to be about three inches, a little over perhaps, no pressure. *That is, if I put a trough three inches wide, it runs one inch deep in there, runs there itself, naturally comes. I have not taken any measurements. I don't know the fall. I don't know the quantity of water, in gallons, per hour.*" It is to be observed that neither the fall at the point of diversion nor the grade of the ditch itself is given. It is clear that this evidence does not show that three miners' inches of water have been diverted, according either to the statutory definition of a miner's inch, or any definition thereof recognized by the authorities. See *Gardner v. Wright*, 49 Or. 609, 91 Pac. 286, 297. The evidence quoted is absolutely devoid of data upon which a conclusion can be reached as to the quantity of water actually diverted into or through the

ditch. To show the quantity in miners' inches there should have been either evidence as to a measurement according to some prescribed method, or evidence of facts upon which a definite calculation could be made. Without evidence from which the quantity of water diverted could be ascertained, the trial court was without evidence upon which it could base any conclusion as to the number of miners' inches which the Guichards were entitled to take on Logan's land, or could make any adjudication whatever of the extent of their rights. [2] In the absence of a finding of the actual diversion of some definite quantity of water, sufficiently supported by evidence, the plea of prescriptive right to take water above their boundary must necessarily fail. See *Hayes v. Silver Creek, etc., Co.*, 136 Cal. 238, 68 Pac. 704. See, also, *Walsh v. Wallace*, 26 Nev. 330, 67 Pac. 914, 99 Am. St. Rep. 692. *Senior v. Anderson*, 130 Cal. 290, 62 Pac. 563, relied on by respondents, is not in point, for the reason that sufficient facts did appear in that case to enable a determination to be made of the relative rights of the parties.

For the purposes of a new trial, it is proper to consider certain other points made by plaintiff for reversal.

We are of the opinion that there was evidence sufficient to support a conclusion that the Guichards have acquired by prescription the right to maintain the ditch constructed and maintained by them on plaintiff's land, for the purpose of diverting from Alba creek and conducting to their riparian land the quantity of water which they continuously used through their ditch. Their claim was of the right to divert water to which they were entitled as riparian owners from a point on the creek located on plaintiff's land, and to maintain a ditch over plaintiff's land for the purpose of conducting such water to their land. The trial court recognized this limitation, the judgment expressly limiting the use of the water by the Guichards to their lands riparian to Alba creek. Evidence given on the trial warranted the conclusion that, although the ditch was constructed on plaintiff's land and the diversion commenced in the year 1897, under permission of Mr. Grover, the then owner of such land, the circumstances under which such permission was originally given, are sufficient to constitute a basis for a claim of right on the part of the Guichards to thenceforth permanently maintain and use the ditch and continue the diversion of water through the same. While there was a conflict in the evidence upon the point, there was sufficient evidence to sustain a conclusion that their subsequent use of the ditch, which continued uninterrupted to the time of the construction by plaintiff of his dam in the year 1907, was, to the knowledge of both Grover and plaintiff, his successor in interest, open, notorious, under a claim of

right, and adverse to Grover, plaintiff and all other persons. The evidence as to what occurred between Grover, plaintiff, and Guichard in 1901 did not necessarily bring the case within the rule of *Jensen v. Hunter*, 41 Pac. 14,¹ where it was held that an offer of money made by the claimant to the landowner for a right of way for water before the statute of limitations had run in such claimant's favor was a confession by the claimant of title in the landowner, which interrupted the running of the statute. Guichard's evidence as to this is enough to support the conclusion that all he did in the matter was, in response to the solicitation of plaintiff that he and his wife surrender all right as riparian owners in the creek except such as they exercised by means of the ditch leading to the point of diversion on plaintiff's land, to agree to get his wife, in whose name their property stood, to waive all such rights. [3] This is not sufficient to compel a conclusion of acknowledgment of any right in the plaintiff to prevent the use of the ditch or the diversion of water through the same. Nothing further appears to have been done toward procuring such waiver.

The evidence of Guichard indicated that Grover, in allowing him to construct his ditch upon his land and establish his place of diversion thereon, and Guichard, in so constructing his ditch and diverting water through the same, believed that the Guichards, as riparian owners, by a resort to condemnation proceedings, could obtain a right of way over Grover's land for the taking of this water. [4] We do not see how this mistaken view could in any way operate to preclude the subsequent acquirement of the right by prescription. In fact, it is rather in support of Guichard's contention that the subsequent construction and maintenance of the ditch was under claim of right, with the knowledge of and adverse to Grover and all other parties.

We see nothing in the record compelling the conclusion that the Guichards are estopped from asserting their rights in the waters of Alba creek by reason of standing by and allowing plaintiff without objection to construct his dam and flume for supplying the inhabitants of Brookdale with water. [5] It does not appear that they knew of, or had any reason to suspect, any intended diversion by plaintiff of any of the water to which they were entitled, until after such diversion had actually been made.

There is no other matter that we deem it necessary to discuss for the purposes of further proceedings.

The judgment is reversed and the cause remanded for a new trial.

We concur: SHAW, J.; SLOSS, J.

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 108 Cal. xvii.

(159 Cal. 466)

In re WOOD'S ESTATE AND GUARDIANSHIP. (S. F. 5,615.)

(Supreme Court of California. March 13, 1911.
Rehearing Denied April 12, 1911.)

1. GUARDIAN AND WARD (§ 53*)—PROPERTY OF WARD—INVESTMENTS.

Under Code Civ. Proc. § 1792, empowering the court to order the investment of a ward's money, the action of the court which will protect a guardian in investments must be had under circumstances bringing such matter to the attention of the court for an adjudication thereon.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 232-241; Dec. Dig. § 53.*]

2. GUARDIAN AND WARD (§ 37*)—CARE REQUIRED OF GUARDIAN.

The measure of care and diligence required of a guardian or similar trustee is such as would be exercised by a man of ordinary prudence and skill in the management of his own business.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 168; Dec. Dig. § 37.*]

3. GUARDIAN AND WARD (§ 55*) — TRUST FUNDS—DEPOSIT—LIABILITY FOR LOSS.

A guardian who, in selecting a bank for the temporary deposit of trust funds exercises such care as a man of ordinary skill and prudence would in the management of his own business, and so earmarks the deposit as to show its trust character, is not responsible if the bank fails, though he is generally liable if he deposits the money in his individual name without any indication of his representative character, notwithstanding he is guilty of no negligence.

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 55.*]

4. GUARDIAN AND WARD (§ 55*)—MONEY OF WARD—DEPOSIT IN BANK—LIABILITY FOR LOSS.

A guardian limiting his control over his ward's funds becomes a guarantor thereof, and where he deposits his ward's money in a bank under an arrangement whereby he could withdraw the money only with the concurrence of the surety on his bond he is liable for loss of the fund through failure of the bank.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 254; Dec. Dig. § 55.*]

Department 1. Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

In the matter of the estate and guardianship of Bennett Wood, a minor. From portion of a decree settling and allowing his final and supplemental account, William R. Taylor, guardian, appeals. Affirmed.

Heller, Powers & Ehrman and P. E. Zabella, for appellant. Wyckoff & Gardner and C. F. Lacey, for respondent.

ANGELLOTTI, J. This is an appeal by William R. Taylor, the guardian of the person and estate of Bennett Wood, a minor, from that portion of the decree settling and allowing his final and supplemental account which denies him credit for \$7,269.53, money of the minor which had been deposited by such guardian in the bank of the California Safe Deposit & Trust Company of San Francisco, and which was on deposit in said bank at the time of its failure in October, 1907.

Appellant was appointed guardian of the estate of this minor and the estates of James Cleveland Wood and Hazel May Wood, minors, by the superior court of Monterey county, in March, 1903. He himself was a resident of Monterey county, as also were his attorneys. The property of his wards, consisting of money received from an estate in Illinois, aggregated \$19,176.68; each minor owning one-third. This money having been brought from the East, appellant deposited the same, in the year 1903, in three San Francisco banks; the share belonging to Bennett Wood being deposited in the California Safe Deposit & Trust Company to the credit of "Wm. R. Taylor, guardian." No order of court was ever obtained authorizing this deposit to be made. The guardian was himself unacquainted with the standing of San Francisco banks, and apparently relied in the selection of a place of deposit entirely on his attorney, Mr. Wyatt, and the Pacific Surety Company, his sole bondsman, as guardian.

The deposit was one upon interest and was what is known as an ordinary savings bank deposit as distinguished from a term deposit, and it was made in such a manner that money could be withdrawn only upon the signatures of the surety company and the guardian; the bank book delivered to the guardian containing the provision: "Checks to be countersigned by the Pacific Surety Co." This book was kept in the possession of the surety company in San Francisco. The effect of this arrangement was to give the surety an effectual veto power over any attempted withdrawal of any of the money on deposit. Not a dollar could be drawn by the guardian without the concurrence of the surety company. The practice of the parties in withdrawing money was for the guardian or Mr. Wyatt to forward the guardian's check from Monterey county to the surety company in San Francisco, and the agent of the company would countersign such check, collect the money from the bank, and forward it to the guardian or his attorney.

The money, with the accretions of interest, less such small amounts as were drawn from time to time for expenses and the support of the minor, continued on deposit with such bank until the time of its failure in October, 1907, at which time it amounted to \$7,269.53. In January, 1907, the National Surety Company was substituted as bondsman for the guardian; the account not being changed in any way, save that the custody of the bank book was given to the new bondsman, and the right to countersign changed from the old bondsman to the new.

The evidence was sufficient to support a conclusion that the guardian made practically no inquiry as to the standing of this bank after the opening of the account, taking it for granted that it was perfectly safe. In

this he was apparently relying entirely on Mr. Wyatt and the surety company.

The evidence was likewise sufficient to support a conclusion that the money was deposited in this bank as a permanent investment, rather than as a mere temporary deposit for safe-keeping until a permanent investment could be found. There was nothing to indicate that the guardian did not consider his full duty and responsibility discharged in the matter of investing this money when he had once deposited it with California Safe Deposit & Trust Company.

As is said in respondent's brief, none of the recitals made in papers filed in the guardianship proceedings brought the matter of the deposit to the attention of the superior court in such a manner as to make it an object of inquiry or adjudication so as to amount to leave or ratification by the court. The action of the guardianship court which will protect a guardian in the matter of investments (see section 1792, Code Civ. Proc.; Guardianship of Cardwell, 55 Cal. 141; Estate of Schandoney, a minor, 133 Cal. 387, 65 Pac. 877) must be action had under such circumstances as show a bringing of such matter to the attention of the court for an adjudication thereon. The record does not compel the conclusion that orders of the guardianship court, authorizing the withdrawal of small amounts needed from time to time for expenses in support of the minor, indicated any permanent deposit anywhere. There is absolutely nothing to indicate that the guardianship court had any notice of any arrangement under which the surety company had any control over the money of the minor.

The California Safe Deposit & Trust Company was doing a general banking business, and at the time of its failure had a very large number of depositors. One of the witnesses testified that the deposits aggregated \$9,000,000, and that among the depositors were some "of the very large business men of San Francisco." The only evidence affording ground for the conclusion that it was considered at all unsafe was that given by persons engaged in the banking business in Santa Cruz county and Monterey county, to the effect that it was looked upon with considerable concern as doing an unsafe business in the matter of loans and special inducements offered depositors, and as being "the weak member in the banking business of San Francisco." The closing of its doors by the bank in October, 1907, was without notice and entirely unexpected by the general public.

There is absolutely nothing in the record to impugn the good faith of the guardian in the matter of this deposit. He undoubtedly believed, with such limited knowledge as he had, that the bank was safe.

The main question on this appeal is as to the liability of the guardian to his ward upon these facts for the money lost by the failure of the bank.

It is universally held that the measure of care and diligence required of a guardian or similar trustee is such as would be exercised by a man of ordinary prudence and skill in the management of his own business. See Pomeroy's Eq. Jur. § 1070; Estate of Law, 144 Pa. 499, 22 Atl. 831, 14 L. R. A. 103.

The necessity of temporarily depositing trust funds in a bank for safe-keeping is recognized, and it is settled law that, if a trustee, for the purposes of such temporary deposit, exercises the degree of care above stated in the selection of a bank, and so earmarks the deposit as to show its trust character, he is not responsible in the event of the failure of the bank. See Woerner, Am. Law of Guardianship, §§ 62, 63. But exercise of this degree of care in the selection of a bank for the deposit of trust funds is not necessarily sufficient to protect the trustee in the event of the failure of the bank.

If he deposits the money in his individual name without any designation or indication of his representative character, he is generally liable in the event of loss, notwithstanding that he has not been guilty of any negligence. See *In re Arguello*, 97 Cal. 196, 31 Pac. 937; *In re Bane*, 120 Cal. 533, 52 Pac. 852, 65 Am. St. Rep. 197. This rule finds its warrant in the fact that the trustee "would be otherwise able to play fast and loose with his cestui que trust, and throw the hazards of his own business on them, by designating the fund in which the loss has fallen as theirs, whether it was or was not so in reality" (see *In re Bane*, supra, p. 536), and in the theory that public policy forbids that the trustee under such circumstances should be permitted to claim that the lost property was trust property, rather than his own, as he had voluntarily caused it to appear.

Likewise, it appears to be in accord with many authorities that, *in the absence of an order of court permitting it*, such a deposit of trust funds in bank is not warranted as an investment, but only for temporary purposes pending investment, such a deposit as an investment being held to be a loan to the bank on personal security only, a kind of investment not considered by such authorities as one ordinarily proper to be made in the exercise of due care. See Perry on Trusts, § 443; Estate of Law, supra; *Murphy v. McCullough*, 40 Tex. Civ. App. 403, 90 S. W. 69. Mr. Woerner, in his American Law of Guardianship, declares it to be a rule of almost universal application to trustees, particularly where minors are concerned, that trust funds shall not be loaned on personal security, and that a guardian is liable to make good all losses arising in consequence of loaning the ward's money without any security. He says that permanent deposits in banks as investments are held to be loans on personal security only, and should not be made, except by leave of the guardianship court. A distinction is drawn between a

temporary deposit of the ward's money for safe-keeping, subject to the demand of the depositor, which case constitutes an exception to the general rule making trustees liable for the loss of trust funds invested on personal security, and a loan constituting an investment of the ward's funds. Section 63. We do not consider it necessary here to definitely decide whether the rule enunciated by these authorities is the true rule, or whether the facts of this case render the guardian liable thereunder on account of the deposit in question. It may be said, however, that in view of the authorities it would appear to be always advisable for a guardian desiring to make this character of investment to bring the matter before the guardianship court, and to act only upon authorization therefor given by such court.

There is another rule sustained by the authorities that appears to us to settle the question of the guardian's liability. That rule is well stated in the syllabus to *McColister v. Bishop*, 78 Minn. 228, 80 N. W. 1118, as follows: "If a trustee enters into any arrangement with reference to trust funds which surrenders or limits his control over them, he becomes a guarantor of the fund, irrespective of his motive or whether his surrender of control was the cause of the loss of the fund." In such a case, in the event of loss of the fund, the court will not enter upon an inquiry whether the loss is due to such abdication of control. While the court there held that the facts of that case did not bring it within this rule, it upheld the principle therein stated as an eminently salutary rule. The same principle was declared by the United States Supreme Court in *Forsyth v. Woods*, 11 Wall. 484, 487, 20 L. Ed. 207, where the court said: "Letters of administration are a trust. They are granted by the probate court, or ordinary, because of confidence reposed in the grantee. They require him to take exclusive charge of the personal property of his intestate and to bring to its administration his own personal attention and judgment. He has no right to allow others to control it or to share in its administration. If he does, he exposes it to unnecessary hazards and subjects it to the disposition of persons in whom the officer of the law has reposed no confidence." Such limitation on the control of the trust property by the trustee as is shown by the facts of this case has been considered at great length in at least two cases, and in each case the conclusion was reached that such a limitation was prohibited by this rule. In *Perry on Trusts*, § 443, we find it declared that, if the trustee deposits trust money "in such manner that it is not under his own exclusive control, as where money is deposited in bank, so that it cannot be drawn without the concurrence of other persons, the trustee will be liable for the failure of the bank, on the principle that it is the duty of the trustee to withdraw the money from the

bank upon the slightest indication of danger or loss, and he cannot perform his duty promptly if he is clogged by the necessity of procuring the concurrent action of other persons." The leading case in England of *White v. Baugh*, 3 Clark & Fin. 44, 6 Eng. Reprint, 1354, and the case of *Fidelity & Deposit Co. v. Butler*, 130 Ga. 225, 60 S. E. 851, 16 L. R. A. (N. S.) 994, in each of which the facts, in all respects material to the question under consideration, were the same as those in the case at bar, and in each of which the rule above declared was held applicable, show reasons for the rule additional to that given in the above quotation from *Perry on Trusts*. The reasons for the rule stated in those decisions are substantially stated in respondent's brief, being that such an arrangement is contrary to public policy, as incompatible with the absolute control which court and guardian should have at all times over the fund in order to preserve it, as placing temptation in the way of officers of surety companies in no way under the jurisdiction of the court to obtain favors from weak banks in return for the bestowal or continuance of deposits, as hindering the guardian from seeking more favorable investments of the funds, and as being, in effect, a pledge of the fund to obtain the bond required by law. The discussion by Lord Brougham and Lord Lyndhurst in *White v. Baugh*, supra, and the exhaustive opinion of Justice Lumpkin in *Fidelity, etc., Co. v. Butler*, in which all of the authorities on the question are reviewed and discussed, satisfy us that the rule forbidding the surrender by a trustee of his control over trust funds, on penalty of becoming a guarantor of the fund, an eminently salutary rule, applies to such an arrangement between the guardian and his surety as is shown by the evidence in this case. No authority in conflict with these views has been cited or found by us, and we know of no reasonable ground for a material distinction between such a limitation on the guardian's control of the trust fund as is shown by the facts herein, and the case of a trustee parting altogether with such control. As substantially said in *Fidelity, etc., Co. v. Butler*, the effect of such an arrangement is to give a surety a complete veto power in the matter of any proposed change of a place of deposit, no matter what circumstances may arise. Whether this arrangement could be enforced or not as between the guardian, the surety and the bank, it did limit and impede the actual control of the fund in such manner as to bring it within the operation of a rule that is thoroughly established and that appears to us to rest upon sound considerations of public policy. If it be desired to provide some method by which a surety company may have some control of a trust fund as to which it has merely become surety for the officer of a court, such as a guardian or administrator, to whom the court has given such fund in charge, the method must be

provided by the legislative department of the government, for the law as it now stands in this state does not authorize it.

Our conclusion on this point renders it unnecessary to consider any of the alleged errors in the matter of the admission of evidence, for none of them affects the question under consideration; the evidence on that point being entirely without conflict.

The decree appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.

15 Cal. App. 410

VULCAN IRON WORKS v. COOK.

(Civ. 851.)

(Court of Appeal, First District, California.
Feb. 16, 1911.)

1. CONTRACTS (§ 214*)—CUSTOMS AND USAGES (§ 13*)—CONSTRUCTION—PAYMENT.

A provision of a contract for furnishing and erecting steel work, that payment of 90 per cent. of the work should be made at delivery, and the balance 35 days after completion of the work, and that when each installment shall become due, and at the final completion of the work, certificates in writing shall be obtained from the contractor, etc., called for payment in installments as the work progressed; the period of such installments being left to general custom.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 980-995; Dec. Dig. § 214;* Customs and Usages, Cent. Dig. §§ 25, 26; Dec. Dig. § 13.*]

2. CONTRACTS (§ 170*)—CONSTRUCTION BY THE PARTIES—USUAL CUSTOM.

Where a building contract, providing for payment in installments as the work progressed, was by the parties treated as providing for monthly payments, which was the usual custom, the doubt and ambiguity in the contract was settled by the construction of the parties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. § 170.*]

3. CONTRACTS (§ 303*)—NONPERFORMANCE—EXCUSE.

Where a building contract, providing for payment by installments, was breached by the failure of the party owning the building to pay the installments, and the other party failed to complete the work, the owner of the building was not entitled to any damages by reason of the higher price he had to pay to have the work completed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1411; Dec. Dig. § 303.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Vulcan Iron Works against Morton L. Cook. From a judgment for plaintiff, defendant appeals. Affirmed.

Heller, Powers & Ehrman, for appellant. Alex. G. Eells and H. K. Eells, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of the plaintiff and against the defendant for goods sold and delivered.

The action arose out of a contract enter-

ed into by the parties, whereby the plaintiff agreed to furnish and erect all the cast iron columns and bases and steel beam girders for the interior and other parts of a six-story and basement brick building to be erected by the defendant on his property at the corner of Minna and Second streets in San Francisco. Paragraph 5 of the contract provides that the defendant was to pay the plaintiff \$75 per ton for the cast iron and \$85 for the steel "at times and in the manner following, to wit: Ninety per cent. (90%) of the work at delivery and the balance thirty-five days after the entire completion of the work: Provided, that when each payment or installment shall become due, and at the final completion of the work, certificates in writing shall be obtained from said architect, stating that the payment or installment is due or work completed, as the case may be, and the amount then due. * * *"

Materials were delivered and set in place, according to the terms of the contract, for a period of three months, and until two stories of the building were completed, when a dispute arose between the parties. At the expiration of the first month's work, the estimate of plaintiff as to the amount due it from the defendant was approved by the architect and paid by the defendant. The second month's work was also approved and paid, except for \$207.64 of the amount claimed, and this arose from an error of the architect in withholding 15 per cent., instead of 10 per cent., of the contract price of the material furnished. Subsequently a certificate was issued by the architect rectifying this error, and also for the third month's work. Defendant failed to pay plaintiff either of these sums; and it is not seriously disputed, and could not be, that this is the reason plaintiff refused to proceed with the work.

The only real point urged in the case is as to when payments were due. Defendant in effect concedes that, if payments were to be made as the work progressed, the usual custom in San Francisco is that they should be made monthly; but he contends that under the terms of the contract in this case the plaintiff was not entitled to receive any payment until all the materials provided for in the contract were delivered. In support of this contention defendant argues that the words of the contract above quoted, "ninety per cent. (90%) of the work at delivery," mean that all of the materials were to be furnished before the plaintiff was entitled to ninety per cent. of the amount due or to any payment. [1] But we think, when the whole of paragraph 5 is read, that it is clear that the contract contemplated installments as the work progressed; the period of such installments to be left probably to the general custom. Indeed, the defendant himself testified that the 90 per cent. clause was stipulated, instead of the usual 75 per cent.

clause, in order to enable the plaintiff to finish the contract on time. [2] However, any possible doubt or ambiguity in the contract as to when payments were due was settled by the contemporaneous acts and conduct of the parties, for the usual custom was followed, and during several months certificates were issued by the architect and payments made by the defendant.

Defendant asserts that the trial court erred in permitting certain certificates of the architect to be introduced in evidence, because of the insufficiency of the bill of items as served on him by plaintiff. He has failed to point out wherein the bill is insufficient, and upon examination it is not apparent to us wherein the defect consists.

[3] Defendant claimed, by way of cross-complaint, that he was entitled to damages by reason of the fact that he was compelled to pay in the market an increased price for iron and steel above the contract price, and also for the rental value of the building during the time that, as he alleges, its completion was delayed through the default of plaintiff. The finding of the court (which is amply supported by the evidence) that the stoppage of the work was due to defendant's failure to make payments when due is a complete and sufficient answer to defendant's position on the cross-complaint. It is true there was considerable delay in the work; but this was not the fault of plaintiff.

The judgment and order appealed from are affirmed.

We concur: LENNON, P. J.; HALL, J.

15 Cal. App. 382

BROADBENT v. KEITH. (Civ. 930.)
(Court of Appeal, Second District, California.
Feb. 14, 1911.)

ELECTIONS (§ 296*) — CONTEST — DISMISSAL — GROUNDS.

An election contest by an elector, under Code Civ. Proc. § 1115, is not subject to dismissal because the original complaint was prematurely filed, where no citation issued thereon, and another complaint was subsequently filed, on which citation duly issued.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 296.*]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Election contest by Andrew E. Broadbent against John M. Keith. Judgment dismissing the contest, and contestant appeals. Reversed.

Conkling & Brown, for appellant. Shaw, Ross & Dyke, for respondent.

JAMES, J. Plaintiff, as an elector of the city of Imperial, on April 15, 1910, filed with the county clerk of Imperial county a verified statement by which he sought to insti-

tute a proceeding to contest the election of defendant as marshal of said city. No citation was issued upon this statement or complaint; but on April 26, 1910, plaintiff filed a new verified statement, setting forth grounds of contest, and upon May 17, 1910, a citation was issued thereon, requiring respondent to appear in the superior court on the 3d day of June and make answer. At the time set for hearing respondent appeared and moved the court to dismiss the proceedings, on the ground that at the time the first statement of contest was filed the board of trustees of the city of Imperial had not declared the result of the canvass of the votes for the office of city marshal. In support of this motion affidavits were filed, showing that the result of the city election was formally declared by the canvassing board on the 16th day of April, 1910, or one day after the day when the first statement or complaint was filed. The superior court granted the motion, and a judgment of dismissal was entered, from which an appeal has been taken.

A proceeding to contest the right of a person to an office is a special proceeding, governed by those sections of the Code of Civil Procedure found in title 2, pt. 3, thereof. Section 1115 provides that, when an elector contests the right of any person declared elected to an office, he must "file with the county clerk a written statement" setting forth certain facts, which statement "must be filed within thirty days after the declaration of the result of the election by the body canvassing the returns thereof." It is provided by section 1118 of the same Code that within 5 days after the end of the time allowed for filing such statements (of contest) the county clerk must notify the superior court thereof, and that the court shall order a special session to be held on some day, not less than 10 nor more than 20 days from the date of its order, at which session a hearing on the merits of the contest shall be had. Section 1119 provides that a citation shall be issued by the clerk to the person whose right to the office is contested to appear at the time and place specified by the order of court for the hearing. Section 1122 then provides as follows: "The court must be governed, in the trial and determination of such contested election, by the rules of law and evidence governing the determination of questions of law and fact, so far as the same may be applicable, and may dismiss the proceedings if the statement of the cause or causes of the contest is insufficient, or for want of prosecution. After hearing the proofs and allegations of the parties, the court must pronounce judgment in the premises, either confirming or annulling and setting aside such election." It is conceded that the second verified statement of contest as filed by plaintiff was sufficient in form and filed within the required time after the canvassing board had

officially declared the result of the election. The order of the court for the hearing of the contest, and the citation issued by the clerk pursuant thereto, were both based upon the second verified statement filed by plaintiff, and not upon the first statement which had been prematurely filed. While in the minutes of the clerk, on the register of actions, the second statement was denominated an "amended complaint," that statement as set out in the bill of exceptions seems not to be so characterized either by title or in substance. So that the superior court, when the matter of contest came on for hearing, was then acting upon a statement of contest sufficient in form, filed by an elector having a right to institute such a contest.

It is not contended that the same person may not file separate statements of contest, nor that, in the event he has filed one statement, either insufficient in form or premature in point of time, that he may not file another. In our opinion, the statement filed by the plaintiff on April 15, 1910, may be disregarded altogether. As before noted, no action of the court was taken based upon this first statement, and when respondent was brought into court to make answer to the contest, it was upon an order made by the court and a citation issued based solely upon the statement as filed on April 26, 1910. To this statement respondent was required to appear and make opposition thereto at the time fixed by the court's order. It was not a case authorizing the court to enter a judgment of dismissal by reason of the causes of contest being insufficient, as is provided may be done by section 1122 of the Code of Civil Procedure, and it is not pretended that the action was dismissed because of any defects of that kind.

The judgment is reversed.

We concur: ALLEN, P. J.; SHAW, J.

15 Cal. App. 353

NAYLOR v. ADAMS. (Civ. 775.)

(Court of Appeal, Third District, California.
Feb. 11, 1911.)

1. COSTS (§ 220*)—TAXATION—MOTION TO RETAX—NOTICE—SERVICE—WAIVER OF DEFECTS.

Where a party entitled by statute to 18 days notice of a motion to retax costs receives but 14 days notice, but addresses a letter to the court opposing the motion both on technical grounds and on the merits, he cannot object to the consideration of the motion on the merits on the ground of the want of statutory notice.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 220.*]

2. EVIDENCE (§ 10*)—JUDICIAL NOTICE—DISTANCES BETWEEN PLACES.

The Court of Appeal for the Third District will take judicial notice that the distance between Oakland and Red Bluff is about 200 miles.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 14; Dec. Dig. § 10.*]

3. COSTS (§ 185*)—WITNESSES' COSTS—FEES—STATUTES—"LEGALLY REQUIRED."

Code Civ. Proc. § 1989, provides that a witness is not obliged to attend as witness before any court out of the county in which he resides, unless the distance be less than 30 miles from his residence to the place of trial, and by Pol. Code, § 4300g, witnesses, when "legally required" to attend the superior court in civil cases, are entitled to mileage actually traveled. Witnesses for the plaintiff residing 200 miles from the place of trial, without subpoena, and on the request of the plaintiff, voluntarily went from their residence to the place of trial and testified. *Held*, that they were not "legally required" to attend, and hence were not entitled to the mileage allowed by section 4300g, and that an allowance for mileage could not be taxed in plaintiff's cost bill.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 739-743; Dec. Dig. § 185.*]

For other definitions, see Words and Phrases, vol. 5, p. 4084.]

4. COSTS (§ 3*)—WITNESSES—WITNESS FEES—RIGHT TO FEES—STATUTORY.

The right of a witness to mileage and other fees in civil cases being solely of statutory creation, a court cannot tax witness fees as costs which are not strictly authorized by statute.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1, 4, 5; Dec. Dig. § 3.*]

5. COSTS (§ 184*)—WITNESS FEES—PER DIEM—ALLOWANCE.

Where witnesses living over 30 miles from the place of trial, and whose attendance could not therefore be compelled by subpoena, attend the trial and testify for plaintiff, they place themselves "under and subject to the order of the court," and the court may make such per diem allowance as the facts warrant, which allowance may be taxed as part of plaintiff's cost bill.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 171; Dec. Dig. § 184.*]

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Charles E. Naylor, Jr., against Frank P. Adams. From an order disallowing certain costs, plaintiff appeals. Order modified, and, as modified, affirmed.

Naylor & Riggins, for appellant. M. J. Cheatham, for respondent.

HART, J. On the motion of defendant to retax the costs in the above-entitled action, the court disallowed and ordered stricken from plaintiff's cost bill the witness fees and mileage claimed for the witnesses Stanley and Runnels, aggregating in amount the sum of \$39.50.

[1] It is first objected by plaintiff that the trial court should not have considered the motion for the alleged reason that he was not given the notice thereof prescribed by the statute; the claim being that he was entitled to 18 days notice, whereas he received but 14 days notice. Since it transpires that plaintiff did, in fact, receive notice of said motion and thereupon made an appearance by addressing to the judge of the trial court a letter which, in fact, constituted nothing less than a brief or argument against the granting of the motion, both for the tech-

nical reason we are now considering and upon the merits, we are unable to perceive what material difference it could have made to plaintiff in the court below or could now make whether the notice which it is insisted that the statute prescribes was given or not. The only object of the notice was accomplished, and it would be pressing technicality to the extreme verge of absurdity, in our opinion, to sustain the objection to the consideration of this appeal on the merits.

As to the merits, the facts are these: The witnesses Stanley and Runnels at the time of the trial were residents of the city of Oakland. Without having been subpoenaed, but wholly upon the request of the plaintiff, they went from Oakland to Red Bluff to testify at the trial on behalf of plaintiff. [2] The distance from Oakland to Red Bluff (a fact of which we are authorized to take judicial notice) is approximately 200 miles. [3] By the terms of section 4300g of the Political Code, witnesses when legally required to attend upon the superior court in civil cases are entitled, for each day's attendance at the trial thereof, to a per diem of \$2, and for mileage actually traveled, one way only, the sum of 10 cents per mile. Computed on the foregoing basis, Stanley and Runnels would each be entitled, for mileage, to the sum of \$20, and, it being alleged in the memorandum of costs that they were in attendance at the trial for two days, each would be entitled on that account to the sum of \$4, making the total for the two the sum of \$48. But the sum actually paid to these witnesses by plaintiff was according to his memorandum of costs \$39.50.

The contention of the respondent is, and such was undoubtedly the theory upon which the court below disallowed the costs in controversy, that Stanley and Runnels, "having come from without the limits within which they could be legally required to attend" the trial as witnesses, were not entitled to have their fees taxed as costs to the defeated party. No case has been cited either from our own courts or from those of other jurisdictions in which this precise question has been considered and adjudicated, and therefore the proposition thus propounded is, so far as we can say to the contrary, *res integra*, at least in California. Section 1989 of the Code of Civil Procedure reads as follows: "A witness is not obliged to attend as a witness before any court, judge, justice, or any other officer, out of the county in which he resides, unless the distance be less than thirty miles from his place of residence to the place of trial." The language of the foregoing section is certainly not obnoxious to the criticism of ambiguity or want of clearness as to its meaning, and it is therefore very evident therefrom that a subpoena issued in a civil case is absolutely without force out of the county and beyond a distance of 30 miles from the place of trial of

the action in which such subpoena has been issued. It therefore of necessity follows that a witness residing out of the county and beyond 30 miles from the place of trial is not "legally required," and cannot be compelled to attend as a witness at such trial, and consequently it is clear that such witness does not come within the description of those witnesses who are entitled to the mileage prescribed by section 4300g of the Political Code. Therefore a witness who cannot be legally required to attend, but who does in fact attend the trial in person, does so voluntarily, and is not entitled to the mileage provided for by said section. This view of the meaning of section 4300g of the Political Code is, we think, strengthened by a consideration of section 2021 of the Code of Civil Procedure, by which provision is made for securing, otherwise than by their personal attendance, the testimony of witnesses upon whom, under the terms of section 1989 of said Code, the service of a subpoena would be a futile act as a means of compelling their attendance at the trial. By the terms of said section the deposition of a witness residing out of the county where the action is to be tried may be taken, and undoubtedly one of the very purposes of this provision is to thus secure at the trial the testimony of a witness who cannot be compelled, by the power of the court or any legal process, to attend in person.

[4] The right of a witness to mileage and other fees in civil cases is purely and solely of statutory creation, and a court is without the power to saddle on the vanquished party in such cases costs which are not thus strictly authorized. If, as is suggested by respondent, the contention of appellant must be sustained, there would be no barrier against the exercise by a court of the power to allow voluntary witnesses residing a thousand or many more miles from the place of trial the mileage prescribed by the statute. The principle upon which such power, if authorized, could be exercised would be the same whatever the distance beyond the 30 miles out of the county from the place of trial, and thus it may easily be imagined how, by calling such power into action, a litigant might impose upon his vanquished adversary a very unjust and even unbearable burden.

[5] But we think the witnesses Stanley and Runnels, having placed themselves "under and subject to the order of the court," are entitled to whatever per diem the facts warrant the court in allowing, and to the extent that plaintiff was disallowed by the trial court proper per diem for said witnesses the order appealed from is erroneous. This is in harmony with the conclusion reached by this court in *Linforth v. S. F. Gas & Elec. Co.*, 9 Cal. App. 434, 99 Pac. 716, cited by counsel for appellant. But that case is not, as appellant seems to suppose, an authority,

for the proposition that a witness residing out of the county at a distance of more than 30 miles from the place of trial is entitled to mileage upon his voluntary attendance in person on the court at the trial. The question of mileage was not involved in that case; the only question discussed and decided being whether a witness, not regularly served with a subpoena, who, nevertheless, attended the trial and testified merely by the request of the party desiring his testimony, was entitled to the per diem prescribed for witnesses by the statute. Among other things, the court, per Chipman, P. J., said: "When called and sworn upon attendance by request he has placed himself under and subject to the order of the court as much as if subpoenaed. The only object of the subpoena and its only office when complied with, is to secure his testimony by personal attendance; it issues, of course, by the clerk, and under seal of the court, at the instance of the party and its 'service may be made by any person.' Code Civ. Proc. § 1886. The whole purpose of the subpoena is subserved when a witness attends at the trial by request of the party, quite as effectually as if he had been subpoenaed. No disadvantage or injury can accrue to the losing party if the witness attends by request. On the contrary, he may save the added expense of mileage and per diem as cost of serving the subpoena."

We are in no doubt that, while Stanley and Runnels ought to be allowed whatever per diem they are entitled to, there is no authority for allowing them mileage. Therefore the court below is directed to modify in accordance with the views herein expressed the order striking from plaintiff's cost bill the items representing the per diem to which Stanley and Runnels are justly entitled, and, as so modified, the order is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

15 Cal. App. 378

STEWART v. BIRCHFIELD. (Civ. 912.)
(Court of Appeal, Second District, California.
Feb. 14, 1911.)

1. ADJOINING LANDOWNERS (§ 7*)—LIABILITIES.

That defendant cleared his land of brush, and wind thereafter blew sand therefrom onto plaintiff's land, which would not have been so carried had the brush been allowed to remain or if the ground had been irrigated, shows no cause of action.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. §§ 53-59; Dec. Dig. § 7.*]

2. ADJOINING LANDOWNERS (§ 7*)—LIABILITIES.

Since one may use his land for all lawful purposes to which such lands are usually applied, if he uses ordinary care to prevent unnecessary injury to adjacent landowners, it is

not necessarily negligent for one to make use of his land which inevitably produces loss to his neighbor.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. §§ 53-59; Dec. Dig. § 7.*]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by T. M. Stewart against W. D. Birchfield. Judgment for defendant, and plaintiff appeals. Affirmed.

Paul Stewart, for appellant. Shaw, Ross & Dyke, for respondent.

JAMES, J. A demurrer to plaintiff's complaint was sustained by the superior court, and, plaintiff declining to amend, a judgment dismissing the action was thereafter entered, from which plaintiff appeals.

[1] The action was brought to recover the sum of \$250 as damages, alleged to have been suffered by plaintiff through the negligent act of defendant. In the complaint it was set out that plaintiff was the owner of certain real property in the county of Imperial, and that defendant was the owner of land contiguous thereto. The plaintiff then proceeded to allege as follows: "That it is a well-known fact that in Imperial county strong winds prevail from a westerly to an easterly direction; that it is a well-known fact that in said Imperial county, and more particularly in the vicinity where said lands of plaintiff and defendant are situated, when land is cleared of brush and leveled and left in that condition without irrigation, sand and soil, because of the action of the winds aforesaid upon the land so cleared, leveled, and exposed and loosened, are blown from land so cleared, leveled, and left unirrigated, to and upon adjacent lands; that the sand and soil so blown is apt to cause, and often does cause, large mounds of sand and soil to form on cultivated portions of land adjoining; that on or about the month of April, 1908, the defendant removed, or caused to be removed, all brush from, and leveled or caused to be leveled, that portion of his said land above described, which lies immediately to the westward of and adjoining the land of the plaintiff; that after said brush had been removed, and said land had been leveled as aforesaid, the defendant did leave his said land wholly unirrigated and uncared for. * * * Defendant left his said land wholly unirrigated and uncared for after the same had been cleared of brush and leveled as aforesaid, and thereby large quantities of sand and soil were permitted to blow over, on, and upon, and did blow over, on, and upon, the said land of the plaintiff, and thus caused large mounds of sand and soil to be erected on and upon the strip of land of the plaintiff aforesaid, all of which is to the great injury of the plaintiff's land, to the damage of the plaintiff."

By the demurrer of defendant it was first objected that the complaint of plaintiff did not state facts sufficient to constitute a cause of action. Several other grounds of special demurrer were also assigned therein, which it will be unnecessary to take notice of.

We are of the opinion that the facts stated in the complaint were not sufficient to constitute a cause of action, and that the demurrer was properly sustained for that reason alone. It is not alleged in the complaint that defendant used his property in any manner other than such as he had a right to use it, and no negligence is charged sufficient to create any responsibility on the part of the defendant for damages which might have resulted from any act committed by him. Briefly stated, it is simply alleged by plaintiff that the defendant cleared his land of the brush which was growing upon it, and that the wind thereafter blew some of the sand or soil therefrom onto the land of plaintiff, which would not have been so carried onto plaintiff's ground had the brush been allowed to there remain, or had defendant after clearing the ground irrigated it. If the defendant had the right to remove brush or trees growing upon his property, which right he undoubtedly possessed as an incident to the ownership of the ground, then, unless he was guilty of some negligent act while removing the same, he would not be responsible in damages to plaintiff. He had the right not only to clear his ground, but to leave it unirrigated, if he saw fit, thereafter, even though his failure to so irrigate it might have produced the damage of which plaintiff complains. [2] "Every man may use his own land for all lawful purposes to which such lands are usually applied, without being answerable for the consequences, provided he exercises ordinary care and skill to prevent any unnecessary injury to the adjacent landowner. It is not, therefore, necessarily negligence on the part of a landowner to make a use of his land which inevitably produces loss to his neighbor; for as he may willfully adopt such a course, and yet not be a wrongdoer, much less is he liable for unintentionally doing that which he has a right to do intentionally." *Shearman & Redfield on Negligence*, § 700. See, also, *Barrows on Negligence*, § 115; *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93; *Middlesex v. McCue*, 149 Mass. 103, 21 N. E. 230, 14 Am. St. Rep. 402; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 6 Atl. 453, 57 Am. Rep. 445; *Brown v. McAllister*, 39 Cal. 573; *Tiffany on Real Property*, § 295.

The point is made by respondent that, as the action is one for damages in the sum of \$250, it was not within the jurisdiction of the superior court. It was appellant's contention, however, that an issue was raised involving the question of title or right to the possession of real property, and therefore

that the action was properly brought in the superior court. We are of the opinion that the objection of respondent to the jurisdiction of the court is well taken, but as a motion to dismiss this appeal, based on that ground, was heretofore made and denied in the Supreme Court, we have treated the case as having been properly brought in the court in which it was entitled and considered the appeal upon its merits.

The judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

15 Cal. App. 341

BERNOU v. BERNOU. (Civ. 796.)

(Court of Appeal, Third District, California.
Feb. 10, 1911.)

1. APPEAL AND ERROR (§ 1024*)—REVIEW—DISCRETION OF LOWER COURT—CHANGE OF VENUE.

Where an order denying a change of venue is made entirely upon affidavits, and there is a conflict of evidence as to the facts, the decision of the trial court is binding on the appellate court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3836; Dec. Dig. § 1024.*]

2. VENUE (§ 70*)—JURISDICTION—RESIDENCE OF PARTIES—FACTS CONSTITUTING RESIDENCE.

Where a defendant shows by his affidavits on motion for a change of venue that persons residing at the place which he claims as his residence had known him there for many years, and had often seen him and met him during that time, the facts shown are not conclusive proof of the residence claimed.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. §§ 122-126; Dec. Dig. § 70.*]

3. DIVORCE (§ 112*) — JURISDICTION — EVIDENCE—RESIDENCE OF PARTIES.

The fact that defendant, in an action for divorce, had been often seen in the place which he claimed as his residence is admissible as tending to prove residence at that place.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 367; Dec. Dig. § 112.*]

4. VENUE (§ 70*)—AFFIDAVIT FOR CHANGE—STATEMENT OF GROUNDS.

Where defendant, in moving for a change of venue on the ground of nonresidence, filed affidavits which stated that to affiants' personal knowledge he had been a bona fide resident of another place, without stating any facts to indicate on what such knowledge was based, the statements are mere conclusions of law and of no effect in supporting the motion.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. §§ 122-126; Dec. Dig. § 70.*]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action for divorce by Fannie M. Bernou against J. B. Bernou. From an order denying defendant's motion for change of venue, he appeals. Affirmed.

W. W. Davidson, for appellant. J. B. Curtin, for respondent.

HART, J. This is an appeal from an order denying the defendant's motion for a change of the place of trial of this action.

The plaintiff, on the 29th day of July, 1909, filed a complaint for a divorce from defendant in the superior court in and for the county of Tuolumne. On the 12th day of November, 1909, the defendant filed a general demurrer to the complaint, and at the same time filed a demand and notice of motion for a change of the place of trial of the action from Tuolumne county to the city and county of San Francisco. Said motion was based upon the ground that the "defendant is now, and was at the time of the commencement of this action, and for a long time immediately prior thereto had been, a bona fide resident of said city and county of San Francisco," etc.

[1] The order appealed from was made entirely upon affidavits filed by the respective parties, and, if said affidavits present a conflict upon the question whether the defendant was a resident of the city of San Francisco at the time of the commencement of this action, the decision of the trial court thereon cannot be disturbed by this court. *Doak v. Bruson*, 152 Cal. 19, 91 Pac. 1002, and cases therein cited. See, also, *Henderson v. Cohen*, 10 Cal. App. 585, 102 Pac. 826. In the first-mentioned case, the Supreme Court, per Shaw, J., says: "In the consideration of an appeal from an order made upon affidavits, involving the decision of a question of fact, this court is bound by the same rule that controls it where oral testimony is presented for review. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered as established."

The plaintiff's affidavit discloses that she had known the defendant for about seven years prior to their marriage; that he was then a resident of the city of San Francisco; that, on or about the 22d day of June, 1908, she went to the town of Columbia, in Tuolumne county, "for the purpose of investigating the values of certain mining property near Yankee Hill, in said county, with a view of interesting persons in the purchase thereof, and returned to San Francisco within a few days thereafter and conveyed information regarding the probable value of said properties to the defendant, J. B. Bernou"; that said defendant desired to become interested with affiant in the purchase and operation of said property, and, with that object in view, accompanied affiant to Tuolumne county, arriving in the city of Sonora on July 2, 1908, and stopped at the Hotel Victoria, in said city; that defendant remained at said hotel until July 8, 1908, when he went to the town of Columbia, in said county, where he remained for a period of two weeks, living, while at said town, at the City Hotel; that he then left Columbia in company with affiant, but returned to said town with affiant on the 23d day of October, 1908; that affiant and defendant became interested in a mine situated near said town of Columbia, and in

the early part of November, 1908, said defendant and affiant went to San Francisco, for the purpose of forming a corporation to be known as the "Nervy Gold Mining Company," and "in the name of said corporation to operate thereafter the said Nervy mine"; that said corporation was organized, and affiant became president and general manager and the defendant treasurer thereof, and its principal place of business was fixed and is in the said town of Columbia; that "said defendant, J. B. Bernou, concluded and so stated to affiant in the month of November, 1908, that he intended to permanently reside at Columbia, in said Tuolumne county, * * * and informed affiant that he had made all arrangements with his real estate agents, Bernard & Muther, in the city and county of San Francisco, to take care of the rents incoming from the property owned by said J. B. Bernou"; that in the latter part of November, 1908, said defendant purchased from James Carder and John Page a store and saloon business, then conducted by them at Italian Bar, in said county, and that in the early part of December, 1908, said defendant went to San Francisco and purchased a stock of goods, wares, and merchandise and liquors, "for the purpose of thereafter carrying on said store and saloon business at Italian Bar, in Tuolumne county, all of which goods subsequently, and before the 6th day of January, 1909, arrived at Italian Bar"; that on the 6th day of January, 1909, said defendant applied to the license collector of Tuolumne county for a liquor and merchandise license to conduct said saloon and store at Italian Bar, and that the same was granted, and that, accompanying the application for said license, was a bond furnished by said defendant for conducting said saloon business; that defendant carried on said business at Italian Bar until the latter part of June, 1909. Affiant states that she and the defendant were married in the city of Martinez, in Contra Costa county, on the 22d day of March, 1909, and that the defendant, at the time of procuring the license from the county clerk of Contra Costa county authorizing the intermarriage of himself and affiant, made and swore to an affidavit in which he declared that at said time he resided at Columbia, in Tuolumne county. Plaintiff further deposes that defendant left her in the town of Columbia on the 24th day of June, 1909, and that, before so taking his departure, he promised plaintiff that he would return to Columbia on or about the 4th day of July, 1909; that on the 28th day of June defendant addressed to plaintiff a letter, dated at San Francisco, in which he stated that he was "expecting several parties (now absent from the city) who may consider investing in the Nervy Company. I am unable to determine the probability of visiting you on the 4th of July. If, however, they return before Friday, I will spend the holiday in your company." It is further

averred by affiant that she brought this action on the 29th day of July, 1909, and that thereafter she undertook to obtain service of summons on defendant, but that, although for several months she diligently sought information as to his whereabouts "through the chief of police and the police department of San Francisco and the sheriff of Los Angeles county, and the sheriff of Alameda county, and the police department of Oakland," she was unable to locate him and therefore unable to cause summons to be served upon him; that his appearance in the action was voluntary, and not because of having been served with process.

In corroboration of her affidavit, plaintiff filed 12 other affidavits by as many residents of Tuolumne county. Some of these affiants, besides repeating much of what is contained in plaintiff's affidavit, declared that Bernou stated to them, just before departing for San Francisco on the 24th day of June, 1909, that he was going to that city for temporary purposes only, and intended to return to Columbia shortly after the 4th day of July, 1909.

The defendant, by affidavit, flatly controverts the statements contained in plaintiff's affidavit, and additionally sets forth certain matters of fact from which, it may be conceded, the court might perhaps have been justified in finding in his favor on the question of residence. He also filed with his moving papers affidavits made by certain citizens of San Francisco. These merely allege that the affiants had known and knew Bernou for a certain number of years prior to and at the time of the commencement of this action, and that during all the times so referred to said defendant, of their "personal knowledge, has been and now is a bona fide resident of the city and county of San Francisco," etc.

Appellant contends that the affidavits filed by plaintiff are wholly lacking in the statement of any positive facts disclosing his residence to have been in Tuolumne county before or at the time of the institution of this action; that the statements contained in said affidavits amount to no more than mere conclusions of law. On the other hand, it is asserted that the affidavits filed by the defendant positively and unequivocally state facts from which it must necessarily be inferred that defendant was, at the time the complaint herein was filed, and had been for many years prior thereto, a resident of the city of San Francisco.

We think counsel for appellant has conceived, to some extent, a mistaken view of the character of the affidavits filed by both sides of the controversy. It is true that the affidavits filed by both plaintiff and defendant contain some statements which involve mere conclusions of the affiants. This is particularly true of all the affidavits filed by the defendant, other than his own. Indeed, the affidavits of Carpy, Godeau, Cailleau, Walsh,

and Bernard, filed in support of defendant's motion, do not contain the statement of a single fact in support of their conclusion that the defendant "has been and now is a bona fide resident of the city and county of San Francisco." These affidavits amount to no more than mere bald statements that they had known defendant for many years in San Francisco and that they have "personal knowledge" of his residence in that city. They state nothing to indicate of what such "personal knowledge" is predicated. [2] The fact that they had known defendant for many years, even aided by the fact that they had seen and met him on many occasions in San Francisco during those years, would not constitute conclusive, nor even satisfactory, proof of such residence, unless supported by some other substantial probative facts. [3] Undoubtedly the fact that defendant had often been seen in San Francisco might well be regarded as a circumstance tending to prove residence in said city, but it could be no more than a circumstance. [4] But the mere statement that the defendant "has been and is a bona fide resident of San Francisco" is, taken alone, obviously without the slightest probative value. It is a conclusion, pure and simple, of the affiant. It involves the very issue submitted by the motion; the question thus raised being, of course, for the court and not for the witnesses to decide.

The affidavit of the plaintiff contains the statement of many facts or circumstances from which a court could reasonably conclude that defendant went to Columbia with a view of permanently locating there, and that, in fact, he did go to Tuolumne county with the intention of making it his permanent home. He became an officer of a mining corporation, whose principal place of business was at Columbia; he bought a merchandising and saloon business at Italian Bar, in Tuolumne county, and replenished the same with goods and merchandise purchased in San Francisco; applied to the local authorities for and was granted a license authorizing him to legally carry on and conduct said business; made an affidavit, when applying for his license to wed plaintiff, in which he also declared that he was then a resident of Columbia; declared to a number of persons his intention to locate, and that he had located, in Tuolumne county as a permanent resident thereof; stated to certain persons, when about to depart for San Francisco, after disposing of his business by a sale thereof to another, that he intended to return. All these constitute circumstances tending strongly to support plaintiff's claim that defendant's legal residence was, at and before the time at which she filed her complaint, in the county of Tuolumne. Indeed, they are sufficient to support the court's order refusing to transfer the cause to San Francisco for trial, and conceding that the facts set out in plaintiff's own affidavit are contradictory thereto, then the result is that

there thus arises such a conflict in the affidavits upon the question of defendant's residence as to fortify the decision of the court below on the motion against successful challenge on appeal.

The order is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

15 Cal. App. 385

IMPERIAL VALLEY MERCANTILE CO. v. SOUTHERN PAC. CO. (Civ. 931.)

(Court of Appeal, Second District, California. Feb. 14, 1911.)

1. RAILROADS (§ 443*)—INJURIES TO ANIMALS—CROSSING ACCIDENT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

In an action for injuries to and death of a portion of a band of sheep by being run into by one of defendant's trains while crossing the track at a road crossing, evidence held to sustain a finding that defendant was negligent in the operation of the train, and that plaintiff's servants in charge of the sheep were not negligent.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 443.*]

2. APPEAL AND ERROR (§ 1001*)—REVIEW—VERDICT.

A verdict on matters of fact is conclusive on appeal, where there is any substantial evidence to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3928; Dec. Dig. § 1001.*]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the Imperial Valley Mercantile Company against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Conkling & Brown, for appellant. Shaw, Ross & Dyke, for respondent.

JAMES, J. Plaintiff brought this action to recover damages caused by the killing of certain sheep belonging to it, alleged to have been caused by the negligence of defendant. The issues made up were submitted to a jury, and a verdict in favor of plaintiff for the sum of \$420 was returned, upon which judgment was entered. An appeal was taken from that judgment, and from an order denying defendant's motion for a new trial.

It is the contention of defendant, first, that the evidence was insufficient to show any negligence on the part of defendant; and, second, that the evidence did show that plaintiff was negligent in the handling of the sheep, which negligence contributed to the cause of the killing of the animals.

A band of about 2,100 sheep belonging to plaintiff were being driven along a public road in the county of Imperial on the 8th day of July, 1908. They were in charge of an employé of plaintiff. The road along which they were being driven crossed the railway track of defendant at what is known

as "Whiting's Crossing." It was nearly dark at the time, and before driving the sheep across the railway tracks the person driving them testified that he went to the track to look for a train, and that he looked up and down to see if there were any lights or any train, and that he did not see anything; that the track at the crossing was straight for several miles each way; that he looked a dozen times up and down the track while he was there, and, neither seeing nor hearing a train approaching, started to drive the sheep across. He was being assisted by a boy, and, when about 600 head of the sheep had crossed, a train approached without the sounding of any whistle or the ringing of a bell, and that before the sheep could be cleared from the track this train struck them, and killed and injured about 84 sheep. The train which did the damage was made up of the engine, tender, caboose, and three water cars. The engine was not placed at the front end of the train, but occupied a position in the middle thereof, with the caboose and one car on one end of it, and the two remaining water cars at the other end. The headlight of the engine did not reflect down the track toward the crossing at the time the train approached, for the interference of the other cars prevented it from so doing. Several eyewitnesses testified that as the train approached the crossing it was traveling backward, the caboose in front, and that no lights of any kind were displayed upon the caboose. The conductor of the train testified that there were red signal lights attached to the caboose, and that he and a brakeman were standing upon the platform of this car with lanterns in their hands. Some of the witnesses had heard, a short while before the accident occurred, the noise of an engine at the station of Heber, a mile and a half away, engaged as they believed from the sounds in switching cars. The train, after striking the sheep, traveled, according to the testimony of the herder, a distance of 110 steps before it was brought to a standstill.

[1] Upon this evidence the jury was fully warranted in making its finding that the defendant had been negligent, and that its negligence was the proximate cause of the killing of the sheep, and, further, that there had been no negligence contributing to cause the damage, committed on the part of plaintiff. It might even be said, upon the facts disclosed by the record, that the undisputed evidence showed both the negligence of the defendant and nonnegligence of the plaintiff. At any rate, the questions were questions of fact, which it was the peculiar province of the jury to determine, and their finding cannot be disturbed. [2] The rule is too well settled to need reiteration that the determination of a jury or a trial court up-

on matters of fact will be deemed conclusive upon appeal, where there is any substantial evidence to support it.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

15 Cal. App. 393

PEOPLE v. BROWN. (Cr. 274.)

(Court of Appeal, First District, California.
Feb. 15, 1911.)

1. HOMICIDE (§ 244*)—SELF-DEFENSE—EVIDENCE—SUFFICIENCY.

Evidence held to warrant a finding that a homicide was not committed in self-defense.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 244.*]

2. HOMICIDE (§ 109*)—SELF-DEFENSE.

Acts constituting self-defense by accused depend, primarily, on his own conduct, and, secondarily, upon decedent's conduct.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 138, 139; Dec. Dig. § 109.*]

3. HOMICIDE (§ 179*)—EVIDENCE—MATERIALITY—INSANITY.

Where accused relied solely on self-defense, evidence that at some time in his life he had been in an accident, resulting in mental and physical injury, was immaterial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 380; Dec. Dig. § 179.*]

4. CRIMINAL LAW (§ 670*)—OFFER OF PROOF—MATERIALITY.

It is not error to exclude prima facie immaterial evidence where counsel refuses to state his purpose in offering it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1593; Dec. Dig. § 670.*]

5. CRIMINAL LAW (§ 1086*)—APPEAL—RECORD—EXCLUSION OF EVIDENCE.

The exclusion of testimony will not be reviewed where no ruling on the objection appears in the record, and counsel do not appear to have insisted upon an answer.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2794; Dec. Dig. § 1086.*]

6. HOMICIDE (§ 190*)—EVIDENCE—ADMISSIBILITY.

One accused of murder could not show what decedent did in the presence of, or said to, a third person before the homicide, where accused was not present.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 399-400; Dec. Dig. § 190.*]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

George W. Brown was convicted of manslaughter, and he appeals. Affirmed.

Ernest Klette, for appellant. U. S. Webb, Atty. Gen., for the State.

LENNON, P. J. The defendant appeals from the judgment of conviction and an order denying his motion for a new trial.

He was informed against by the district attorney of Fresno county for the crime of murder, and found guilty of manslaughter. In support of his plea of not guilty the defendant attempted to prove that the homicide was committed by him in self-defense.

The defendant on the 25th day of Feb-

ruary, 1910, was employed as a porter in the Palace Saloon at Coalinga, Fresno county. The defendant's statement of the incidents leading up to the shooting was substantially that at about 11 o'clock on the morning of the day just mentioned the deceased, William Miller, very drunk and quarrelsome, entered the saloon where defendant was employed, and, without any real or apparent provocation, commenced in vulgar and vile language to abuse and ridicule the defendant. This conduct continued almost without interruption, and with scarcely a word of protest from the defendant, until the noon hour, when the defendant went to his lunch. He returned to his work behind the bar about 3 o'clock in the afternoon of the same day. Miller also returned to the saloon about this time, and renewed his abuse and vilification of the defendant, adding to it a challenge to fight. Miller left the barroom for a few moments, and went upstairs to a lodging house, where he became engaged in an altercation with the landlady. At the suggestion of Al Johnson, a bartender in the place, who had come on duty while Miller was upstairs, the defendant followed Miller, and requested him to cease his disturbance and go back to the barroom. Miller, in reply and without any other provocation, gave the defendant a vicious kick in the stomach, and then, in an effort to get away from the defendant, stumbled and fell down the stairs into the barroom. When Miller got on his feet he turned about—so defendant claimed—shook his fist at the defendant and said, "I'll fix you." No other witnesses in the case saw this movement or heard the remark quoted. The defendant, without any attempt to retaliate, returned to the barroom and quietly resumed his duties. All of the witnesses for the people are agreed that from this time on until the shooting occurred Miller, with but slight interruption, freely and in filthy language abused and reviled the defendant without any apparent cause or provocation, and at one time attempted to reach or strike the defendant across the bar, but was intercepted by Johnson, the bartender.

The defendant during all of this time was apparently calm and collected, and never once made reply to the abuse that was being heaped upon him. Finally Johnson urged Miller to cease, and requested him to leave the place. Miller, after inviting the defendant to come outside and fight, said to Johnson that he would go, and started for the street door between two friends and companions, one of whom had him by the arm. Miller was now so drunk that he staggered in his walk. At this time the defendant was at one end of the bar engaged in cracking ice. To reach the street door it was apparently necessary for Miller to go at an angle in the direction of the place where the defendant was working. As Miller was ad-

vancing toward the door on his way out with a friend on either side, he half turned and called the defendant a vile and filthy name. Thereupon the defendant came forward from his place at the end of the bar, stepped around behind Johnson, and fired two shots from a revolver at Miller, the second of which proved fatal. While Miller was on his way just before the shooting, and about the time the defendant left his place at the end of the bar, some one said, "Look out for him, Al. He's got a gun." This remark apparently was made by one of the companions of Miller, who was not produced at the trial; but no witness who heard it knew for certain that it was Miller or the defendant that was referred to as having a gun. Miller's body was searched immediately after the shooting, but no weapon of any kind was found upon him. When the witnesses of the shooting closed in upon the defendant he exclaimed: "I'm not going to run away. They may hang me, but I am a ruined man. He kicked me in the stomach."

"I'll get you" was the only remark claimed by the defendant to have been made by Miller at any time which could have been construed as a threat against the defendant, and this, according to the defendant's statement, was said some 20 minutes before the shooting. The defendant claimed that Miller, just before and at the time of the shooting, had one hand in his pocket, and was apparently struggling to draw a weapon. None of the several witnesses for the people who were present prior to and at the time of the shooting saw Miller then or at any other time make even the semblance of an attempt to draw a weapon; and they were certain that no threat to kill or to do the defendant bodily harm was made by Miller when, staggering drunk, he was being escorted from the saloon by his two friends. The defendant, at the time of the shooting, was 53 years old, and Miller was a young man perhaps 18 or 20 years of age. Miller and the defendant were entire strangers until the morning in question. The defendant claimed that he shot to kill, believing at the time that his life was in danger. He insisted that this belief was fully justified by the events of the day, and particularly by the remark, "Look out for him, Al. He's got a gun." His attention, he claimed, was attracted from his work by this remark. He understood it as referring to Miller; and, upon looking up and aside, he saw Miller advancing upon him with one hand in a pocket apparently about to draw a weapon.

[2] It is now claimed that the defendant was justified by all of the circumstances surrounding the killing in honestly believing that an attack was about to be made on his life, or that he was in imminent danger of great bodily harm; and that therefore the verdict of the jury, finding him guilty of manslaughter, was contrary to the evidence. It is difficult for us to take counsel seriously

in this contention; and if it were not for the earnestness with which he presents the point we would not give it more than passing notice. [1] "The acts which a defendant may do and justify under a plea of self-defense depend, primarily, upon his own conduct, and, secondarily, upon the conduct of the deceased." *People v. Hecker*, 109 Cal. 462, 42 Pac. 307, 30 L. R. A. 403. The killing being admitted, and the conduct of the defendant up to the moment of the shooting being free from fault, it only remained for the jury to determine from all of the surrounding circumstances whether the conduct of the deceased preceding and at the time of the killing was sufficient to justify the defendant in an honest belief, as a reasonable man, that his life was in danger, or in the fear of immediate great bodily harm at the hands of the deceased. That the jury carefully and favorably considered the remarkable fortitude and self-restraint of the defendant all during the trying ordeal to which he was subjected prior to the shooting is evident by their verdict reducing the killing from murder to manslaughter. A careful reading of the record, not only shows a substantial conflict on many of the material points in the case, but reveals sufficient evidence from which the jury might properly have inferred that the killing was not done in self-defense, but was rather the result of a natural resentment smoldering in the breast of the defendant, which was suddenly fanned into a flame of passion by the vile name hurled at him by the deceased immediately before the shooting.

[3] The following is a transcript of the proceedings during a portion of the direct examination of the defendant when he was upon the witness stand in his own behalf:

"Mr. Klette: Q. Now, I will ask you, Mr. Brown, did you ever at any time receive an injury, or were you ever in any accident where you received any injury?

"Mr. Church: We object to that as incompetent, irrelevant, and immaterial.

"The Court: I do not see that that would have any bearing.

"Mr. Klette: Injury to his head, if the court please.

"The Court: You are not offering it for the purpose of proving irresponsibility?

"Mr. Klette: I am simply offering it for whatever weight it may have with the jury one way or the other—basing my case largely on self-defense; but I believe it is a fact which the jury is entitled to know, having what weight it may with the jury.

"Mr. Church: It is irrelevant, incompetent, and immaterial at the present time unless they propose to prove a defense by insanity.

"Mr. Klette: I don't think we have to state our object."

Thereupon the objection was sustained by the court, and the ruling is now assigned as error.

In view of the claim of self-defense interposed upon behalf of the defendant, the evidence sought to be elicited by the question objected to was wholly immaterial. Whether or not the defendant could properly unite a plea of insanity with a claim of self-defense under the facts of this case need not be here decided. The fact remains that his sole defense was self-defense; and, in the absence of a plea of insanity, evidence that at some time in his life defendant had been in an accident resulting in mental and physical injury was immaterial. *People v. Davis*, 36 Pac. 96.¹ [4] The proposed evidence was prima facie immaterial to the issue raised by the defendant's plea of not guilty and the special defense of self-defense; and therefore the trial court was entitled to know specifically the purpose of counsel in asking the question. *People v. Shaw*, 111 Cal. 175, 43 Pac. 593; *People v. Schell*, 123 Cal. 359, 55 Pac. 1006. It was counsel's duty in fairness to the court and in aid of the due and orderly administration of justice to have stated his purpose fully and completely, and his failure to do so upon the record here presented was sufficient to justify the court in sustaining the objection.

The landlady of the lodging house above the saloon where the killing occurred was called and sworn as a witness in behalf of the defendant. At one point in the examination of this witness counsel for the defendant endeavored to have her tell the jury the details of the altercation which the deceased had with her when the defendant was not present. Following an objection by the district attorney that the question called for immaterial, irrelevant, and incompetent testimony, the court and counsel indulged in a general discussion as to the merits of the question and the objection. [5] It nowhere in the record appears that the court ruled upon this particular objection, and, as counsel for the defendant did not insist upon an answer to his question, we do not feel called upon to consider or discuss his assignment of error in this behalf. [6] However, later on in the examination of the witness the record discloses the following question, objection and ruling:

"Mr. Klette: Q. Well, I will ask you, Mrs. Leggett, after Miller was standing by the window there what did he do or say to you?"

"Mr. Church: We object to that unless it is shown it was in the presence of the defendant.

"The Court: At present I will sustain the objection."

The objection was properly sustained. The question called for testimony which could only have been the narrative of a past event not occurring in the presence of the defend-

ant. In no sense could it be considered, as it is claimed by counsel to be, a part of the *res gestae*. *People v. Wong Ark*, 96 Cal. 125, 30 Pac. 1115.

The judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; HALL, J.

15 Cal. App. 387

INYO DEVELOPMENT CO. v. BOARD OF SUP'RS OF INYO COUNTY. (Civ. 804.)

(Court of Appeal, Second District, California. Feb. 14, 1911.)

HIGHWAYS (§ 60*)—ESTABLISHMENT—REVIEW.

Where a board of supervisors had jurisdiction to determine the question of damages due petitioner in laying out a road, any error in rulings on the admissibility of evidence before the board, or the competency of witnesses, etc., cannot be corrected by a writ of review; petitioner's remedy being to refuse to accept the award, as authorized by Pol. Code, § 2690, whereupon the district attorney is required to condemn the property according to law.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 60.*]

Appeal from Superior Court, Inyo County; F. F. Oster, Judge.

Writ of review by the Inyo Development Company against the Board of Supervisors of Inyo County. From an order of dismissal, petitioner appeals. Affirmed.

P. W. Forbes, for appellant. Frank C. Scherrer and Ben H. Yandell, for respondent.

ALLEN, P. J. This is an appeal from a judgment and order of the superior court of Inyo county dismissing a writ of review. It appears from the record that on April 6, 1909, more than ten persons, representing themselves to be freeholders within the county of Inyo, and representing that more than two of them were at the time residents of the road district wherein the proposed road is situate, and who were taxable therein for road purposes, petitioned the board of supervisors to lay out, open, construct, and maintain in the Fourth road district a public road, whose termini, width, and general route were specified in the petition; that said petition was accompanied by a good and sufficient bond in double the amount of the probable cost of viewing and laying out the proposed road, conditioned as provided by statute, which bond was duly approved. Thereafter, on the 8th of April, the board of supervisors met and said petition was by them considered, and evidence was presented upon the part of the petitioners showing the genuineness of the signatures attached to the petition; that at least ten of the petitioners were freeholders, who would be accommodated by the proposed road; that more than two of them were residents of the road district wherein the proposed road was situate,

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 101 Cal. xviii.

and who were taxable therein for road purposes. Thereupon the board, after considering the evidence, appointed three viewers, one of whom was a surveyor, to view and survey the proposed new road, and to submit to the board an estimate of the cost of the opening thereof, including the purchase of the right of way, and their views of the necessity for the road. These viewers gave the requisite notice provided by the statute and made a favorable report upon the petition.

Thereafter, at the next meeting of the board, time was fixed for hearing the report, and notice was given, as required by section 2688 of the Political Code, of the hearing of such report. At the time appointed the supervisors took testimony in relation to the public necessity of the road, and by their order declared the amount of damages to the nonconsenting landowner, who was the plaintiff herein, and over whose land the road was to be opened, and declared the report approved and the location of the road established in accordance with the report of said viewers, and further found the damages sustained by plaintiff, over whose land said road was ordered to be opened, to be the sum of \$25, and said sum was awarded as damages to plaintiff, and which sum was ordered set apart from the treasury of the county out of the road fund of road district No. 4, to be paid to said nonconsenting landowner. Plaintiff thereupon sought by a writ of review to have the action of said board annulled, claiming that the record disclosed a want of jurisdiction in said board to make its orders opening said road and awarding said damages. Upon the record being certified to the superior court, and upon examination and hearing thereof, it dismissed the writ, from which judgment plaintiff appeals.

There is and can be no contention as to the sufficiency of the petition, or of the bond, or of any proceeding leading up to and culminating in the order appointing the viewers, and that at the time of the appointment of such viewers and preceding the same ample evidence was presented to the board, showing that the petitioners possessed the qualifications required by the statute, and that the road not only accommodated ten or more of the signers, but the public generally. These things being determined, jurisdiction attached to the board for the making of subsequent orders in the premises. While the plaintiff contends that the record discloses a want of jurisdiction, it presents in the record nothing to support such contention.

It is further contended that the award of damages to plaintiff as a nonconsenting landowner was based upon incompetent testimony; that is to say, that the evidence upon which the amount was based was given by a witness not shown to be an expert in val-

ues. The board having jurisdiction to hear and determine the question of damages, if any error intervened in rulings upon the admissibility of evidence, or the competency of a witness, the same could not be corrected by a writ of review. In addition to this, however, plaintiff is in no wise precluded in its remedy by the finding of the board as to its damages. Section 2690 of the Political Code insures to it the right, when dissatisfied, to refuse to accept the damages, and thereupon the district attorney of the county is required to proceed under proceedings in condemnation to have the amount ascertained and determined.

We see nothing in the record as suggesting error upon the part of the court below in dismissing the writ of review, and such order and judgment are affirmed.

We concur: SHAW, J.; JAMES, J.

15 Cal. App. 390

WEBSTER v. SUITER. (Civ. 888.)

(Court of Appeal, Second District, California.
Feb. 14, 1911.)

1. APPEAL AND ERROR (§ 1015*)—QUESTIONS OF FACT—REVIEW—GRANT OF NEW TRIAL.

Where a motion for a new trial was granted because of the insufficiency of the evidence, the order cannot be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876; Dec. Dig. § 1015.*]

2. APPEAL AND ERROR (§ 933*)—PRESUMPTIONS—GRANT OF NEW TRIAL.

Where plaintiff moved for a new trial for insufficiency of the evidence, and for newly discovered evidence, and the trial court granted the motion without specifying the particular ground for the ruling, it must be presumed on appeal that both the grounds alleged were considered in disposing of the motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3425, 3772-3776; Dec. Dig. § 933.*]

3. APPEAL AND ERROR (§ 1015*)—REVIEW—GROUNDS FOR SUSTAINING DECISION—GRANT OF NEW TRIAL.

Under such circumstances, since the ruling must be sustained if either of the grounds alleged is sufficient, and since the ground of the sufficiency of the evidence is not reviewable, the question of the sufficiency of the newly discovered evidence to warrant a new trial will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876; Dec. Dig. § 1015.*]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Anna B. Webster against B. F. Suiter. From an order granting a new trial after findings for defendant, he appeals. Affirmed.

George E. Whitaker, for appellant. W. W. Kaye, for respondent.

JAMES, J. Defendant appeals from an order of the superior court granting the mo-

tion of plaintiff for a new trial. The action was brought upon a promissory note executed by defendant. It was claimed on the part of the defendant that the note had been paid by the assignment of another promissory note owned by defendant. The latter note defendant had delivered to the Bank of Kern, with the understanding, as he testified, that it was to be received by said bank in extinguishment of the indebtedness owing by him to plaintiff's assignor on the note here sued upon, and also in extinguishment of an indebtedness owing by defendant to said bank. Defendant sought to prove that the Bank of Kern, in receiving the note under the alleged agreement mentioned, was acting on its own behalf, and also as the agent of plaintiff's assignor. These matters were controverted by evidence offered on behalf of the plaintiff, and the trial court made its findings in favor of defendant.

Subsequently thereto plaintiff gave notice of intention to move for a new trial on various statutory grounds, among them specifying that the evidence was insufficient to justify the decision of the court, and also that she had discovered new evidence material to her case, which she could not have produced with reasonable diligence at the trial. The motion for a new trial was thereafter presented, and the court made a general order directing that the same be granted. [1] For aught that appears in the record, the motion for a new trial may have been granted because of the insufficiency of the evidence, and if it was granted for that reason, of course, under the well-established rule governing the review of such matters on appeal, the order cannot be disturbed.

Counsel for appellant in his brief makes the statement that the only showing made by plaintiff in the lower court in support of her motion for a new trial was by submitting affidavits of newly discovered evidence, which he insists were not sufficient to authorize the court to grant said motion. [2] There is nothing in the record, however, which substantiates this contention, and even if it was a fact that all of the argument made at the hearing of the motion for a new trial was directed to the point as to evidence newly discovered by the plaintiff, the plaintiff would still be entitled to have all of the grounds mentioned in her notice of intention to move for a new trial considered by the trial court, and we must presume that they were so considered.

In the case of *Sherwood v. Kyle*, 125 Cal. 655, 58 Pac. 271, an order had been made granting a motion for a new trial, and in the course of a discussion upon the subject of

the right of the appellant there to have the order reviewed on appeal the Supreme Court said: "It is not necessary to discuss the other points made on the motion for a new trial. They are, however, all involved on this appeal; for the court cannot foreclose the defendant as to any of them by granting a new trial upon some one ground. Except where one ground is as to the insufficiency of the evidence, and this only as to the ruling upon that one point, it is utterly immaterial here upon what ground the new trial was granted. The respondent may defend the ruling upon any point involved in his motion." We quote, also, from the case of *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 161, 47 Pac. 1020: "That the granting of a new trial is a thing resting so largely in the discretion of the trial court that its action in that regard will not be disturbed, except upon the disclosure of a manifest and unmistakable abuse, has become axiomatic, and requires no citation of authority in its support. * * * But so long as a case made presents an instance showing a reasonable or even fairly debatable justification, under the law, for the action taken, such action will not be here set aside, even if, as a question of first impression, we might feel inclined to take a different view from that of the court below as to the propriety of its action. More especially is this true where, as here, the question rests largely in fact, and involves the proper deduction to be drawn from the evidence. The opportunities of the trial court in such instances for reaching just conclusions are, as a general thing, so superior to our own, that we will not presume to set our judgment against that of the former, where there appears any reasonable room for difference."

[3] It becomes necessary, then, to consider whether or not the affidavits by which a showing of newly discovered evidence was attempted to be made were sufficient to authorize the granting of the motion. The trial court had the right to consider the matter of the sufficiency of the evidence to justify the decision and, if it was dissatisfied with its conclusion thereon, to grant the motion for a new trial. If the order as made can be sustained on the ground that the court did not abuse its discretion in granting the new trial for this reason, it must be affirmed. Upon the evidence given at the trial and as shown in the bill of exceptions, it cannot be said that the court improperly exercised its discretion in making the order complained of.

The order is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

15 Cal. App. 400

PEOPLE v. WALKER. (Cr. 288.)

(Court of Appeal, First District, California.
Feb. 15, 1911. Rehearing Denied
March 15, 1911.)

1. BANKS AND BANKING (§ 21*)—UTTERING FICTITIOUS CHECK—ELEMENTS OF OFFENSE.

The essentials of the offense denounced by Pen. Code, § 476, punishing the passing with intent to defraud any fictitious check, are the uttering and publishing of a fictitious check with knowledge of its character and an intent to defraud, and the state need not prove that accused drew or attempted to draw on an account which he had established in a bank based on the fictitious check, or that the bank was in fact defrauded by the transaction.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 25; Dec. Dig. § 21.*]

2. BANKS AND BANKING (§ 21*)—UTTERING FICTITIOUS CHECK—INTENT—QUESTION FOR JURY.

The intent with which a depositor of a bank who had opened a deposit account in a fictitious name deposited a fictitious check in violation of Pen. Code, § 476, and thereby received credit on his account therefor, is for the jury, who need not accept his statement of his intent in making the deposit, but the establishment of the account and the subsequent deposit of the check creating an opportunity to defraud the bank justify a finding of an intent to defraud.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 25; Dec. Dig. § 21.*]

3. CRIMINAL LAW (§ 552*)—CRIMINAL INTENT—EVIDENCE.

The intent with which a person does a criminal act may be inferred from all the surrounding circumstances.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1257-1262; Dec. Dig. § 552.*]

4. CRIMINAL LAW (§ 1035*)—MISCONDUCT OF TRIAL JUDGE AND PROSECUTING ATTORNEY—OBJECTIONS—EXCEPTIONS.

Accused may not on appeal complain of a discussion between the district attorney and the court on the court ruling on the admissibility of evidence, unless at the time he made an objection thereto, coupled with a specific assignment of misconduct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2644, 2645; Dec. Dig. § 1035.*]

5. WITNESSES (§ 337*)—CROSS-EXAMINATION OF ACCUSED—IMPEACHMENT.

Under Code Civ. Proc. § 2051, authorizing the impeachment of a witness by proof on his examination of his conviction of a felony, accused testifying in his own behalf may be impeached by proof on his cross-examination of a commission of a felony, though on his arraignment he admitted as alleged in the information a prior conviction.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1147; Dec. Dig. § 337.*]

6. BANKS AND BANKING (§ 21*)—UTTERING FICTITIOUS CHECK—EVIDENCE—ADMISSIBILITY.

On a trial for passing a fictitious check purporting to have been signed and indorsed by a third person on a designated bank, evidence of the nonpayment of the check and of the fact that the third person did not have an account with such bank was admissible.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 25; Dec. Dig. § 21.*]

7. CRIMINAL LAW (§ 695*)—EVIDENCE—OBJECTIONS—SUFFICIENCY.

An objection to hearsay evidence which does not specifically state that it is incompetent, or which does not specifically state any other legal ground of objections, is properly overruled.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1633-1638; Dec. Dig. § 695.*]

8. CRIMINAL LAW (§ 696*)—MOTION TO STRIKE OUT EVIDENCE—GROUNDS.

A motion to strike out evidence must be based on an objection previously stated, where an opportunity to object presented itself, and a failure to specify the grounds of objection is a waiver of the objection, and a motion to strike is without the foundation of a valid objection, and is properly denied.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1639-1644; Dec. Dig. § 696.*]

9. CRIMINAL LAW (§ 693*)—EVIDENCE—OBJECTIONS—TIME TO MAKE.

An objection to the admissibility of evidence not seasonably made need not be ruled on.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1630; Dec. Dig. § 693.*]

10. BANKS AND BANKING (§ 21*)—UTTERING FICTITIOUS CHECK—EVIDENCE.

On a trial for passing a fictitious check purporting to have been drawn by a third person on a designated bank, the testimony of the receiving teller of the bank that, referring to the bank book showing the names of the depositors, the name of the third person did not appear as a depositor was admissible as prima facie evidence that the check was fictitious.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 25; Dec. Dig. § 21.*]

Appeal from Superior Court, City and County of San Francisco; Wm. P. Lawlor, Judge.

John R. Walker was convicted of making and uttering a fictitious check, and he appeals. Affirmed.

Philip C. Boardman and J. K. Ross, for appellant. Attorney General Webb, C. M. Fickert, and Fred L. Berry, for the People.

LENNON, P. J. The defendant was charged with the crime of making, passing, uttering and publishing a fictitious check as defined by section 476 of the Penal Code. Included in the information is a charge of prior conviction of the crime of forgery committed in the state of Missouri. When arraigned upon the information, the defendant pleaded "not guilty," and confessed the prior conviction. Upon his trial he was found guilty, "as charged in the information herein, in having uttered, published, and passed the check set forth in said information in the manner and form alleged therein." The defendant was sentenced to a term of 14 years in the state prison at Folsom, and his appeal is from the judgment of final conviction and the order denying his motion for a new trial.

It is not disputed by counsel for the defendant that the evidence on the whole case supports the finding of the jury that the check was fictitious, and was uttered and

published by the defendant; but it is contended that the evidence is insufficient to warrant the finding of a fraudulent intent on the part of the defendant.

From the evidence offered and received at the trial in support of the case for the people, it appears that a few days prior to the 11th day of April, 1910, the defendant opened an account with the Savings & Loan Society of San Francisco in the assumed name of "Harvey Monig"; the defendant representing himself at that time to be Harvey Monig. Thereupon the usual passbook of the bank was issued to the defendant in the name of Harvey Monig. Subsequently, on the 11th day of April, 1910, the defendant again appeared at the place of business of the Savings & Loan Society, and presented to the cashier of that institution for deposit the sum of \$2 in silver coin and a check calling for the sum of \$43. The check was drawn on the International Banking Corporation of San Francisco, payable to Harvey Monig, and purporting to have been made and signed by one "Robert D. Metcalf." The check and money were received and accepted by the bank for deposit only. The defendant was then credited in his passbook and in the books of the Savings & Loan Society with the sum of \$45. The check at the time it was presented and received for deposit was indorsed "Robert D. Metcalf" and "Harvey Monig." In due course the check was presented for payment by the Savings & Loan Society to the bank upon which it was drawn. Robert D. Metcalf did not have an account there, and the check was returned to the Savings & Loan Society unsatisfied, with the notation "Has no funds" inscribed thereon.

To the arresting officers, the defendant freely and voluntarily admitted that he knew the check was fictitious at the time he deposited it with the bank. The defendant did not draw or attempt to draw on the account which he had opened with the Savings & Loan Society; and it is conceded by the people that the bank was not in fact defrauded or injured by the transaction.

The defendant, as a witness on his own behalf, claimed that he had deposited the check with the bank for collection only, and without any intention to defraud. Aside from this his testimony was limited in effect to a denial that he knew, or ever admitted knowing, the check to be fictitious at the time of its utterance. His reason for assuming the name of Harvey Monig was neither clear nor convincing; and the explanation that he gave of how or from whom he received the check was weak and improbable, but, if true, tended strongly to support the inference of knowledge at all times on his part that the check was spurious.

[1] The uttering and publishing of a fictitious check, with knowledge of its character and an intent to defraud, are the essentials of the offense of which the defendant was found guilty. It was not essential for the

people to prove that the defendant drew or attempted to draw on the account which he had established, or that the bank was in fact injured or defrauded by the transaction. *People v. Turner*, 113 Cal. 281, 45 Pac. 331; *Arnold v. Cost*, 3 Gill & J. (Md.) 219, 22 Am. Dec. 302; 3 Greenleaf on Ev. § 103. [2] The intent with which the check in question was deposited was a question exclusively for the jury; [3] and the intent with which a person does an act may be inferred from all the surrounding circumstances. The jury was not compelled to accept the defendant's statement of his intent and purpose in making the deposit. The establishment of the account and the subsequent deposit of the check created an opportunity for the perpetration of a fraud upon the bank; and we are of the opinion that the facts and circumstances of the case as revealed by the entire evidence fully warranted the jury in finding that the check in question was uttered, published, and passed by the defendant with intent to defraud the bank.

While the defendant was on the witness stand in his own behalf, the district attorney on cross-examination asked him if he had ever been convicted of a felony. The question was answered in the affirmative without any objection being interposed. However, an objection was subsequently made to the question upon the ground, in substance, that, the defendant having confessed a prior conviction upon his arraignment, the people were precluded, by the terms of section 1025 of the Penal Code, from again alluding to the subject in the presence of the jury. The objection was overruled; the court apparently treating the objection as having been made prior to the answer. Complaint is now made of the ruling, and also for the first time of the court's remarks preceding the ruling. The court's remarks and the reply of the district attorney prior to the ruling were pertinent and proper, and seemingly were intended to safeguard the defendant against the evil results of what might have been an unwarranted or, to the defendant, a misleading question. The court, for its guidance in ruling on the question, was privileged to know what was in the mind of the district attorney, and it was the latter's duty to reply. The discussion revealed the fact of another conviction still pending against the defendant in the same court. [4] The possibility of this resulting in injury to the defendant cannot be considered by this court, however, in the absence of an objection, coupled with a specific assignment of misconduct, made at the time of the trial. *People v. Shem Ah Fook*, 64 Cal. 382, 1 Pac. 347; *People v. Abbott*, 101 Cal. 646, 36 Pac. 129; *People v. Trask*, 7 Cal. App. 104, 93 Pac. 891; *People v. Osborn*, 12 Cal. App. 148, 106 Pac. 891.

The objection itself (assuming it to have been seasonably made) was properly overruled. [5] When the defendant took the wit-

ness stand in his own behalf, he subjected himself to possible impeachment in the mode authorized by section 2051 of the Code of Civil Procedure (People v. Hickman, 113 Cal. 80, 45 Pac. 175; People v. Mayes, 113 Cal. 624, 45 Pac. 860); and therefore, notwithstanding defendant's confession of a prior conviction, it was proper on cross-examination, for the purpose of impeachment, to ask him if he had ever been convicted of a felony. People v. Crowley, 100 Cal. 479, 35 Pac. 84; People v. Arnold, 116 Cal. 686, 48 Pac. 803.

The criticism of the trial court's explanation of the phrase "evidence in the case," as used in the usual and approved definition of a reasonable doubt, is hypercritical, and does not require extended notice.

Charles F. Waller, the messenger of the Savings & Loan Society, was called as a witness for the people, and without objection testified that he saw the check in question on the 12th day of April, 1910. At this point the following occurred: "Mr. Berry (for the people): Q. Where did you see it? Mr. Ross (for the defense): We want to interpose an objection now in advance as to anything that was done with this check after the 11th. The Court: The objection is overruled." The witness answered this question, and then, in response to further questions of the district attorney, and without any further objection or attempted objection from the defense, testified in substance that he presented the check to the International Banking Corporation for collection, and that payment was refused. This, and everything else testified to by the witness as having been said and done by him and others in an effort to collect the check, was not said or done in the presence of the defendant. In a word, all of the evidence elicited from the witness was clearly hearsay, and therefore incompetent. When the witness referred to concluded his testimony, a motion was made by the defense to strike out the evidence given, "upon the ground that he was attempting to testify to facts that occurred after the commission of the offense." This motion was eventually denied.

[6] Evidence of the nonpayment of the check, and of the fact that Robert D. Metcalf did not have an account with the International Banking Corporation, was admissible (Williams v. State, 126 Ala. 57, 28 South. 632; People v. Tollefson, 145 Mich. 444, 108 N. W. 751); but hearsay testimony was not competent to establish these facts. However, treating the objection as a timely one, and, conceding the testimony to be hearsay, and therefore incompetent, [7] the court did not err in its ruling, because neither incompetency nor any other legal ground of objection was specifically stated. People v. Chee Kee, 61 Cal. 404. It was not error for the

court to refuse to strike out the evidence in question. [8] A motion to strike out evidence must be based upon an objection previously stated. People v. Long, 43 Cal. 444; People v. Rolfe, 61 Cal. 542. This of course assumes that an opportunity to object presented itself, as it did in this case. Failure to specify the grounds of an objection is in effect a waiver of the objection (People v. Baird, 105 Cal. 126, 38 Pac. 633), and therefore in this case the motion to strike out was without the foundation of a valid objection to support it, and was properly denied. People v. Nelson, 85 Cal. 428, 24 Pac. 1006.

James E. Orbison, the receiving teller of the International Banking Corporation, as a witness for the people testified without objection that Robert D. Metcalf "had no account at any time with the bank; there was no such name in the accounts of the corporation, and if the books were produced they would show there was no such account." Upon the suggestion of the court that there was no foundation for the testimony given in reference to the contents of the books, the witness was withdrawn, and his testimony in this particular stricken out. The order striking out did not, as far as we can ascertain from the record, include the testimony of the witness given without objection that Robert D. Metcalf had no account at any time with the bank. Later this witness was recalled, and had with him a book of the bank showing the names of its depositors, beginning with the 25th day of March, 1910, and ending with the 30th day of June, 1910. The sum and substance of the evidence given at this time by the witness is contained in the following question and answer: "Mr. Berry: Q. Referring to that book will you state whether or not the name of Robert D. Metcalf appears as a depositor of the International Banking Corporation during the time covered by that record before you? A. No, sir." After the answer of the witness to the question had been given Mr. Boardman, associate counsel for the defendant, said: "I understand that our objection goes to each question, on the ground it does not tend to prove it was a fictitious check, or the nonexistence of any such person." This was in effect an objection to the question quoted; but the court did not rule upon it. [9] The objection was not seasonably made, and the court was therefore not required to rule upon it. [10] In any event the testimony was admissible as prima facie evidence that the check was fictitious. People v. Eppinger, 105 Cal. 36, 38 Pac. 538; Williams v. State, 126 Ala. 57, 28 South. 632; 3 Greenleaf on Ev. § 109.

The judgment and order are affirmed.

We concur: KERRIGAN, J.; HALL, J.

15 Cal. App. 363

In re CHADBOURNE'S ESTATE.

CHADBOURNE v. CHADBOURNE.

(Civ. No. 756.)

(Court of Appeal, Third District, California.
Feb. 11, 1911.)1. APPEAL AND ERROR (§ 533*)—RECORD—
OPINION OF TRIAL COURT.

The trial judge's opinion is no part of the record on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2339-2400; Dec. Dig. § 533.*]

2. EXECUTORS AND ADMINISTRATORS (§ 35*)—
REMOVAL—DISCRETION OF COURT—"NEGLECT"—"OMIT."

Code Civ. Proc. § 1511, provides that, "if an executor * * * neglects for two months after his appointment to give notice to creditors as prescribed, * * * the court must revoke his letters" and appoint another executor. Pen. Code, § 7, subd. 2, provides that the term "neglect" imports a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily uses in acting in his own concerns. *Held* that, construing section 1511 in view of the policy of the law to effectuate testator's expressed will as far as possible, it gave the court a wide discretion in removing executors thereunder, and an executor should not be removed if the failure to publish the notice within the required time is satisfactorily excused; the terms "to neglect" and "to omit" not being synonymous, since to neglect is to omit by carelessness or design, while an omission may be involuntary and inevitable.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 227-262; Dec. Dig. § 35.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4740, 4741; vol. 8, p. 7729; vol. 6, p. 4959.]

3. EXECUTORS AND ADMINISTRATORS (§ 35*)—
REMOVAL.

Courts will reluctantly remove an executor if there is no weighty cause therefor, and it does not clearly appear that the interest of the estate will be prejudiced by not removing him.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 227-262; Dec. Dig. § 35.*]

4. STATUTES (§ 183*)—CONSTRUCTION—LEGISLATIVE INTENT.

The legislative intent will be effectuated, if possible, though it may appear to be contrary to the letter of the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 261; Dec. Dig. § 183.*]

5. STATUTES (§ 227*)—DIRECTORY STATUTES.

Statutes which when, literally construed, are mandatory, may be held directory, and vice versa, so that the word "shall" or "must" may under some circumstances be construed as "may."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 308, 309; Dec. Dig. § 227.*]

6. EVIDENCE (§ 96*)—BURDEN OF PROOF—
FAILURE TO PERFORM STATUTORY DUTY—
EXCUSES.

The burden is upon one who fails to perform a duty imposed by statute to excuse his failure in order to relieve himself from the penalty.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 119-121; Dec. Dig. § 96.*]

7. EXECUTORS AND ADMINISTRATORS (§ 91*)—
DUTIES OF EXECUTOR.

An executor must act with such prudence and diligence as are generally observed by prudent men in their own affairs.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 397-402; Dec. Dig. § 91.*]

8. EXECUTORS AND ADMINISTRATORS (§ 35*)—
REMOVAL—GROUND FOR REFUSAL—INAD-
VERTENCE—VIOLATION OF STATUTE.

An executor obtained an order for publication of notice to creditors, and, on the same day, went to his attorney's office, and the latter's stenographer was instructed to have the notice published, and both the executor and his attorney believed that it had been published, but as an additional precaution the attorney some four weeks thereafter sent his stenographer to the county clerk's office to see if the affidavit of publication was on file, and she mistakenly reported that it was, and the executor did not know that the notice was not published within the statutory period of two months, until a petition was filed for his removal on that ground, though he was a subscriber to the paper in which he had directed the notice to be published. Both the executor and his attorney believed in good faith that the notice had been published. *Held*, that the executor should not be removed for failure to have the notice published within the statutory period, not being guilty of intentional neglect.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 227-262; Dec. Dig. § 35.*]

9. EXECUTORS AND ADMINISTRATORS (§ 35*)—
CONSTRUCTION—FORFEITURE STATUTE.

A statute should be construed to avoid a forfeiture if it can be reasonably so interpreted, and Code Civ. Proc. § 1511, requiring the court to revoke an executor's letter if he neglects for two months after appointment to give notice to creditors, should be construed, if possible, so as to prevent unnecessary removal of executors.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 227-262; Dec. Dig. § 35.*]

Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Application by Dennie May Chadbourne for the removal of F. A. Chadbourne, as executor of Edwin Chadbourne, deceased. From an order of removal, the executor appeals. Reversed.

See, also, 112 Pac. 472.

T. T. C. Gregory, for appellant. Paul C. Harlan, for respondent.

BURNETT, J. The appeal is from an order and judgment removing F. A. Chadbourne, a brother of the testator, from the office of executor for failing to publish notice to creditors within the statutory period of two months. The proceeding was based upon section 1511 of the Code of Civil Procedure and was instituted by Dennie May Chadbourne, the widow of deceased, and a co-executor with appellant.

Appellant obtained an order for publication of the notice on the day he was appointed executor, and on the same day he went with his attorney to the office of the latter, and the attorney's stenographer was instructed

to have the notice to creditors published in the Solano County Courier, the paper selected by said F. A. Chadbourne. Both appellant and his attorney believed that the notice had been published, but some four weeks after the said order was made, for additional assurance, said attorney sent his stenographer to the office of the county clerk to see if the affidavit of publication of notice to creditors was on file and she reported that it was, mistaking for the one in question the "affidavit of publication of time set for proving the will." Not until the petition of respondent was filed did appellant or his attorney even suspect that said notice to creditors had not been published. There is no kind of doubt that they both acted in the utmost good faith and with a sincere purpose to discharge promptly their legal duty. It may be said, also, that it does not appear that by reason of the delay in the publication of said notice any detriment was caused to said estate. As to that, it was found by the court below "that no damage of any kind has been caused, nor any damage accrued to said estate by reason thereof, other than such as may arise from delay in administering the estate herein."

It is asserted by appellant, and not disputed by respondent, that the trial judge made the order of removal because he felt constrained to hold that he had no discretion in the premises, believing that the said section is mandatory in its nature. From the opinion filed in the cause appellant makes the following quotation: "The provisions of section 1511 seem to me to be mandatory, and leave no discretion whatever in the court as to the revocation of the letters. There is no doubt but what it would have been better if the administration of this estate could have gone on without friction or interruption. There seems to be nothing for the court to do but revoke the letters of both Fred A. Chadbourne and also of Dennie May Chadbourne."

[1] While the opinion of the trial judge is manifestly no part of the record here and is not subject to review, yet counsel seem to concede that it may be accepted as indicative of the court's interpretation of the statute and as suggestive of the vital point involved in the controversy.

[2] It may be admitted at the outset that the provision taken literally rather lends support to the trial court's decision. The section is as follows: "If an executor or administrator neglects for two months after his appointment to give notice to creditors, as prescribed by this chapter, the court must revoke his letters, and appoint some other person in his stead, equally or the next in order entitled to the appointment."

We think, however, that the more reasonable view is that it was not intended by the Legislature that in every case where there is an omission for two months to publish said notice the court is required to revoke the let-

ters. There are certain considerations suggested by appellant, cognate to the main inquiry, which make this contention more readily acceptable, and which point to the conclusion that it was the intention of the Legislature to invest the trial judge with a wise discretion in the removal of executors or administrators, and to confer upon him the power to decline to revoke the letters if it appears that the failure to publish within the statutory period is satisfactorily excused.

In the first place, it should be and is the policy of the law to give effect, as far as it can be legally done, to the expressed will of the deceased. The nomination of the executor is evidence of the confidence reposed in him by the testator, and the deliberate purpose and desire thus solemnly expressed as to the administration should not be thwarted, unless the plain provisions of the law or the interests of justice demand it. In the case at bar, the testator required no bond nor security of any kind for the faithful discharge of the duties of executor, and, as further evidence of his faith in F. A. Chadbourne's fidelity, he constitutes him, in connection with two other brothers, the trustee of a fund of \$5,000 for the education of the two sons of the testator. The foregoing is not, of course, a controlling circumstance. It would not justify an interpretation of the law in opposition to the plain will of the Legislature, but it should not be laid out of view where there may be a question as to what the Legislature intended in a provision relating to the removal of an executor. At least, it should rather incline the court to give to the law a construction as favorable as possible to the executor, where he has not shown himself to be incompetent, corrupt, or grossly negligent. It has been declared that "the principle governing the disposition of applications such as this is expressed in the phrase 'whom the testator will trust so will the law.' The executor is the confidential agent solemnly chosen by the testator to execute his wishes as they may be expressed in his will. To this agent the testator confides a most sacred trust. The person who accepts it accepts great obligations to the living and the dead and if he be alive to the binding force of those obligations and determined to discharge them bravely and honestly without partiality or preference, it will rarely if ever happen that he will be called upon to defend himself against a charge of misconduct or personal unfitness. Under the rules so familiar to all, we are not permitted to lightly pass over the wishes of the person who lives but in the memory of possibly the very one chosen to represent him after death and whom it is sought to displace. The reason for taking away the authority of a person so chosen should be well grounded upon undoubted proof of his utter improvidence and unfitness for the duties of his trust."

[3] But beyond this the courts have gen-

erally extended to administrators a similar consideration, and they have manifested a reluctance to remove them unless compelled to do so. It is thus expressed in 18 Cyc. 165: "The courts are reluctant to remove an executor or administrator where no strong cause exists therefor, and it does not clearly appear that retaining the representative in office will jeopardize the interests of the estate." In *Haines v. Carpenter*, 1 Wood, 262, Fed. Cas. No. 5,905, it is said: "A strong case must be made out to induce the court to take possession of the property from an executor who has qualified and given bond for the faithful discharge of his trust and has taken possession under the will." And the Supreme Court of this state has said in the *Estate of Graber*, 111 Cal. 434, 44 Pac. 165, that "to revoke or forfeit letters testamentary or of administration, ipso facto, by a statute, is most rigorous treatment and we would not be inclined so to construe the law, unless the intention of the lawmaking power to that effect was plainly manifest." We must assume that the Legislature had before it this policy of the law when it enacted the statute in controversy.

[4] And, while the language upon its face seems to be mandatory, the cardinal canon of interpretation requires, of course, that we give effect to the intention of the lawmakers, though it may seem opposed to the letter of the statute. This is well expressed by Judge Thayer in *Chauncey v. Dyke Bros.*, 119 Fed. 9, 55 C. C. A. 587, as follows: "We are aware that some courts have at times expressed in strong terms the necessity of pleading and enforcing statutes literally without regard to consequences. Some of these utterances have been called to our attention. But this doctrine of literalism which clings to the letter of a statute and ignores its purpose is not well calculated to promote the ends of justice. It is not the duty of a court of justice to perpetuate mistakes inadvertently made by the lawmaker by a blind adherence to the letter of the law, when the purpose of the law is apparent. Legislative bodies are not always fortunate in the use of language, but, if careful attention is paid to all the provisions of a statute as well as to the conditions which led to its enactment, little difficulty will generally be experienced in ascertaining what was intended. When the purpose is disclosed, it should be given effect, since whatever is within the intention of the lawmaker is as much within the statute as if it was within the letter."

[5] In accordance with this primary rule of interpretation, courts have construed "may" as mandatory, giving it the meaning of "shall" or "must" (*Estate of Ballentine*, 45 Cal. 699; *Hayes v. County of Los Angeles*, 99 Cal. 74, 33 Pac. 766; *Sutherland on Statutory Construction*, 634); and in many cases it is held that "shall" and "must" are directory merely (*Wallace v. Feeley*, 61 How. Prac. [N. Y.] 225; *Merrill v. Shaw*, 5 Minn.

148 [Gil. 113]; In *re Thurber's Estate*, 162 N. Y. 244, 56 N. E. 631; *Stone v. Pratt*, 90 Hun, 39, 35 N. Y. Supp. 519; *First Nat. Bank of Seneca v. Lyman*, 59 Kan. 410, 53 Pac. 125; *Cook v. Spears*, 2 Cal. 409, 56 Am. Dec. 348; *People v. Sanitary Dist. of Chicago*, 184 Ill. 597, 56 N. E. 953). In *Clancy v. McElroy*, 30 Wash. 567, 70 Pac. 1095, the Supreme Court of Washington had before it a statute quite similar to the one involved herein, and the decision is directly in point. There section 6201 of the statute provided that "every executor and administrator shall make and return, upon oath, into the court, within one month after his appointment, a true inventory of the real and personal estate of the deceased which shall come into his possession or knowledge," and section 6208 provided that "if any executor or administrator shall neglect or refuse to return an inventory within the time prescribed, or within such further time, not exceeding three months, as the court shall allow, the court shall revoke the letters testamentary or of administration." As stated by appellant, the inventory was not returned within the statutory period, nor was the period extended by the court. It was insisted that the statute was mandatory, it being expressed in mandatory terms, "the court shall revoke," and it was urged by petitioner that the court had no discretion where the executor failed to file the inventory within the statutory time. The court in discussing this claim said: "No such statutory provision in the same terms has been brought to our attention, but it is a familiar rule of construction that the spirit as well as the letter must be considered in determining whether its provisions are mandatory or directory. The words 'may' and 'shall' may be used according to the context and intent found in the statute and are frequently construed interchangeably. From the reading of these two sections in connection with the received construction and nature of probate proceedings and the ordinary discretion of the superior court in such proceedings, it is concluded that the authority of the superior court to remove an executor in this case rests in a sound legal discretion. Considering that the failure of the executor to formally file the inventory was through mere inadvertence and forgetfulness and the further fact that he was the trustee selected by the testator and otherwise competent to manage the estate, no abuse of discretion is perceived in the court's rulings."

Again, the term "neglects" indicates very clearly that the court is clothed with some discretion. It is not the "omission" or "failure" to publish the notice that demands the removal of the executor or administrator, but if he "neglects for two months after his appointment," etc., the court must revoke his letters. Here also the Legislature must have had in mind the well-established significance of the expression. "To neglect" and "to omit" are not synonymous terms. There may

be an omission to perform an act or condition which is altogether involuntary and inevitable. To neglect is to omit by carelessness or design." *New York Guaranty & Indemnity Co. v. Gleason*, 53 How. Prac. (N. Y.) 122.

The Penal Code of this state (section 7, subd. 2) also provides that "the term 'neglect' imports a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns." In this light the provision must be viewed. The section is the same as though it had provided that if the executor or administrator fails to publish the notice for two months, and his failure is the result of carelessness or design, the court must revoke his letters. Under the view of respondent, if the executor had been prevented by some unavoidable circumstances from making the publication, the result would be the same, since the court has no discretion. We think no such drastic penalty was contemplated by the Legislature. Of course, it is plainly the duty of the executor to make the publication within the statutory time. He is commanded to do so, and he should endeavor to comply with the direction of the law. The statute does not complacently leave it to the discretion of the executor as to the time when this notice shall be published, but its language is imperative as to the time, and, if he fails, he must satisfactorily excuse his omission or else his letters will be revoked. It may be said also that he is commanded to file his inventory within a certain time. Section 1443 of the Code of Civil Procedure provides that "every executor or administrator must make and return to the court within three months after his appointment, a true inventory and appraisement of all the estate of the deceased." Yet if he fails to do so, and has a sufficient excuse, the court will overlook his default. In *re Graber*, *supra*. In the admission by respondent that under circumstances rendering it impossible for the executor to give the notice within the prescribed limit his letters should not be revoked, there is, indeed, virtually a concession that the court is vested with some degree of discretion in the premises.

[6] Should this discretion have been exercised in favor of the executor? It is contended by respondent that his violation of the statutory duty per se rendered the executor guilty of negligence, and therefore the decision of the lower court could not have been otherwise. But respondent insists upon a conclusive presumption where only a disputable presumption exists. The rule in such cases is that, where it appears that a party has failed to perform a duty imposed by the law, the burden is cast upon him to excuse his conduct in order to relieve himself from the penalty. He would be required to overcome the *prima facie* case presented by the omission to do what the statute requires. In the *Graber Case*, *supra*, the respondent had not obeyed the mandate of the law, and yet

the court below held it was a case of excusable neglect and therein was sustained by the Supreme Court; it being said: "The fact that such revocation can only take place after notice is a clear indication that the executor or administrator is to be given an opportunity to come before the court and show cause why his letters should not be revoked. Whether the cause shown be good or bad is a matter largely within the discretion of the trial court, and, when that court has investigated the question and adjudicated upon it, it will only be when a gross abuse of discretion has occurred that the court will interfere." So in *Hubbard v. Smith*, 45 Ala. 516, where the administrator had failed to return an inventory in the time required by law, the court said: "He ought to have filed an inventory, as any other administrator is required to do, and to have made annual settlements, but the mere omission to do so when he was not negligent and there has been no detriment to the estate is not ground for reversal." Indeed, the cases are numerous where there has been a technical violation of the law, and yet where the delinquent has been relieved of the penalty on account of inadvertence, surprise, or excusable neglect.

[7] As to the degree of care required of an administrator or executor, the authorities are uniform that "he must act with such prudence and diligence as are generally observed by prudent men of intelligence and discretion in regard to their own affairs."

[8] The executor here honestly endeavored to have the notice published. He intrusted the matter to his attorney, which is the course ordinarily pursued, and which, we may assume, usually results in a compliance with the law. He had every reason to believe and did believe that the notice had been published. It is true that he was a subscriber to the paper in which he directed the notice to be published, and it may be a little peculiar that he did not examine the paper for the notice, but he had no reason to suspect that the direction of his attorney would not be carried out. There was no designing neglect, but an oversight on the part of the stenographer, regrettable, but scarcely of sufficient gravity to authorize the removal of the executor. In the *Estate of Welch*, 86 Cal. 183, 24 Pac. 944, it is said: "While it is the duty of courts to protect carefully the interests of estates, the rights of those who are appointed to take charge of and manage them should not be overlooked, and an administrator should not be removed except for good and sufficient cause." In *Heisler v. Sharp*, 44 N. J. Eq. 167, 14 Atl. 624, it is said that: "No man is infallible. The wisest make mistakes; but the law holds no man responsible for the consequences of his mistakes which are the result of imperfection of human judgment and do not proceed from fraud, gross carelessness, or indifference to duty."

There is also the other consideration of some moment that the forfeiture of an office

is involved, and the rule is that such provisions must be strictly construed, and forfeiture is not favored. It is so stated in *People v. Perry*, 79 Cal. 105, 21 Pac. 423, in this language: "Provisions for forfeiture of vested rights, whether in statutes or contracts, are not favored, and are, as they ought to be, construed as strictly or as liberally as possible against the forfeiture." The burden is upon the party claiming a forfeiture to show that such was the intention of the instrument. [9] If the agreement or statute can be reasonably interpreted so as to avoid a forfeiture, it should be so construed. *Quatman v. McCray*, 128 Cal. 285, 60 Pac. 855.

Under all the circumstances disclosed, we do not think the court was justified in revoking the letters of Mr. Chadbourne for an honest mistake which was not the result of gross carelessness and which was not productive of any positive injury to the estate.

The order is reversed.

We concur: CHIPMAN, P. J.; HART, J.

15 Cal. App. 407

EAST SHORE LUMBER CO. v. HEALY-TIBBITTS CONST. CO. (Civ. 862.)

(Court of Appeal, First District, California. Feb. 15, 1911.)

SALES (§ 358*)—ACTION FOR PRICE—EVIDENCE—ADMISSIBILITY.

A contractor, sued for the price of material bought for several buildings, could not show how much material was required for one of the buildings, without showing what material went into the other buildings, since such evidence in no way tended to contradict plaintiff's case.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 358.*]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by the East Shore Lumber Company against the Healy-Tibbitts Construction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Alex. G. Eells and H. K. Eells, for appellant. C. L. Colvin, for respondent.

HALL, J. Plaintiff brought suit to recover the sum of \$1,626.89 for lumber sold and delivered to defendant by plaintiff, and recovered judgment for the full amount prayed for. Defendant appealed to this court from the judgment, and the only points urged for a reversal arise out of the rulings of the court in sustaining objections to two questions asked by appellant of each of two witnesses called by appellant.

The evidence shows without conflict that the defendant was engaged upon four building jobs in Oakland, and that one Reeder was its foreman and building superintendent, and, to quote from the appellant's brief, "had authority to order lumber for these various

jobs." The plaintiff proved that the lumber sued for had all been bought from plaintiff by Mr. Reeder acting for the defendant; that the lumber had been delivered from time to time as ordered by Mr. Reeder, and receipts given therefor. The lumber was delivered at the various jobs as ordered by Reeder. Some of it also was delivered to the Pacific Lumber Company to be cut up in accordance with the orders of defendant, and two loads were delivered at a house in Berkeley, which belonged to Mr. Reeder, but which plaintiff did not know was not being constructed by appellant for Mr. Reeder. After the lumber had been delivered to Reeder's house, however, Reeder himself paid to plaintiff on account thereof \$31.97, which was credited on appellant's bill, leaving the amount sued for as the balance unpaid.

Appellant, on its own behalf, placed Mr. Reeder on the witness stand, and he also testified to the purchase and delivery of the lumber, and that plaintiff's account was in all respects correct; that the several jobs being done by defendant at the time were a concrete building at the foot of Fifth avenue for the Western Power Company, a pumping plant for the city of Oakland, a fire engine house for the city of Oakland, and a building for the Western Pacific Company. He further testified that he received all the lumber for the defendant called for by the bills of plaintiff, and that it went into the various jobs, including, however, his own house, but that he had paid \$31.97 to plaintiff on account of the lumber used in his residence, and had the same credited to defendant's account, and, in addition, had paid appellant on account of the material that went into his house \$212, which he testified was largely in excess of the value of such materials.

Appellant then called one Horton, its secretary, who testified that he had examined the plans and specifications for the building appellant was erecting at the foot of Fifth avenue. He was then asked: "How much lumber would be required in said building as shown by the plans and specifications?" Objection was made to the question and sustained. He then testified that the work being done by appellant on said building was the concrete work, and that the lumber bought was for the forms to hold the concrete, and that after completion he measured the building on the ground to ascertain the amount of lumber it would require to make the forms. He was then asked: "How much lumber would it require?" Objection was made and sustained.

Similar questions were asked of another witness by appellant, and objections made and sustained. It is the rulings upon these questions that are now claimed to be erroneous.

We are unable to discover any error in the rulings. No matter what answer might

have been given, such answers could not have tended to disprove the case made by plaintiff and the testimony of defendant's own witness Reeder. The questions were directed only to the lumber used in one building, and no other evidence was offered tending in any way to contradict the evidence given in support of plaintiff's case, and no effort was made to show what lumber went into the other jobs. Lumber had been furnished for five jobs; for, besides the four jobs being done by appellant, lumber had been furnished for the Reeder house in Berkeley, for which appellant had accepted payment from Reeder, and had thus ratified his act in buying the same upon their account. The record before us does not show what amount of lumber was charged to the building at the foot of Fifth avenue, or, indeed, that any of the lumber was charged to any particular job. The evidence in the record simply shows that the total amount sued for was sold and delivered as ordered by Reeder, and the fragmentary evidence offered would not have thrown any light upon the question at issue.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

15 Cal. App. 416

PEOPLE v. MUHLY. (Cr. 137.)

(Court of Appeal, Third District, California.
Feb. 16, 1911.)

1. CRIMINAL LAW (§ 784*)—TRIAL—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

Where the evidence is circumstantial, it is proper to instruct that the evidence must not only be consistent with the hypothesis of guilt, but inconsistent with every other rational hypothesis.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883-1888; Dec. Dig. § 784.*]

2. CRIMINAL LAW (§ 741*)—TRIAL—QUESTIONS FOR JURY.

Where the circumstances justify a reasonable inference of guilt, the question is for the jury, though an inference of innocence might be drawn.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1705, 1713, 1716, 1717, 1727, 1728; Dec. Dig. § 741.*]

3. CRIMINAL LAW (§ 1159*)—APPEAL AND ERROR—VERDICTS.

A verdict in a criminal case based on circumstantial evidence carries the same presumption of correctness on appeal as other verdicts, and will not be reversed, unless wholly unwarranted by the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

4. HOMICIDE (§ 250*)—EVIDENCE—SUFFICIENCY.

Evidence held to support a verdict of manslaughter against one accused of homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 515-517; Dec. Dig. § 250.*]

5. HOMICIDE (§ 332*)—APPEAL—REVIEW—VERDICTS.

Where a defendant has twice been convicted of manslaughter, and the trial court has shown his belief in the defendant's guilt by imposing the maximum penalty, the appellate court will be reluctant to reverse for failure of proof.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 699-704; Dec. Dig. § 332.*]

6. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—REPETITION.

Instructions covered by instructions already given are properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

7. HOMICIDE (§ 7*)—MOTIVE.

Motive is not indispensable to a conviction of homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 12; Dec. Dig. § 7.*]

8. CRIMINAL LAW (§§ 763, 764*)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

An instruction in a homicide case that the question of motive becomes important, if not controlling, as showing the cogency of the circumstances, and that it is necessary that the facts from which the motive be implied be proved, is an invasion of the province of the jury under Const. art. 6, § 19, providing that judges shall not charge juries on matters of fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748; Dec. Dig. §§ 763, 764.* Homicide, Cent. Dig. §§ 579, 603, 631, 648.]

Appeal from Superior Court, Madera County; W. M. Conley, Judge.

T. H. Muhly was convicted of manslaughter, and appeals.

See, also, 11 Cal. App. 129, 104 Pac. 466.

Frank Kauke and Ernest Klette, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, for the People.

CHIPMAN, P. J. Defendant was charged with the murder of one James H. Bethel, alleged to have been committed on or about February 28, 1908, at the county of Madera. The jury found him guilty of manslaughter and recommended him to the mercy of the court. The sentence of the court was 10 years imprisonment at San Quentin. Defendant appeals from the judgment of conviction and from the order denying his motion for a new trial.

1. The principal point upon which a reversal is asked is that the evidence was insufficient to justify the verdict. At a former trial the defendant was convicted of manslaughter. On appeal the judgment was reversed. 11 Cal. App. 129, 104 Pac. 466. At the last trial the court properly instructed the jury that, if they believed from the evidence beyond a reasonable doubt that the defendant was guilty as charged, they must find him guilty of manslaughter. The defendant may deem himself fortunate, if guilty, that at his first conviction the jury by their verdict rendered impossible his conviction upon a subsequent trial of the higher crime, for the evidence tended to show a bru-

tal murder by some one, with no accompanying circumstances pointing to any less crime than murder. While it is concededly true that the homicide, as viewed from the evidence was murder, it is strongly urged that the evidence fails to connect the defendant with it.

[1] The evidence of defendant's guilt is circumstantial. Reliance is placed upon the rule stated in *People v. Staples*, 149 Cal. 405, 425, 86 Pac. 886, 894. We quote: "Where the evidence is of such a character (circumstantial), it must be not only consistent with the hypothesis of guilt, but inconsistent with any other rational hypothesis. The deduction to be drawn from these circumstances is ordinarily one for the jury, but where, in a case such as this, every circumstance relied on as incriminating is equally compatible with innocence, there is a failure of proof necessary to sustain a conviction, and the question presented is one of law for the court." This statement of the rule suggests a very serious question, arising under the constitutional provision which makes the jury the exclusive judges of the facts. Where there is a series of circumstances from which, as is claimed here, guilt is made to appear, is it not the province of the jury to determine whether or not "every circumstance relied on as incriminating is equally compatible with innocence"? Under what condition in a particular case may the court assume the functions of the jury and determine that each of the numerous circumstances relied on as incriminating is, or that all of them taken together are, equally compatible with innocence, and therefore the verdict is not sustained? In the case now here the defendant presents in numerical order most, if not all, of the circumstances relied on for conviction, and endeavors to show each of these circumstances to be equally compatible with innocence, and hence there is a failure of proof necessary to sustain a conviction. The principle enunciated in the *Staples* Case is undoubtedly proper to be given as an instruction to the jury, and it was given by the learned trial court in unmistakable terms.

[2] But we do not think it can be accepted, or was intended to be accepted, as a rule of universal application to guide the appellate court in all cases arising out of or dependent upon circumstantial evidence. It rarely happens that circumstances attending the commission of a crime may not, in the opinion of the reviewing court, reasonably be susceptible of an interpretation compatible with the innocence of the person associated with such circumstances; and, if one after another of the alleged incriminatory circumstances may be eliminated, they would necessarily cease to have any probative force considered collectively.

There is always an atmosphere around the circumstances of every case as it is being presented to the jury which is dissipated by the appeal. This atmosphere is not always

conducive to impartial action by the jury, but ordinarily it tends to just inferences and conclusions from the evidence adduced, and unless it otherwise appears it must be presumed that such inferences and conclusions were fairly deducible from the circumstances disclosed. Take some of the circumstances shown in this case; for example, the conduct and demeanor of the accused at the coroner's inquest and afterwards, conscious of resting under suspicion; or consider the fact of defendant's opportunity to commit the crime; or that he was the owner of the gun which probably was used in killing the deceased; or that the defendant made some apparently hostile declaration about the deceased some time previous to his death; or that defendant knew of the homicide shortly after it occurred, to wit, about 8 o'clock in the evening, and did not inform his neighbors of the fact until the next morning, but left the body lying on the ground unprotected during a very stormy night—each of these circumstances may be reconciled with innocence. But are not the jury the judges of the inferences to be reasonably drawn from the circumstances? As we understand the *Staples* Case, the rule there laid down followed an analysis of the evidence from which the court was authorized to conclude that there was no evidence warranting the verdict. We do not understand that case to hold that, where the circumstances are such as to reasonably justify the inference of guilt, the case will be taken from the jury because an inference of innocence might also reasonably have been drawn. Between these two inferences the jury must choose, and it is only where the evidence obviously does not warrant the inference of guilt that the court will interfere. This must be so, or the weight of the circumstantial evidence, and the inferences to be drawn from it in almost every case, must finally be determined by the appellate court, thus making the court the arbiter of both law and fact.

[3] In our judgment a verdict of a jury, and the judgment of conviction based upon circumstantial evidence, come to us as any other verdict and judgment, clothed with like presumption of support; and, unless we can say that the inference of guilt drawn from the evidence was wholly unwarranted, we cannot interfere.

[4] It appears from the evidence that deceased was an old man, unmarried, aged 75 years; he boarded with defendant, who with his wife and children lived in a house about 175 feet from a roadside house in which deceased lodged and kept a saloon and some articles of merchandise. On the evening of February 28, 1908, deceased took supper with defendant's family at about 7 or 7:30 o'clock and went thence to his saloon; a few minutes later, and while defendant was helping in the kitchen, defendant heard a shot. All we know of what happened we learn from witnesses at the trial who were present at the

inquest, on February 29th, following the homicide, and heard the defendant testify, and who narrated what he testified to; also from some statements made by defendant to witnesses apart from his testimony at the coroner's inquest.

Witness W. A. Ellis had some conversation with defendant about the homicide on Monday, the 29th day of February, the day of the inquest, and he was present and heard defendant's testimony at that time. Ellis testified:

"Mr. Goucher: Q. Mr. Ellis, were you present on the 29th day of February or on the 1st day of March, 1908, in the Bethel saloon at the time the defendant testified before the coroner's jury? A. Yes, sir. Q. Do you remember any remarks that he made, any conversation, if any such conversation happened between you and this defendant touching a shotgun? A. Yes, sir. Q. Will you state what that conversation was? A. There was some conversation in regard to the gun, and he, turned around to me, and said, he says, 'You know the gun, Will,' he said; 'it is that Benson gun,' and I said, 'Yes; I know the gun.' Q. You knew by that remark, and you answered him accordingly, what kind of a gun he referred to?

"Mr. Kauke: We object to what the witness knew.

"The Court: He said he knew the gun, he has already answered. He said he knew by Benson's gun; he knew what gun it was.

"Mr. Goucher: Do you know whether it had any other besides Muhly and Benson before it came the property of either? A. Yes, sir. Q. Whose gun was it?

"Mr. Kauke: We object, it is immaterial.

"The Court: The objection will be overruled.

"Mr. Goucher: Prior to the time that either Benson or Muhly owned it? A. Charlie Ellis owned it. Q. Is that Charles A. Ellis a brother of yours? A. Yes, sir. Q. Can you describe the character or caliber or gauge and make of the gun? A. Yes, sir; I can. Q. Please do so. A. Well, the gun was a 12-gauge Remington shotgun, and it was a 32-inch barrel gun, pretty good gun for a gun that cost perhaps \$35 or \$40. Q. Remington make? A. Yes, sir. Q. 23-gauge? A. Yes, sir. Q. Was it hammerless or a hammer gun? A. It was a hammer gun. Q. Did you ever see Mr. Muhly in possession of that gun prior to the day of the inquest? A. I don't remember ever seeing him with the gun. Q. Mr. Ellis, do you remember the testimony in a general way given by Mr. Muhly at the coroner's inquest? A. In a general way; yes, sir. Q. Well, will you state what he said so far as any account of the shooting or alleged shooting of James H. Bethel was concerned, as to his own movements, as to the time, and as to the circumstances? A. Well, he said that the baby had been sick that afternoon, and that they had supper pretty late—I think he said about 7 o'clock;

and Mr. Bethel came down to the house and ate supper, and after supper he went into the living room or sitting room and stood by the fireplace a little while, and went up to the saloon where he slept. Q. That is, by 'he' you mean—that is, accounting for the movements of Bethel? A. Yes, sir. Q. According to Mr. Muhly's testimony? A. Yes, sir; and shortly after he went up to the saloon, while Mr. Muhly was in the kitchen washing dishes, and he said that he heard a shot, and he went out the back door of the kitchen and around to the corner of the kitchen, perhaps 20 seconds after the first shot. Why, no; just as he got to the corner of the building he heard some scuffling on the porch, and heard the old man say, 'Don't do that boys, don't,' and then he heard another shot, and he went further over to the chicken house, part way between the barn and house and saloon building, and stood there for a few minutes, perhaps 15 minutes, and went back to the house and stayed there for perhaps an hour, and then he went back to the saloon; and he seen the body of Mr. Bethel lying there on the ground, and he said he did not see him move, nor he could not see him breathe, and he thought he was dead; and he went back to the house and told his wife he guessed the old man was killed, and they went to bed. Q. Do you remember whether he said when, if he did visit at all the scene, the time was that he visited the place where Bethel's body lay? A. He did not say the time; but about one hour after the shooting? Q. No; I am not speaking about that; after he said he went to bed, did he say in that testimony when he next saw Bethel's body? A. Yes, sir. Q. Go ahead. A. The next morning. Q. Well, what did he say about it? A. He said he went up there and seen the body lying there, and I don't just remember whether he said he or his wife took a blanket off of the card table and covered the body up, and he went up to Mr. Blazer's to notify them. Q. Did he inform you or any other hearer there while testifying before that coroner's jury as to seeing anybody else besides Mr. Bethel—seeing anybody engaged in this fight or in the killing? A. I believe that he did see some forms on the porch, but it was too dark; he could not see who they were, nor how many there was; nothing definite. Q. Do you remember whether he represented that he saw any forms prior to the second shot, or was it after the second shot? A. No, sir; he did not. Q. Do you know where the chicken house is with reference to—I mean the dwelling house where Muhly lived? A. Yes, sir. Q. Could you indicate on the map? A. Yes, sir; it is marked 'dwelling.' Q. This is the Muhly house, and the chicken house is where— A. The chicken house—this is the chicken house (showing). Q. Did he indicate in a statement where he was when he went up in that direction after the second shot? A. Well, he said he went up near the chicken

house. Q. Near the chicken house? A. He did not say just exactly where—up to the chicken house; I think those are the words he used, to the chicken house. Q. Did he in the course of that testimony make any reference to a shotgun? A. Yes, sir. Q. Just state what he said. A. As I have already stated, he spoke about the gun. Q. That was in a conversation, a side conversation to you; but in his testimony outside of that, did he say anything about having a shotgun, or where the shotgun was that night? A. Yes, sir.

"Mr. Kauke: We object to that, he has answered it.

"The Court: That is when he was on the witness stand; the objection will be overruled.

"The Witness: Shall I be permitted to explain?

"The Court: Yes.

"A. When he turned to me and said, or asked me, or told me, that I knew the gun, that was while he was on the witness stand; while he was being questioned.

"Mr. Goucher: Q. I mean the rest of his testimony outside of what he said to you; I am asking about that. A. Yes; he said he had a gun, and that the gun was down to the house that morning, I believe, and that he said the gun was generally kept down to the house, and that he had taken the gun up that morning to Mr. Bethel's; that Mr. Bethel used the gun to shoot quail with. Q. Did he say anything about the then whereabouts of the gun while he was a witness? A. He said that he looked for the gun and could not find it; did not know where it was. Q. Do you remember whether he stated about what hour it was, or about what time in the day, when the gun was taken up to Bethel's? A. He said in the morning. Q. In the morning? A. Yes, sir. Q. Did he say when he had looked for the gun, whether he had looked for it the night of the shooting or the day after or what time? A. I don't remember as to his saying what time he had looked for it. Q. Did you take any part in the search at Bethel's saloon or store? A. Yes, sir. Q. Do you know whether that shotgun called by you the Benson gun, and which had formerly belonged to your brother, was found up to the time that the coroner's jury finished its investigation? A. It was not found; no, sir."

This is about as full and clear a statement of what was said by defendant at the inquest as appears in the record. Other witnesses also testified as to what defendant testified to. They differ in some respects from the account given by Ellis, but not materially.

The autopsy showed that a part of one charge of bird shot, No. 7 or 8, struck the deceased on the side of his face and head, and that a second charge struck the side of the saloon, and came from the direction of defendant's house, as was indicated by the perforations in the building. Death, however, was caused by the crushing of the skull

of deceased with some blunt instrument, leaving parallel marks, which indicated probably that the instrument used was a double-barreled gun. There was evidence of empty No. 12 cartridges being found on the ground near the scene of the homicide similar to cartridges produced by defendant at the inquest, and not unlike some found in the saloon.

Undersheriff Hensley spent some nine days in the neighborhood, before defendant's arrest, investigating the circumstances of the homicide and searching for the gun. He had some conversation with the defendant on the subject. On one occasion he asked defendant to assist him in his search for the gun, and defendant replied: "He said he did not care to do that; that he would not find his own gun if he could. He says, 'Inasmuch as I am suspicioned anyway,' and of course I said a good deal, urging him to make suggestions to me or my men the probable hiding place and so forth, and give me the benefit, possibly, of his experience as a hunter of hidden things, and finally he said to me—we had walked some little distance—that his idea of hidden things was— Q. Well, go ahead and state what Mubly said. A. He stepped back a little distance at the end of a log. He says, 'For instance, you dig down there. You will find a pot, and in that pot you will find a jar, and in that jar is all the valuable papers I have buried,' and he said my idea would be to bury it; would be the safest way to hide it. That is all he said at that time." Later the witness dug down as suggested by defendant and found the pot and jar.

At a second conversation the witness asked defendant if he (witness) understood defendant to say, when he called for help to search for the gun, that he refused, and defendant answered, "Yes." Witness then asked him what caused him to say he "had been suspicioned," and defendant replied: "Well, when I saw that tearing off the boards off the saloon, I concluded I was suspicioned." "Q. Is that all the conversation? A. I asked him why he did not go to the assistance of his partner that night, and he said that he had been taking him out of trouble before, and he got tired of it." He was asked what troubles he referred to, and he spoke of but one, and that as occurring at the store of Charles Ellis. When the undersheriff arrested him, about March 9th, defendant "stepped into the room to change his clothes," and witness testified: "I stepped with him, and he said to me, 'And you think I done it?' I said, 'Yes.' That was all there was said."

One of the persons, Sam Polkenhorn, said by defendant to have been at Ellis' store at the time referred to, and with whom in part the alleged difficulty occurred with deceased, testified that he did not remember to have had any trouble with deceased.

Witness J. H. Peabody testified that he saw the deceased about half past 4 in the afternoon of February 28th, at his saloon, and this is the last time he was seen alive

so far as appears otherwise than through the statements of defendant. This witness testified also to having had a conversation with defendant about the 1st day of February, a month before the homicide. "Q. Where did you have that talk with Mr. Muhly? A. Well, it was right alongside the road known as the Bethel garden, a spot where he raised some melons southeast of the house. * * * Q. How far from Bethel's saloon? A. I should judge between two and three hundred yards. * * * Q. Relate the conversation. A. I drove along there with my wagon, and Mr. Muhly was plowing up what is known as the melon patch, and I asked him what Jim was going to do about raising melons there, and he said, 'God damn him; he never will raise any more melons here,' and that's about all there was said about that. We turned it off to something else, and I didn't pay any more attention to it and went on. Q. So far as you remember, was there any further conversation? A. What is that? Q. Was there any conversation than what you have now related? A. Not in regard to Mr. Bethel or anything of that kind. Q. Did you know at that time of your own knowledge whether there had been any melons raised on the particular piece of ground which Mr. Muhly was then engaged in plowing, had it been a melon patch before that? A. Yes, sir. Q. For a long time? A. Off and on, I guess, for several years. Q. Did you recite at any point in that conversation to Mr. Muhly what Bethel's success had been according to his own representations in raising melons as to the value of melons he had raised? A. Yes; he said that Bethel told him he raised a couple of hundred dollars worth of melons off of that patch. Q. And the statement that you have made is what Muhly said on the subject were in the future prospective of raising melons? A. Yes, sir."

There was much testimony by witnesses as to the personal demeanor of the defendant when on the witness stand and at other times, introduced no doubt to furnish a basis for an inference that he showed a guilty conscience. Other witnesses testified that they had observed no unusual conduct or demeanor in the defendant at these times. These witnesses were, of course, not permitted to give their interpretation of defendant's acts, but they described them as they appeared while he was testifying and at other times.

At his first trial the jury disagreed; at the second trial he was found guilty of manslaughter; and at the third trial a like verdict was rendered, with, as stated, a recommendation to the mercy of the court. The trial court seems not to have heeded this recommendation, for it gave defendant the full limit of imprisonment.

We have endeavored to state the principal circumstances upon which the jury reached the verdict of guilty. There were some other

circumstances seemingly trifling when considered unaided and alone. Indeed it is contended that there is not a single circumstance which may not be reconciled with defendant's innocence. Consider, for example, that defendant knew, according to his own story, that deceased was in some sort of serious peril; that he heard a shot at the saloon where deceased was, followed by a cry indicating his danger, and then another shot; defendant returned to his home without further inquiry and remained there for nearly an hour; then went to the saloon and found deceased lying dead on the ground; he left the body as he found it, exposed to the storm, returned to his wife, told his wife, and went to bed, and did not inform his nearest neighbor, a quarter of a mile away, until the next morning. Now consider this manifest indifference to the fate of deceased with his previous declaration to witness Peabody, "God damn him, he never will raise any more melons here;" consider this, also, with his statement that it was his own gun with which the shots were fired, and that it has never been found, and that defendant refused to aid in its discovery. Can we say as matter of law that the jury were unauthorized to draw from these and other circumstances any inference of guilt? We think not. Is it reasonable to suppose that the assailants of deceased in some way got possession of defendant's gun at the saloon on the day of the homicide, came back at night, called him out to the porch, fired at deceased, and then beat him on the head with the gun barrel until he was dead? And yet defendant says this is what may have happened, and is entirely consistent with defendant's narrative of the circumstances.

We do not think it necessary to further notice the evidence. Our opinion is that the jury were justified in finding the defendant guilty. Some consideration is due to the fact, also, that the learned trial judge, after sitting at three trials of the case, denied defendant's motion for a new trial, and was so impressed with defendant's guilt as to disregard the recommendation of the jury.

[5] We should be loath to disturb a verdict upon questions of fact alone, buttressed as this is by the evidence we have pointed out, and by two convictions, and by the implied opinion of defendant's guilt, inferable from the sentence imposed.

[6] 2. Error is claimed because of the refusal of the court to give certain instructions. On page 44 is an instruction upon the law where the case rests upon circumstantial evidence. It was refused and properly, for the court had fully and very favorably to defendant instructed the jury in language as strong as used by the Supreme Court in the Staples Case, *supra*, and as favorably as asked by the defendant.

[7] 3. On pages 46 and 47 are two instructions, which were refused, upon the question of motive as an important factor in cases

where reliance is placed "in whole or in part on circumstantial evidence." The court was asked to tell the jury that: "The question of motive becomes important, if not controlling, as showing the cogency of the circumstances, and in such cases it is necessary that the facts be established from which motive may be implied, and that a motive cannot be supplied by mere speculation." Motive is not indispensable to a conviction, and where the court so charged the jury it was held not error. *People v. Besold*, 154 Cal. 363, 369, 97 Pac. 871.

[8] Furthermore the instruction asked invades the exclusive function of the jury as judges of the facts. The court may not charge the jury upon questions of fact. Article 6, § 19, Constitution; *People v. Glaze*, 139 Cal. 154, 163, 72 Pac. 965.

4. On pages 36 and 37 and 39 and 40 are instructions given by the court on the subject of reasonable doubt. It is claimed by defendant that they are the same as were given in *People v. Verduzco*, 13 Cal. App. 789, 110 Pac. 970. Defendant adopts the argument made at that time by counsel for defendant, in his attack upon the instructions. We held that they were not erroneous. Rehearing of that case was denied by the Supreme Court, and we conclude that we may safely dismiss the point without further notice.

5. Some errors of law are assigned as occurring in the admission of certain evidence, but an examination of the record discloses no prejudicial error in any of the particulars pointed out.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

15 Cal. App. 413

AVERY v. CULLEN. (Civ. 921.)

(Court of Appeal, Second District, California.
Feb. 16, 1911.)

1. SALES (§ 92*)—CONTRACTS—OBLIGATION TO REPURCHASE.

Where a seller agreed to repurchase the goods within a specified time if the buyer became dissatisfied, the seller on the buyer giving notice of his dissatisfaction became immediately liable for the payment of the price he had agreed to pay on a repurchase.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 257, 259; Dec. Dig. § 92.*]

2. SALES (§ 92*)—CONTRACTS—OBLIGATIONS TO REPURCHASE.

Where the failure of a buyer under an agreement of the seller to repurchase within a specified time to insist on the repayment of the price within such time was due to the act of the seller in persuading him, not to do so, the seller could not refuse to repurchase on the ground that the tender of the goods had not been made in time.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 257, 259; Dec. Dig. § 92.*]

3. CORPORATIONS (§ 117*)—SALE OF STOCK—RESCISSION—TENDER.

Under Civ. Code, § 1691, requiring a party rescinding a contract to restore to the other

party everything of value received under the contract, a buyer of valueless corporate stock need not on rescinding the contract of sale tender a return of the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 506; Dec. Dig. § 117.*]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Henry W. Avery against J. F. Cullen. From a judgment for plaintiff, defendant appeals. Affirmed.

Henry W. Nisbet, for appellant. Watkins & Blodget, for respondent.

JAMES, J. Defendant has appealed from a judgment entered against him for the sum of \$2,250 as principal and \$630 interest. Three causes of action were alleged in plaintiff's complaint, each of which grew out of the purchase from defendant of shares of stock in a corporation called the Pittsburg Placer Mining & Milling Company. On the 9th day of October, 1906, plaintiff purchased 500 shares of that stock from defendant, and on the 11th of October following he purchased 1,500 additional shares, paying for all of the stock at the rate of 50 cents per share. On September 18, 1906, one Georgiana Avery purchased 2,500 shares of the stock of the same company from the defendant, and she thereafter assigned to the plaintiff her right of action against defendant, which is the subject of the third count of plaintiff's complaint. At the time the sales of the several parcels of stock were made, defendant, in consideration thereof, executed a written contract by the terms of which he agreed to repurchase the stock within 18 months, in the event the plaintiff or Georgiana Avery became dissatisfied therewith, and to repay the amount of the purchase price, together with interest at the rate of 10 per cent. per annum. It is alleged in the complaint that, before the expiration of 18 months, the plaintiff and his assignor did become dissatisfied with the stock purchased, and gave notice to defendant of that fact. It is further alleged that the stock of the Pittsburg Placer Mining & Milling Company never had any value whatsoever. In the findings of the court these allegations of fact are determined to be true, and judgment was entered in favor of plaintiff as indicated. The record on appeal consists of the judgment roll only, and appellant has filed no brief presenting any of the grounds upon which he relies for reversal. We have examined the findings, however, and are of the opinion that they fully support the judgment as made by the trial court. It is true that it was alleged by plaintiff and found by the court that the stock was not tendered back to defendant by the plaintiff and his assignor and repayment of the money agreed to be paid demanded until the 29th day of October, 1908, which was after the expira-

tion of the 18 months from the date of the several sales.

[1] The agreement of defendant was to repurchase the stock "providing the said H. W. Avery (or Georgiana Avery) becomes dissatisfied with said stock." Upon the giving of the notice to defendant by the purchasers of their dissatisfaction with the stock, defendant became immediately liable for the payment of the money he had agreed to pay in that event. *Gay v. Dare*, 103 Cal. 454, 37 Pac. 466.

[2] The facts as found by the court show that the failure of plaintiff and his assignor to insist upon the repayment of the purchase price and interest within the 18 months was due to the acts of defendant in persuading them not to do so. This being true, defendant could not refuse to comply with the terms of his agreement to repurchase on the ground that the tender of the stock was not made in time. *Pierce v. Lukens*, 144 Cal. 397, 77 Pac. 996. If the case is to be viewed as one for rescission, then no tender of the stock by plaintiff to defendant was necessary, as the court found that the stock was valueless, and that it had never had any value.

[3] A party rescinding is only required to tender back those things received by him which are of value. Civ. Code, § 1691.

The judgment as rendered is fully sustained by the findings, and it is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

15 Cal. App. 287

In re SEYMOUR'S ESTATE. (Civ. 779).
(Court of Appeal, Third District, California.
Feb. 4, 1911.)

1. COURTS (§ 202*)—PROBATE PROCEEDINGS—RIGHT TO APPEAL.

Code Civ. Proc. § 963, subd. 2, conferring a right of appeal from orders after final judgment, does not apply to appeals in probate proceedings which exist only under subdivision 3, authorizing appeals from specified orders in probate.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 202.*]

2. COURTS (§ 202*)—PROBATE PROCEEDINGS—APPEAL—ORDERS APPEALABLE.

Code Civ. Proc. § 963, subd. 3, authorizing appeals in probate only from specified orders, did not authorize an appeal from an order directing the manner of disposing of decedent's body and directing the place in which it should be interred, nor did it warrant an appeal from an order refusing to vacate an order fixing such place of interment and setting apart out of the estate a sum to be expended therefor.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 202.*]

3. COURTS (§ 204*)—JURISDICTION.

Where an order is made without jurisdiction and is unappealable, the remedy of objecting parties is by a direct attack by some other mode in an appellate court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 204.*]

4. DEAD BODIES (§ 4*)—DISPOSITION—JURISDICTION.

Where the authorities of a city prior to decedent's death had adopted ordinances prohibiting further interments in a cemetery in which deceased had a mausoleum, the probate court at the instance of decedent's executors had jurisdiction to order the interment of his remains in a cemetery other than that in which he and his wife had orally expressed a wish to be buried, and to provide for such interment out of the funds of decedent's estate against a protest of objectors interested in the estate of decedent's widow, but who were not of kin to him.

[Ed. Note.—For other cases, see Dead Bodies, Dec. Dig. § 4.*]

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of Simon H. Seymour, deceased. From an order denying the motion of Charles E. Parent, executor of the will of Susan C. Seymour, deceased, to vacate an order directing the executors of Simon H. Seymour to purchase a burial lot in Cypress Lawn Cemetery in the county of San Mateo in which to inter the body of their decedent, and to erect an appropriate monument on the grave at a cost not to exceed \$5,000, they appeal. Dismissed.

Charles F. Hanlon, for appellants. Charles W. Slack, for respondents.

HART, J. Simon H. Seymour, deceased, and Susan C. Seymour, deceased, were during their lives husband and wife, having intermarried in the year 1877. In June, 1904, Simon, while spending the summer with his wife at Bartlett Springs, this state, died, leaving no children. Susan was in the same month appointed special administratrix of Simon's estate by the superior court of the city and county of San Francisco, and discharged the duties of that office until the purposes of the special administration were fully accomplished and the last will of the deceased was admitted to probate. The last-mentioned proceeding was had in the month of April, 1905, and letters testamentary granted and issued to Reuben H. Lloyd and E. W. Hawkins.

The other facts relating and leading to the order from which this appeal is taken are accurately narrated in his brief by counsel for the executors of Simon's estate, and we will therefore adopt the same here as the statement of said facts:

"The Seymour family having no suitable burial ground, the body of Simon was temporarily deposited in the public vault of the Cypress Lawn Cemetery, in San Mateo county. In April, 1906, the widow, desiring to place the corpse in a permanent grave, and having selected the cemetery agreeable to her, petitioned the court to direct the executors so to inter. On the day set for the hearing of the petition, San Francisco was

in flames, thus preventing the hearing of the petition. Nothing was thereafter done about the matter until August 9, 1907, when, in pursuance of a petition of Simon's executors, an order was made authorizing the executors to 'purchase a burial plot in Cypress Lawn Cemetery in which to inter the body of Simon H. Seymour, deceased, and to erect an appropriate monument upon the grave of said decedent, at a cost not to exceed the sum of \$5,000.'

"Previously, and on July 16, 1906, Susan died. On October 23, 1907, a notice of motion to vacate the order of August 9th, together with a supporting affidavit, was served and filed by the executor of the will of Susan. On June 4, 1908, the petition of Sarah Harrington and Robert McBryant, sister and brother and next of kin of Susan, was filed, praying the court to set aside the order of August 9th, in relation to the burial of Simon. The petition was supported by an affidavit setting forth that Simon and Susan had in their lifetime desired to be buried together with George Kordmeier and John McBryant, respectively, the brother of Simon and the father of Susan. The two motions were heard from June 14, 1908, to June 16, 1908. On June 19, 1908, the motions were denied on the ground that the moving parties had no interest in the controversy."

The controversy is brought here by an appeal from the order denying the motion of the executor of Susan's estate and that of Harrington and McBryant to set aside and vacate the order authorizing the executors of Simon's estate to "purchase a burial plot in Cypress Lawn Cemetery in which to inter the body of Simon H. Seymour, deceased, and to erect an appropriate monument upon the grave of said decedent, at a cost not to exceed the sum of \$5,000."

[1] The point is made by the respondents that the order appealed from is a nonappealable order, and a motion to dismiss the appeal on that ground is under submission. The point is well taken, and the motion must be granted.

The cases are uniform upon the proposition that authority for an appeal in any probate matter must be found in subdivision 3 of section 963 of the Code of Civil Procedure, for said subdivision of said section specifically points out all and the only cases or instances in which an appeal may be taken in probate proceedings. There is no other provision of law in this state which purports to authorize an appeal in any case in probate matters. Subdivision 2 of said section 963, establishing the right of appeal from orders after final judgment, has often been held not to apply to probate proceedings. Therefore any order in probate proceedings that does not come within any of the cases enumerated in subdivision 3 of said section 963 is not appealable, and an attempted appeal from such an order is

abortive, and will, of course, be dismissed. See Estate of Calahan, 60 Cal. 232; Estate of Lutz, 67 Cal. 457, 8 Pac. 39; Estate of Wiard, 83 Cal. 619, 24 Pac. 45; Estate of Hathaway, 111 Cal. 270, 43 Pac. 754; Estate of Wittmeier, 118 Cal. 255, 50 Pac. 393; Estate of Hickey, 121 Cal. 378, 53 Pac. 818; Estate of Winslow, 128 Cal. 311, 60 Pac. 931; Estate of Cahill, 142 Cal. 628, 76 Pac. 383; Estate of Edelman, 148 Cal. 233, 82 Pac. 962, 113 Am. St. Rep. 231; Estate of Fretwell, 152 Cal. 573, 93 Pac. 283; Estate of Bouyssou, 1 Cal. App. 657, 82 Pac. 1066.

[2] Appeals in probate proceedings are limited by subdivision 3 of section 963 of said Code to the following judgments or orders: "From a judgment or order granting or refusing to grant, revoking or refusing to revoke, letters testamentary, or of administration, or of guardianship; or admitting or refusing to admit a will to probate, or against or in favor of the validity of a will, or revoking or refusing to revoke the probate thereof; or against or in favor of setting apart property, or making an allowance for a widow or child; or against or in favor of directing the partition, sale, or conveyance of real property, or settling an account of an executor, administrator, or guardian; or refusing, allowing, or directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, or legacy, or distributive share; or confirming or refusing to confirm a report of an appraiser or appraisers setting apart a homestead." Manifestly, it will require no argument to demonstrate that the foregoing provisions authorizing appeals in probate cases do not include, even by analogy and much less by express terms, an order of the character of the one from which it is sought to prosecute the appeal in the case before us.

The objection to the order to vacate which the proceedings giving rise to the order appealed from were inaugurated, is not directed against the amount of money thus authorized to be expended for a burial place, but against the manner in which the body of Simon H. Seymour was thus proposed to be disposed of. In truth, the real gravamen of the opposition of the appellants to the order seems to be in its omission to provide for the interment of the remains of Susan and those of her father and Simon's brother in the same plot or vault in which the remains of Simon are to be interred. But, as declared, it is very clear that there is to be found in the language of subdivision 3 of section 963, supra, neither authority for an appeal from an order directing the manner of disposing of the body of the deceased or the particular place in which it shall be interred, nor any warrant for an appeal from an order refusing to vacate and set aside an order providing for the permanent repose of the body of a deceased person and setting apart out of the estate of the

deceased a sum of money to be expended for that purpose.

But it is declared by counsel for appellants that the order establishing the place of burial and fixing and allowing the sum to be expended therefor "is in excess of the jurisdiction of the lower court, and null and void, whether there be an appeal or not, so the question of what constitutes an appealable order is immaterial." This position is untenable. It proceeds upon the theory that Simon having in his lifetime expressed the wish (not in his last will) that his remains be interred along with the remains of his wife, on her death, and those of his brother and father-in-law, in what is known as the "Woodlawn Cemetery," and Susan having (not by will) expressed a similar wish and so expressed herself to the executors of Simon's estate, who agreed to comply with said wish, the order of the court with the respect to said matter being, as is the charge, in conflict with the wish so expressed and the agreement so had with said executors, is in excess of the jurisdiction of the court. In other words, the contention is that it was the duty of the court to make an order in the premises in conformity with the wish of Simon and Susan in that regard, and that it was without authority or jurisdiction to make any other order, with reference thereto.

[3] A complete reply to this proposition is that, if the court was without jurisdiction to make an order from which the law has provided for no appeal, the remedy of the parties dissatisfied with such order, assuming that there were such parties having the legal right to complain thereof, would lie in a direct attack upon the court's action in thus usurping jurisdiction or exercising unauthorized power. We do not understand it to be the rule that, where a court makes an order from which no appeal is authorized by the statute, such order nevertheless becomes appealable if it appears that in making it the court exceeded its jurisdiction or that the court's jurisdiction to make it may be inquired into on an appeal therefrom. While, under our view of the case, it is unnecessary to pass upon the question whether the court did or did not exceed its jurisdiction in making the order objected to, we do not hesitate to say that the case of *O'Donnell v. Slack*, 123 Cal. 285, 55 Pac. 906, 43 L. R. A. 388, cited by appellants, could not, even if the question of jurisdiction of the court were properly submitted here, furnish a great amount of comfort to appellants. In that case, which was before the court on a writ of certiorari, the power or jurisdiction of the court to order the remains of the deceased to be delivered to the custody of a stranger as against the right of the widow of the deceased to the possession and disposition of his remains was directly in question. The court in probate had against opposition interposed by the widow as the next of kin to the deceased made an order directing the delivery of the

possession of the remains of her deceased husband to one Martin, a stranger to his blood, to be by said Martin removed to Ireland for burial. The Supreme Court held that the court below "exceeded its jurisdiction in attempting to award the custody of the body of the deceased to one not of kin, to the exclusion of the next of kin."

No such proposition could arise in any proceeding on the facts presented here. As before stated, the attack upon the order to which objection is made is not that the court below had thus attempted to award custody of the remains of the deceased to some one other than the next of kin, but that the manner of disposing of the body and the place of burial provided for by said order were not in accord with the wish of Simon himself and his deceased wife.

[4] It appears from the evidence or affidavits supporting the motion to vacate the order complained of that the body of Simon from the time of his death up to the time at least of the making of said order had reposed in a public vault in one of the cemeteries of San Mateo county, for which vaultage fees were required to be paid, and that it was the intention that it should remain there until provision was made for a place for its permanent repose. It further appears that Simon, during his lifetime, had purchased a plot on which he had erected a mausoleum in the Masonic Cemetery, situated in the city of San Francisco, in which were interred the remains of his brother and father-in-law, and where it was intended his own and his wife's remains should be interred. It seems that before Simon's death the board of supervisors of the city and county of San Francisco "adopted ordinances prohibiting further interment of the remains of deceased persons in said San Francisco cemetery." Thereafter said Simon "made attempts to move the said mausoleum to some cemetery in San Mateo county," but he failed to accomplish that object. After Simon's death, his widow visited all the cemeteries, and finally decided to select Woodlawn Cemetery in San Mateo county in which she desired that the remains of her husband, of herself, and those of his brother and her father should be interred. It is also shown that at the time of the making of said order there was, in fact, living no next of kin to Simon. His widow's share in his estate had been distributed to her before death, and the objectors to the order, other than the executor of her estate, were a brother and a sister of Susan, in no degree or sense next of kin to Simon. It seems to us that, under the facts as thus briefly detailed, there could be no possible question of the power of the court to make provision for the permanent repose of the remains of Simon in accordance with whatever reasonable or proper showing the executors of his estate might make. In fact, it was the absolute duty of the executors, under the circumstances, to initiate and prose-

cute appropriate proceedings for providing for the final and permanent disposition of the remains of their testator, and, of course, equally the duty of the court, upon a proper showing, which must be presumed to have been made, to make an order authorizing the executors to execute that duty. Whether the course pursued by the executors and the court in the execution of that duty was strictly in harmony with the wish of the deceased and his widow, the latter deceased before the order was made, could not, manifestly, affect or interrupt the court's power or jurisdiction to make the order. For aught that can be said to the contrary, so far as this record shows, it might have been found by the court to be impracticable, for reasons good and sufficient, to make provision for the burial of Simon's remains agreeably to his and his wife's expressed wishes. But, at all events, as declared in the outset, there is no warrant in law for an appeal from an order such as the one from which this appeal is attempted to be prosecuted, and the motion to dismiss will therefore have to be granted. So ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

15 Cal. App. 373

ZANY v. RAWHIDE GOLD MINING CO.
(Civ. 781.)

(Court of Appeal, Third District, California.
Feb. 11, 1911.)

1. PLEADING (§ 122*)—ANSWER—FACTS WITHIN DEFENDANT'S KNOWLEDGE.

Where the facts alleged in a complaint are presumptively within the knowledge of the defendant, a denial upon information and belief will be treated as an evasion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 249-252; Dec. Dig. § 122.*]

2. PLEADING (§ 121*)—ANSWER—FACTS WITHIN DEFENDANT'S KNOWLEDGE.

In an action against a mining company for a balance due for boarding defendant's employes and providing teams, material, and services, an answer to a sworn complaint that the defendant has no positive knowledge whether it entered into the contract alleged, or that plaintiff performed his part of the agreement, is not permissible as an answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 245-248; Dec. Dig. § 121.*]

3. ASSIGNMENTS (§ 131*)—PLEADING—MATERIALITY.

Allegations in a complaint as to assignment and reassignment of the claim sued on are immaterial, as involving mere matter of proof.

[Ed. Note.—For other cases, see Assignments, Dec. Dig. § 131.*]

4. APPEAL AND ERROR (§ 907*)—BILL OF EXCEPTIONS—EVIDENCE.

In the absence of a bill of exceptions, it cannot be said that there was an abuse of discretion in refusing to set aside a judgment on the pleadings, and allow defendant to file an amended answer; as, assuming that affidavits therefor are sufficiently authenticated, the ap-

pellate court cannot say that no other affidavits were read at the hearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2916; Dec. Dig. § 907.*]

5. APPEAL AND ERROR (§ 960*)—JUDGMENT ON PLEADING—SETTING ASIDE—DISCRETION OF COURT.

In an action against a mining company for services, affidavits filed on a motion to set aside a judgment on the pleadings alleged that the president of defendant corporation declared that he would keep plaintiff out of the money due him just as long as he could; that he would keep the suit pending as long as possible; that he would carry the action to the highest court and would cause plaintiff as much trouble and expense as he could; that he would fight any suit in such a manner that plaintiff should never get a cent, for it would cost him every dollar that he might recover in costs and attorney's fees; and that he would drive plaintiff out of the county a beggar. It further appeared from the affidavits that there was an entire absence of good faith in the defense interposed. Held, that the appellate court will be slow to interfere with the discretion of the trial court in denying the motion.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 960.*]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by Charles Zany against the Rawhide Gold Mining Company. From a judgment for plaintiff on the pleadings, and from an order denying defendant's motion to set aside the judgment and for leave to amend the answer, defendant appeals. Affirmed.

S. M. Shortridge and C. M. C. Peters, for appellant. Rowan Hardin and J. B. Curtin, for respondent.

BURNETT, J. The plaintiff in a verified complaint sued the defendant for \$1,972.88, the balance due for boarding the employes of defendant, and furnishing material and teams and performing certain services for defendant at its special instance and request.

The defendant's verified answer was as follows: "Comes now the defendant above named, and, for answer to the complaint in the above-entitled action, admits, denies, and alleges as follows: First, it admits its incorporation as alleged in paragraph 1 of said complaint; second, upon its information and belief, it denies each, all, and singularly the allegations contained in paragraphs 2, 3, 4, 5, and 6 of said complaint; and, third, it alleges that, as to the allegation contained in paragraph 7 of said complaint, it has not sufficient information to enable it to make answer, and for that reason it denies the allegations contained in said paragraph 7 of said complaint. Wherefore said defendant prays to be hence dismissed with its costs." The plaintiff moved for judgment on the pleadings upon the ground that "the complaint filed in said action is verified and that the answer therein

does not deny a single material allegation of said complaint." The motion was granted and judgment rendered accordingly for plaintiff on July 5, 1910. Afterward a motion was made by defendant to have said judgment vacated, and to be permitted to file an amended answer. This motion was heard on affidavits and counter affidavits, and was denied by the court on July 18, 1910. The court's action in rendering said judgment and denying said motion is herein assailed.

[1] It is to be observed that not a single allegation of the complaint is denied positively. As is stated in *Loveland v. Garner*, 74 Cal. 301, 15 Pac. 844, the rule is well settled that, "where the facts alleged in the complaint are presumptively within the knowledge of the defendant, he must answer positively and a denial upon information and belief will be treated as an evasion." *Curtis v. Richards*, 9 Cal. 38. And in such a case the defendant should, at least, show how it happened that he was without knowledge as to such facts. *Brown v. Scott*, 25 Cal. 190. And the rule applies as well to corporations as to natural individuals. *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453. It is further declared, in the *Loveland Case*, supra, that "for defendants to say (practically) that they do not know whether for seven months a certain person was their superintendent, or whether, during that time, the corporation of which they were directors worked or developed any mine, or extracted any ores or minerals, or incurred any liabilities or disbursed any money or was engaged in conducting the business of mining, or received any money whatever, is to indulge in a playful frivolity not consistent with the solemnity of sworn pleadings in a court of justice."

[2] With equal propriety may it be asserted here that the implication that the defendant has no positive knowledge whether it entered into a certain contract with plaintiff to board its employes and to furnish said defendant with a team at a certain price, etc., and that plaintiff performed his part of the agreement and that a certain amount of money became due thereunder to plaintiff and that no part of it has been paid is not to be tolerated for a moment. The assumption that defendant had no positive knowledge as to all these matters is opposed to common observation and experience. If a defendant does know the facts and lacks the courage or the candor to declare them, he cannot expect any consideration from a court of justice. If, when he is served with the complaint, he is actually ignorant of any material fact which he ought to know, it is his duty to become informed before he files his answer. *Mendocino County v. Peters*, 2 Cal. App. 28, 82 Pac. 1122. The rules of pleading, under our system, are intended to prevent evasion and to require a denial of every specific aver-

ment in a sworn complaint, in substance and in spirit, and whenever the defendant fails to make such denial he admits the averment. *Doll v. Good*, 38 Cal. 290. In *Hewel v. Hugin*, 3 Cal. App. 254, 84 Pac. 1002, it is held that the denial on information and belief by the treasurer of an irrigation district that certain coupons were ever signed by the secretary of said district raised no issue on that point. In *Bartlett Estate Co. v. Fraser*, 11 Cal. App. 373, 105 Pac. 130, it is held that a denial of the averment of nonpayment of a note for want of information and belief is evasive and raises no issue, "being of matter presumptively within the knowledge of the defendant, which must be positively denied." In *San Francisco Gas Co. v. San Francisco*, supra, it is said: "A municipal corporation outside of its government capacity is in many respects to be regarded the same as a private corporation, and its officers and agents through whom it acts must be presumed to know the contracts it enters into, the purchases it makes, and the property it uses. Knowledge of such matters must rest with some of its officers and the corporation cannot shield itself under an assertion of ignorance." The same principle is announced and applied to different facts in various decisions of our Supreme Court.

[3] As to the allegations in reference to the assignments, they are entirely immaterial, for, as pointed out by respondent, the assignment and reassignment left the claim as it was originally, and they really involve probative matters that have no place in the pleading. *Miles v. McDermott*, 31 Cal. 271; *McCaughy v. Schuette*, 117 Cal. 224, 46 Pac. 666, 48 Pac. 1088, 59 Am. St. Rep. 176. The complaint is sufficient without them, and therefore their immateriality becomes apparent. *Whitwell v. Thomas*, 9 Cal. 499.

[4] In reference to the appeal from the order denying the motion to set aside the judgment and permit defendant to file an amended answer, it is really sufficient to say that it cannot be determined, in the absence of a bill of exceptions, that there was an abuse of discretion. Even if we assume that the affidavits are sufficiently authenticated, we cannot hold that no others were read and filed at the hearing. *Manuel v. Flynn*, 5 Cal. App. 319, 90 Pac. 463; *Ramsbottom v. Fitzgerald*, 128 Cal. 75, 60 Pac. 522; *Estate of Dean*, 149 Cal. 487, 87 Pac. 13.

[5] But, looking at the showing as it appears in the record, we can readily understand why the court below should look with disfavor upon defendant's application; for, among other things, it appears, apparently without contradiction, that the president of the corporation declared to Mr. Zany that he would keep said plaintiff out of the money due him just as long as he could; that he would keep the suit pending as long as possible; that he would carry said action to the highest court of the land, and would

cause said Zany as much trouble and expense as he could; that he would fight any suit in such a manner that Zany should never get a cent, for it would cost him every dollar that he might recover in costs and attorney's fees, and that he would drive Zany out of the county a beggar. There are other statements in the affidavits strongly tending to show the entire absence of good faith and the utter want of any valid defense on the part of appellant; to which statements the trial court had a legal right, of course, to give full credit.

In view of the record, it is perfectly clear that we cannot disturb the judgment or order without doing violence to well-established principles of procedure and exceeding the prescribed limits of appellate jurisdiction.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

15 Cal. App. 429

LE BRETON v. STANLEY CONTRACTING CO. et al. (Civ. 859.)

(Court of Appeal, First District, California.
Feb. 17, 1911.)

1. ASSIGNMENTS (§ 49*) — REQUISITES — CHECKS.

An unrepresented and an unaccepted check on a bank is not an assignment of the deposit of the drawer.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 85-98; Dec. Dig. § 49.*]

2. BANKS AND BANKING (§ 77*) — CHECKS — LIABILITY OF BANK TO PAYEE.

An unrepresented and unaccepted check gives the holder no right against the bank upon which it is drawn, though the drawer have sufficient funds there to pay it, and hence, in an action by the receiver of an insolvent bank on a note, the defendant cannot set up such a check as a valid counterclaim.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 165-176½; Dec. Dig. § 77.*]

3. BILLS AND NOTES (§ 389*) — PRESENTMENT.

That the bank upon which a check is drawn is insolvent, or has closed its doors before the holder has an opportunity to present the same, does not excuse nonpresentment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1055; Dec. Dig. § 389.*]

4. PLEADING (§ 121*) — EVIDENCE OF DEFENSE — CONSTRUCTION.

In an action by the receiver of an insolvent bank, the defendant denied the allegations of the receivership for lack of information or belief. The truth of these matters could have been ascertained by an inspection of the court records. *Held*, that such denials are not permissible.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 245-248; Dec. Dig. § 121.*]

5. PLEADING (§ 343*) — MOTIONS FOR JUDGMENT ON PLEADINGS.

A motion for judgment on the pleadings is like a demurrer for failure to state a cause of action or defense, and hence, where an answer failed to state a defense, the plaintiff could both demur and move for judgment on the pleadings.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1048-1051; Dec. Dig. § 343.*]

6. PLEADING (§ 343*) — MOTIONS FOR JUDGMENT ON PLEADINGS — TIME FOR MOVING — AFTER DEMURRER SUSTAINED.

While an order sustaining a demurrer without leave to amend usually disposes of the case, yet that does not preclude the court from also granting a motion for judgment on the pleadings.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1048; Dec. Dig. § 343.*]

7. JUDGMENT (§ 536*) — CONSTRUCTION — INTEREST.

Where a note, providing for 6 per cent. interest, to be computed monthly, was reduced to judgment in 1910, and the judgment prescribed that interest should be paid upon the face of the note at the rate of 6 per cent. per annum from the date of the making of the note, and to be computed monthly, the allowance of interest must, under the provisions of Civ. Code, § 1918, providing that parties may agree in writing for the payment of any rate of interest, and it shall be allowed until the entry of judgment, be construed to run only to the time of the judgment, and the judgment is not invalid as allowing more than 7 per cent. interest, contrary to Civ. Code, § 1920.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 980; Dec. Dig. § 536.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Edward J. Le Breton, as receiver of the California Safe Deposit & Trust Company, against the Stanley Contracting Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Thomas C. Huxley, for appellants. J. V. De Laveaga, for respondent.

LENNON, P. J. This is an appeal from a judgment of the superior court of the city and county of San Francisco, rendered and entered in favor of the plaintiff and against the defendants James Stanley and the Stanley Contracting Company.

These defendants, on the 29th day of October, 1907, were indebted, upon their promissory note in the sum of \$2,262.35, to the California Safe Deposit & Trust Company, a banking corporation. The note was dated May 15, 1907. It was due in 90 days from its date, and bore interest at the rate of 6 per cent. per annum, payable monthly, and if not so paid to be compounded. On October 30, 1907, the California Safe Deposit & Trust Company suspended, closed its doors, and never resumed business.

The plaintiff, E. J. Le Breton, as the duly appointed, qualified, and acting receiver of the defunct bank, brought suit upon the note, and after an order sustaining his demurrer to the answer of the defendants, without leave to amend, obtained a judgment against them on the pleadings for the full amount of the principal and interest due on the note.

The allegations of the complaint with reference to the court's order adjudicating the bank to be insolvent, and appointing the plaintiff its receiver, are the only allegations

attempted to be denied by the answer of the defendants, and the denial in each instance is made and based upon lack of information or belief. There is no denial or attempted denial in the answer of the due execution of the note, or of the amount of the indebtedness due thereon as set out in the plaintiff's complaint.

As a separate defense and by way of counterclaim, the answer of the defendants averred, in substance, that, on October 29, 1907, one Kittie J. McCue, who was then a commercial depositor with the California Safe Deposit & Trust Company in the sum of \$2,400 and upwards, made and delivered to defendants her check, drawn thereon in favor of the Stanley Contracting Company, for the sum of \$2,400. By reason of the failure of the California Safe Deposit & Trust Company, said check was never paid or presented for acceptance and payment, and has ever since been held by defendants. It was not alleged in the answer that the check had ever been certified or accepted by the bank, or that the check was drawn against a special fund, or for the precise balance on deposit with the bank and to the credit of Kittie J. McCue.

Plaintiff demurred to the allegations of the answer, upon the ground that the same were insufficient to constitute either a defense or an offset to the cause of action stated in the plaintiff's complaint. With the demurrer plaintiff filed a motion for judgment on the pleadings. The demurrer and motion apparently were heard and considered together. On January 17, 1910, the demurrer was sustained without leave to amend, and the motion was granted. On January 20, 1910, judgment on the pleadings was entered in favor of the plaintiff and against the defendants James Stanley and the Stanley Contracting Company in the sum of \$2,262.35, "together with interest thereon at the rate of 6 per cent. per annum from the 15th day of May, 1907, said interest to be compounded monthly, together with plaintiff's costs of suit." The court did not err in sustaining the demurrer without leave to amend.

[1] The check in question was never presented to or accepted by the bank, and therefore as to the bank it was not an assignment to the Stanley Contracting Company of the amount called for in the check. *Donohue-Kelly Banking Co. v. S. P. Co.*, 138 Cal. 183, 71 Pac. 93, 94 Am. St. Rep. 28; *Pullen v. Placer Co. Bank*, 138 Cal. 172, 69 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19; *Harlan v. Gladding-McBean Co.*, 7 Cal. App. 52, 93 Pac. 400; *Greenebaum v. Am. Trust, etc., Bank*, 70 Ill. App. 407.

[2] In the absence of such an assignment, no cause of action on the check existed in favor of the Stanley Contracting Company against the bank (*O'Connor v. Mechanics' Bank*, 124 N. Y. 324, 26 N. E. 816), and therefore the check could not be properly pleaded

as a defense, by way of counterclaim, to the cause of action stated in the plaintiff's complaint. *Barber v. Reynolds*, 33 Cal. 497; *Chase v. Evoy*, 58 Cal. 348; *Harrison v. McCormick*, 69 Cal. 618, 11 Pac. 456; *Roberts v. Donovan*, 70 Cal. 112, 9 Pac. 180, 11 Pac. 599; *Stockton, etc., Society v. Giddings*, 96 Cal. 90, 30 Pac. 1016, 21 L. R. A. 406, 31 Am. St. Rep. 181.

[3] That the bank in this case had failed and closed its doors before the defendants had a reasonable or any opportunity to present the check for acceptance and payment is of no consequence, and does not relieve the situation of the defendants, or alter the rule in their favor. The fact remains that the check was never presented or accepted, and therefore the right to claim an appropriation of the fund specified in the check as to the bank was never perfected. *Northern Trust Co. v. Rogers*, 60 Minn. 208, 62 N. W. 273, 51 Am. St. Rep. 526; *Greenebaum v. American Trust, etc., Bank*, supra.

In the case of *Butterworth v. Peck*, 5 Bosw. (N. Y.) 341, the receiver of an insolvent bank, as in the case at bar, brought suit upon a promissory note, and a check, upon which payment had been refused, but which had been presented for payment prior to the failure of the bank, was pleaded as a set-off. The court, in refusing to allow the set-off, held that "the check was not an appropriation of a specific fund. It gave no right of action against the bank without acceptance, and if it gave no right of action, it cannot constitute a right of set-off or counterclaim."

A practical reason for the rule refusing the right of set-off in such cases is found in the case of *Northern Trust Company v. Rogers*, supra, a case very similar to the case at bar, wherein it was said: "To allow it would be to open the door to the commission of fraud on the great body of the creditors of the insolvent bank, and would practically defeat the great object of the insolvent law, which is the equal distribution of the assets of the insolvent company among the creditors. In every case where a bank failed, having a large number of both creditors and debtors, it would be the easiest matter in the world for a number of each class to collude together, and, by the former giving antedated checks to the latter, to absorb all the assets of the bank to the exclusion of the other creditors."

No right of action on the check existing in favor of the Stanley Contracting Company, no right of counterclaim or set-off could possibly arise out of the facts stated in the answer, and therefore the order of the court sustaining the demurrer without leave to amend was the only proper ruling which could have been made in the premises.

[4] The truth of the allegations of the complaint, with reference to the order adjudicating the bank insolvent and appointing the plaintiff its receiver, could have been

readily ascertained by the defendants from an inspection of the court records, and therefore the defendants' denials of these allegations for lack of information or belief were wholly insufficient. *Mulcahy v. Buckley*, 100 Cal. 487, 35 Pac. 144. Denials in this form, with knowledge or means of knowledge as to the truth or falsity of the allegation attempted to be denied, are never permissible. They may be disregarded by the court (*Mullally v. Townsend*, 119 Cal. 52, 50 Pac. 1066); and if the answer fails otherwise to put in issue the material allegations of the complaint, judgment may be rendered and entered on the pleadings. *Doll v. Good*, 38 Cal. 287.

Counsel for appellants suggests that the order sustaining the demurrer without leave to amend practically disposed of the entire case, and thereby precluded the court from entertaining and disposing of the motion for judgment on the pleadings.

[5] A motion for judgment on the pleadings is similar in purpose and effect to a demurrer grounded upon the alleged insufficiency of the facts stated in a pleading. It admits the facts alleged, and challenges their sufficiency to support a cause of action or maintain a valid defense. *De Toro v. Robinson*, 91 Cal. 371, 27 Pac. 671. The plaintiff in this case was privileged to take advantage of the alleged defect in the defendants' pleading by demurrer or motion for judgment (*Kelley v. Kriess*, 68 Cal. 210, 9 Pac. 129), either or both of which, if successful, would be sufficient upon which to found a judgment.

[6] An order sustaining a demurrer without leave to amend ordinarily disposes of the case, and, in the absence of any directions from the court, it is then the duty of the clerk to enter an appropriate judgment. *Gallardo v. Reed*, 49 Cal. 346; *Mora v. Le Roy*, 58 Cal. 8; *Lang v. Superior Court*, 71 Cal. 492, 12 Pac. 306, 416.

In this instance the motion for judgment on the pleadings was before the court, and it was therefore proper for the court to dispose of it. The judgment was entered by direction of the court after the order sustaining the demurrer and granting the motion was made, and the fact that the order for judgment made reference to the sustaining of the demurrer without leave to amend neither helped nor harmed the judgment as finally entered.

[7] The rate of interest prescribed by the judgment does not, as claimed by counsel for appellant, run on indefinitely. A judgment may be construed in connection with the pleadings in the case. *Ex parte Ambrose*, 72 Cal. 401, 14 Pac. 33. It is obvious that the rate of interest allowed by the judgment in this case was according to the terms of the note, which by operation of law terminated at the entry of judgment. Civ. Code,

§ 1918. Thereupon the judgment bore no greater rate of interest than 7 per cent. per annum. Civ. Code, § 1920.

The judgment is affirmed.

We concur: HALL, J.; KERRIGAN, J.

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159 Cal. 608

In re ROBINSON'S ESTATE. (L. A. 2,528.)
(Supreme Court of California. March 31, 1911.)

1. WILLS (§ 450*)—CONSTRUCTION.

A will should be construed by ascertaining the meaning of the words employed by the testator to disclose his intent; such interpretation being given as will give some effect to every expression rather than one which will render any of the expressions invalid, as provided by Civ. Code, § 1325.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 966; Dec. Dig. § 450.*]

2. WILLS (§ 527*)—CONSTRUCTION—DISTRIBUTION OF RESIDUE—HEIRS.

Testator gave a pecuniary legacy to M., whom he described as his niece, and then bequeathed the residue to his "heirs at law," according to the laws of succession, "including my niece above named, to share in this clause." Held that, though M. sustained no blood relationship to testator, the will should be construed as entitling her to take a share of such residue, as an heir; she being regarded as taking as the sole child of a deceased brother or sister.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1140; Dec. Dig. § 527.*]

Department 2. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Judicial settlement of the estate of Charles A. Robinson, deceased. From an order denying a petition for distribution of a part of the residue to Mrs. Teresa Martin, she appeals. Reversed.

Wal. J. Tuska, for appellant. Stutsman & Stutsman and Hammack & Hammack, for respondent.

HENSHAW, J. The will of Charles A. Robinson, deceased, was duly admitted to probate. That will gave "to my niece, Mrs. Teresa Martin of San Francisco, the sum of \$1500.00." The residuary clause of the will is as follows: "Fourth, all the remainder of my estate I give, bequeath and devise to my heirs at law as they are entitled by the laws of inheritance and succession, including my niece above named, to share in this clause."

No difficulty arose over the legacy to Mrs. Teresa Martin, which she received in due course of administration. Under pending proceedings for the distribution of the residue of the estate Mrs. Martin petitioned for distribution to her of one-fifth of that residue under the residuary clause above quoted. It was shown at the hearing that Mrs. Teresa Martin sustained no blood relationship to the deceased. She was not in law his niece, but was the niece of his deceased wife. Therefore Mrs. Teresa Martin was not an heir at law of deceased. It further appeared that the heirs at law of the deceased were a surviving sister and the descendants of two deceased sisters and of one deceased brother. The court in probate denied the petition of Mrs. Teresa Martin upon the ground that "the testator's attempt to make

said Teresa Martin an heir at law, and therefore entitled to share in said distribution, is void for uncertainty."

The correctness of the court's conclusion in this regard and the right of Teresa Martin to take under the residuary clause of the will above quoted is the question here presented for consideration. The question is a narrow one.

[1] It is to be resolved in the light of the familiar canons of construction that the inquiry of the court will be directed to the meaning of the words employed and the intent of the testator will be derived therefrom (Estate of Anna Young, 123 Cal. 337, 55 Pac. 1011), and that the words of a will are to receive an interpretation which will give to every expression some effect rather than one which will render any of the expressions inoperative (Civ. Code, § 1325).

[2] It is manifest that the testator designed that Mrs. Teresa Martin should share in the distribution of the residue of his estate, and that she should be treated as an heir at law, though not in fact one. The will itself answers the question as to the class or category into which she should go as such heir at law. She is to be considered as a niece of the deceased. But, as a niece would not be an heir at law saving upon the death of the parent related by blood to the deceased, it follows necessarily that the testator meant Mrs. Martin to be regarded as an heir at law standing in the position of the child of a deceased brother or sister. As Mrs. Martin is alone mentioned in this connection, it also necessarily follows that she is to be regarded for the purpose of distribution as the sole child of such deceased brother or sister and that her distributive portion would therefore be one-fifth of the residuum of the estate.

It is therefore ordered that the decree of distribution be modified in conformity herewith.

We concur: LORIGAN, J.; MELVIN, J.

159 Cal. 98

In re DAVISON'S ESTATE. (L. A. 2,570.)
(Supreme Court of California. Dec. 30, 1910.)

HOMESTEAD (§§ 84, 151*)—JOINT OWNERSHIP—PROBATE HOMESTEAD.

The court, in the administration of the estate of a decedent, cannot set apart land as a probate homestead, unless a homestead could have been impressed upon such land in decedent's lifetime, and since neither the husband nor wife, jointly or severally, could, during the husband's lifetime have made a valid homestead declaration upon his undivided interest in land held by them as tenants in common and jointly occupied by them, St. 1867-68, c. 138, providing that a homestead may be declared upon land of a cotenancy where the declarant is in the exclusive occupancy thereof, and resides thereon, not applying where the occupation is joint, the widow is not entitled to a homestead

in the husband's undivided interest in such property.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 121, 291; Dec. Dig. §§ 84, 151.*]

Department 2. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

In the matter of John M. Davison, deceased. From an order sustaining a demurrer to the widow's application to have a probate homestead set apart to her, she appeals. Affirmed.

Haines & Haines, for appellant. J. B. Mannix, for respondents.

LORIGAN, J. This is an appeal by the widow from an order sustaining an opposition and demurrer to her application to have a probate homestead set apart to her out of the estate of her deceased husband.

The petition stated that decedent died intestate and childless, leaving surviving him his widow, the petitioner; that at his death he was the owner of an undivided half, as his separate property, of two lots in the city of San Diego, the petitioner being the owner in her separate estate of the other undivided one half thereof; that on the premises were erected a dwelling house, barn, and other improvements made during the marriage, the cost thereof being paid, one half from the community funds, the other half out of the separate funds of the petitioner; that the undivided one-half of the realty owned by decedent was worth, without the improvement, \$600; that the value of his undivided one-half of the improvements so made from community funds was \$900, and that the undivided half of the land and improvements vested in the wife as her separate property was of the same value; that said improvements were placed on the property during the lifetime of the decedent, for the purpose of making the premises a home for himself and petitioner, which they occupied as such up to the time of his death, and which petitioner still occupies; that no written declaration of homestead was made in the lifetime of decedent by himself and petitioner, or either of them.

The prayer was that the interest of the estate of the decedent in the property be set apart by the court to the widow as a homestead—for life as to the realty, and as to the improvements absolutely. The demurrer and opposition to the petition was interposed by certain heirs at law of decedent, on the ground that the court had no power to impose a homestead on the undivided interest of the estate of the decedent in the property.

It will be noted that what the superior court sitting in probate was asked by the widow to do was to select and set apart to her, as a probate homestead, the undivided interest of her husband alone in lands held

by them during his lifetime as tenants in common.

It is, of course, well settled that the court in the administration of the estate of a decedent cannot set apart lands of the estate, as a probate homestead, unless they were lands upon which a homestead could have been impressed in the lifetime of the deceased. *Estate of Noah*, 73 Cal. 590, 15 Pac. 290, 2 Am. St. Rep. 834; *Estate of Carraher*, 107 Cal. 618, 40 Pac. 1032. So the question presented here is, Could either spouse during the lifetime of the husband impress a homestead solely on his undivided interest in property held in common by both? If this could have been done, the court erred in refusing to make the homestead order asked by petitioner.

It has uniformly been held by this court, commencing with the early cases of *Wolf v. Fleischacker*, 5 Cal. 244, 63 Am. Dec. 121, and *Giblin v. Jordan*, 6 Cal. 416, followed by a number of other decisions, including the late cases of *Schoonover v. Birnbaum*, 148 Cal. 551, 83 Pac. 999, and *U. S. Oil, etc., Co. v. Bell*, 153 Cal. 781, 96 Pac. 901, that under both the early homestead acts, and the present Code provisions respecting homesteads, a homestead may not be created by one joint tenant in lands held in joint tenancy or as tenants in common, except as authorized by the act of 1868 (Stats. 1867-68, p. 116), which provides that a homestead may be declared upon land of a cotenancy, where the declarant is in the exclusive occupation of it and residing thereon. Under this act it was held in *Higgins v. Higgins*, 46 Cal. 259, that a wife might impress a valid homestead upon her husband's interest in a cotenancy where these conditions existed.

The cases above cited, and others, including also the pertinent provision of the act of 1868, are considered and discussed in the recent case of *Swan v. Walden*, 156 Cal. 195, 103 Pac. 931, 134 Am. St. Rep. 118, and it is shown that the right of a cotenant to impress a homestead upon land held in cotenancy (except where the conditions prescribed by the act of 1868 are met) is denied in the earlier decisions because, on account of the nature of the tenancy, there can be no segregation or delimitation of the boundaries of the particular estate, or interest in the property of the cotenancy sought to be impressed, whereby it can be determined as to what particular part of the land the homestead attaches; and that the rule so established by these decisions has been uniformly followed and is still adhered to.

It is insisted, however, by appellant that these cases only have application where a cotenancy exists between the husband or wife and third persons, and do not apply where, as here, the tenancy in common existed between husband and wife solely, and

relies upon the decision in this very case of *Swan v. Walden*, which, she contends, makes this distinction, and upon the authority of which she claims that she is entitled to have the interest of her deceased husband, as cotenant in the property, set apart to her as a probate homestead.

In the case relied on *Walden* and his wife were the owners in joint tenancy of two lots upon which they resided, and upon both of which Mrs. Walden made a declaration of homestead, and the question presented on the appeal there was whether such a homestead could be legally created by her as joint tenant in the property held in cotenancy. The court in deciding the question, after declaring that the rule denying the right of a cotenant to impress a homestead upon the land of the cotenancy, except under the conditions prescribed by the act of 1868, still obtained as a rule of property in this state, and after referring to the case of *Giblin v. Jordan*, supra, where it was held that under it the husband could not impress a homestead upon property held in joint tenancy by himself, wife, and daughter because as to the tenancy they were entire strangers to each other, said: "But the case which is here presented is different in this respect. Here the wife seeks to impress the whole land with the homestead characteristic. This she may do as to her own interest, which is her separate property, and this she may do as to her husband's interest, since she has the power to declare a homestead upon the husband's separate property, though he has no such power over hers. The homestead thus attempted to be declared is upon land, all of which is susceptible at the instance of the wife of having the homestead characteristics impressed upon it. There is no occasion for segregation or partition, or delimitation of boundaries, since the homestead attaches to all of the estate and all of the land. The reasons which, in the view of this court, make it legally impossible for the husband to declare such a homestead when there was a cotenancy between himself, his wife, or third persons, does not exist in the peculiar instance of the case at bar."

It will be observed that in this *Swan* Case the court was dealing with a selected homestead, impressed by the wife upon land held in cotenancy solely by herself and husband, and her right to do so is sustained because, as she had a right to declare a homestead upon her separate property, and also upon the separate property of her husband, the effect of her declarations was to impress the entire land, and the entire interests therein held by them in joint tenancy, with the homestead characteristics; that within the spirit and intent of the act of 1868, authorizing a homestead to be filed where a cotenant was in the exclusive occupation of the land of the cotenancy, Mrs. Walden had such exclusive possession for such purpose. It was her peculiar position under the homestead

law which made it possible for her to impress the land in its entirety that took the homestead declared by her out of the general rule denying the right of a cotenant to create a valid homestead on cotenancy property. It is clearly pointed out in that opinion that, in the peculiar instance of the homestead there under consideration, as the entire interest in the tenancy was susceptible to the impress of a homestead upon it by the wife, the reason supporting the general rule denying the right of the husband to declare a homestead upon land held in cotenancy by himself or wife or third parties did not apply.

Here, however, an entirely different question is presented. We are not dealing with a selected homestead which the court is asked to set apart to the surviving wife. What was sought in the matter at bar in the superior court was to have that court select, designate, and set apart as a probate homestead, not the land of the cotenancy in its entirety, but the undivided interest of the deceased cotenant. If the superior court could do this, it could only do it because in the lifetime of the decedent, either he or his wife could have impressed a homestead on this particular cotenancy interest alone. Neither of the spouses, however, could do this. The husband under no circumstances could declare a homestead which would embrace, with his own interest, that of his wife in the cotenancy property, because he is prohibited under the homestead law from declaring a homestead on the separate property of his wife, unless with her consent, manifested by making or joining in the making of the declaration. Such a general declaration, as it would embrace the whole of the land and the entire interest in the cotenancy, would not be affected by the general rule.

But neither the husband nor the wife, jointly or severally, could in the lifetime of the husband have made a valid declaration of homestead upon his undivided interest in the cotenancy property, so as to affect that interest alone with the homestead characteristics, separate and distinct from the undivided interest of the wife therein. The right to do this, as we have seen, is distinctly denied by the decisions, except under certain conditions provided for in the act of 1868. That act, however, permits a valid homestead to be declared upon the undivided interest of a cotenant in the cotenancy property only when he is in the exclusive occupation of the property, having it inclosed, and in *Higgins v. Higgins* the right of the wife to declare a valid homestead to the extent of the husband's estate therein, though she had no interest in the property, was sustained under the act because the husband was in the actual occupation of the property to the exclusion of the other cotenants having interests therein. But the provisions of the act have no application under the facts recited in the petition at bar. During the lifetime of the husband both spouses were

in actual occupation of the property; there was no exclusive occupation within the terms of the act which would have authorized the wife to declare a homestead on her undivided interest, or authorized either of them to declare it upon the undivided interest of the husband.

While it is claimed that the cases recognize a distinction in the application of the general rule precluding a cotenant from impressing a homestead on land held in cotenancy, where the cotenancy exists between the husband and wife, and between the husband and strangers, no such distinction has been pointed out by counsel. In fact, in *Giblin v. Jordan*, *supra*, the existence of any such distinction was expressly denied.

Undoubtedly, under the rule in *Swan v. Walden*, during the lifetime of her husband petitioner might have declared a valid homestead upon the entire cotenancy property, and on the death of her husband the superior court sitting in probate would have set such homestead apart to her. She, however, declared no such homestead, but asks the court now to do what neither she nor her husband could have done in his lifetime, namely, to impress the undivided interest of her husband in the cotenancy with a homestead, while her undivided interest has not been, and cannot be, so impressed. The general rule which made it legally impossible for the homestead to have been impressed upon the undivided interest of the husband alone in his lifetime makes it equally impossible for the superior court to do so, and it properly denied the application of the petitioner.

The order appealed from is affirmed.

We concur: HENSHAW, J.; MELVIN, J.

159 Cal. 604

MCCARTHUR v. BLAISDELL. (L. A. 2,033.)

(Supreme Court of California. March 28, 1911.)

1. ACCOUNT (§ 4*)—EQUITY—RIGHT OF PLAINTIFF—TRUST RELATION.

A contract between S. and defendant as to their performance of a contract to erect mining reduction works, etc., (1) stated an agreed valuation of the machinery, etc., contributed by each; (2) provided that each party might contribute half the expenses of the work, but that in default thereof the other party might contribute more than half, and should be credited with the excess with interest; (3) provided that the compensation for the work should be divided in proportion to the amounts advanced during the work, provided for the salary of defendant as manager, and as to his powers as superintendent, and the method of his paying for supplies. *Held*, that a trust relation was created, rendering defendant liable to account for the interest of S.

[Ed. Note.—For other cases, see *Account*, Cent. Dig. §§ 13, 14; Dec. Dig. § 4.*]

2. LIMITATION OF ACTIONS (§ 39*)—LIMITATIONS APPLICABLE.

The statutory bar of an action for such an accounting is that provided by Code Civ.

Proc. § 343, for matters not thereinbefore provided for, and not under section 337, providing a four-year limitation for actions on any contract, obligation, or liability founded on a contract in writing, nor under section 339 placing a two-year limitation on contracts, etc., not founded on an instrument in writing.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 200; Dec. Dig. § 39.*]

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Beauchamp H. Smith, for whom pending appeal his administrator, William T. McArthur, was substituted, against Hiram W. Blaisdell. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Reversed.

J. F. Conroy, for appellant. E. A. Meserve, for respondent.

MELVIN, J. An action was brought by Beauchamp H. Smith for an accounting and for certain specific property under an asserted copartnership. Judgment was given in favor of the defendant. Plaintiff moved for a new trial, and this appeal is prosecuted from an order of the superior court denying said motion. After the appeal was taken, the appellant died, and William T. McArthur was duly appointed administrator of the estate of the deceased, and was substituted as appellant.

The amended complaint which appears in the transcript bases the right to the relief demanded upon the alleged existence of a copartnership between defendant and the assignor of plaintiff's intestate created about February 21, 1899, whereby the partners agreed to share equally in all profits and losses of said enterprise, and it is further averred that the contract of copartnership was amended by a certain agreement dated March 1, 1899, a copy of which is made a part of the complaint. It is in evidence, however, that the case was partly tried under plaintiff's theory and pleading that the contract of March 1, 1899, itself created a copartnership, and the amendment to the complaint was made after the court had ruled that the agreement witnessed a joint enterprise not in the nature of a copartnership. The court insisted that proof of the existence of the copartnership must be made before the other evidence might be produced. Such proof was not forthcoming and nearly all of the rulings of which appellant complains were based upon the omission to show partnership. By the contract which as an exhibit is made a part of the complaint, S. Morgan Smith, assignor of plaintiff's intestate and H. W. Blaisdell, the defendant, for the purpose of fixing and determining their mutual obligations, agree upon the proper manner of carrying out the provisions of a certain contract which they are about to make with the "King of Arizona Company" (a corpora-

tion) for the erection of a plant and pipe line, and the method by which they shall apportion the 80,000 shares of the capital stock of said corporation to be paid them for their work of construction and for materials to be used. First, there is an agreed valuation of the machinery, lumber, etc., contributed by each of the parties. Next, it is stipulated that each party shall have the right to contribute one-half of the necessary expense of carrying on the work for the "King of Arizona Company"; but, if either fails so to do, the other reserves the right to furnish more than half the amount needed, receiving credit for the excess above his share so advanced, which shall bear interest at the rate of 1 per cent. per month. The agreement next recites that, when the 80,000 shares of stock shall have been issued in payment for the work done and material furnished to the "King of Arizona Company," said shares shall be distributed to the parties in proportion to the amounts advanced by them respectively during the progress of the work. The rest of the contract relates to the salary of Blaisdell as manager, to his powers as superintendent, and to the method whereby he is to spend money for supplies.

The answer denied all of the material allegations of the complaint and pleaded the bar of the statutes—sections 337, 338, and 339 of the Code of Civil Procedure.

Findings of facts and conclusions of law were all practically in favor of the defendant, following closely the averments of the answer. The court found that there was no partnership between Smith and Blaisdell; that pursuant to the contract of March 1, 1899, Smith and Blaisdell entered into an agreement with the "King of Arizona Company" to construct and equip its reduction plant, and that their compensation was to be two-fifths of the stock of said corporation; that defendant was not called upon to furnish one-half of the cost of said reduction plant and equipment; that defendant did not violate any duties toward any copartnership nor did he have any money belonging to said copartnership under his control; that neither the defendant nor his attorney received any stock from the "King of Arizona Company"; that S. Morgan Smith had not advanced any money for any copartnership existing between him and defendant, and that defendant, Hiram W. Blaisdell, was not shown to have received any money, thing of value, or property whatsoever, either from the "King of Arizona Mining & Milling Company" or from the "King of Arizona Company," or from any corporation or person in any manner growing out of or connected with the transactions and enterprises provided for by the contracts referred to and set out in plaintiff's amended complaint.

[1] Appellant asserts that there were trust relations between Smith and Blaisdell, and that the details of the work, the amounts received by Blaisdell, the sums paid to his assignees, and other matters should have been allowed in evidence. We think that this contention is correct. Whenever proof regarding these matters was offered during the trial, it was met with the objection that partnership had not been proven and the court sustained such objection. It is not necessary to examine the assigned errors in detail, as practically all of them are based on the court's theory that no evidence of any other transactions was admissible until satisfactory proof of a copartnership had been produced. In its rulings upon this subject the court was in error. The contract of March 1, 1899, was set out in full in the complaint and an accounting was demanded. Under the contract in question, a trust relationship was created, and, if anything of value had been received by defendant, or in his behalf, pursuant to this agreement, there might, and probably would, arise a necessity for an accounting with the right of S. Morgan Smith, or his representative to demand it. It is true that the court found that Blaisdell had received nothing under the contract in question, but that was after the rulings by which evidence on that subject was excluded.

[2] The court found that the cause of action set out in the amended complaint was barred by the provisions of sections 337 and 339 of the Code of Civil Procedure. It is conceded that the original complaint was filed on July 20, 1903, although the record does not disclose the date. The complaint alleges that the contract was completed on July 21, 1899. This is not denied. Hence, if the action was begun on July 20, 1903, it is not barred. Code Civ. Proc. § 343.

We find no other alleged errors requiring attention.

The order denying defendant's motion for a new trial is reversed.

We concur: SHAW, J.; SLOSS, J.; ANGELLLOTTI, J.; LORIGAN, J.; HENSHAW, J.

15 Cal. App. 358

TITLE INS. & TRUST CO. et al. v. LUSK
et al. (Civ. 957.)

(Court of Appeal, Second District, California.
Feb. 11, 1911.)

1. EVIDENCE (§ 83*)—PRESUMPTION—PERFORMANCE OF OFFICIAL DUTY.

Where it is not shown when the trial was had in a proceeding to condemn lands for a street, or when the verdict was rendered, it will be presumed, under Street Law (St. 1903, c. 268) § 6, requiring such actions to be governed by the provisions of the Code of Civil Procedure, that the judgment was entered by the

clerk within 24 hours after rendition of the verdict as required by Code Civ. Proc. § 664.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

2. CONSTITUTIONAL LAW (§ 106*)—VESTED RIGHTS—REMEDIES—RIGHT TO DISCONTINUE.

The right given to a city by Street Law 1903 (St. 1903, c. 268) § 14, to discontinue condemnation proceedings without prejudice at any time before payment of compensation, is not a vested right, and Street Law 1909 (St. 1909, c. 684) § 11, providing that proceedings to condemn lands then pending should be thereafter continued under that law, and section 8, providing that condemnation proceedings may be abandoned up to the time of entry of the interlocutory judgment, are not invalid; such sections merely relating to remedies which are always within the control of the Legislature, provided a reasonable remedy is still left.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 106.*]

3. CONSTITUTIONAL LAW (§ 42*)—CONSTITUTIONAL QUESTIONS—WHO MAY RAISE.

Only those can question the validity of a statute who would be injured by its enforcement.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40; Dec. Dig. § 42.*]

4. CONSTITUTIONAL LAW (§ 106*)—VESTED RIGHTS—REMEDIES—RIGHT TO DISCONTINUE.

Where a city, which under Act 1903 (St. 1903, c. 268) § 14, had the right to discontinue without prejudice proceedings to condemn land for streets at any time before payment of compensation, had nine months after the passage of Act 1909 (St. 1909, c. 684) § 8, changing the limit for discontinuance to the time of entering interlocutory judgment, in which to discontinue, but entered such judgment without so doing, it cannot subsequently claim that the change in the statute was an unreasonable impairment of its remedy, and hence an unconstitutional interference with its vested rights.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 106.*]

5. EMINENT DOMAIN (§ 167*)—STREET WIDENING—STATUTES—EFFECT PENDING PROCEEDINGS.

Act April 21, 1909 (St. 1909, c. 684) § 8, amending Street Law 1903 (St. 1903, c. 268) § 14, by providing that proceedings for the condemnation of land for street purposes could be abandoned without prejudice only before entry of the interlocutory judgment, instead of at any time before payment of compensation, applies, under the express provisions of section 11 of the act of 1909, to proceedings pending when the amendment took effect.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 167.*]

6. MANDAMUS (§ 3*)—PUBLIC OFFICERS—STREET IMPROVEMENTS.

Under Code Civ. Proc. § 1085, providing that a writ of mandate may be issued to a corporation, board, etc., to compel performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station, such mandate may issue to a city council to compel it to proceed as expressly required by Street Law 1903 (St. 1903, c. 268) § 19, to pass upon and determine, as in their discretion and judgment is proper, the questions involved in the protests as to a street assessment and the orders with reference to its confirmation or modification, or the ordering of a new assessment in lieu of the original assessment filed, such action on the part of the city council being a duty resulting from an office and no plain,

speedy, and adequate remedy at law is open to petitioners.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 8-34; Dec. Dig. § 3.*]

7. STATUTES (§ 85*)—GENERAL AND SPECIAL LAWS—REGULATING CIVIL REMEDIES.

Nor is the act of 1909 (St. 1909, c. 684), regarding condemnation proceedings, in contravention of the Constitution, prohibiting special legislation, as the procedure may not be said to be special because it is peculiar to the character of the action with reference to which it is prescribed.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 85.*]

8. EMINENT DOMAIN (§ 246*)—RIGHT OF PLAINTIFF TO ABANDON PROCEEDINGS—STATUTES.

The right of a city to abandon condemnation proceedings for street purposes is not affected by Code Civ. Proc. § 581, subd. 2, authorizing dismissal of actions by either party on the written consent of the other, since Street Law 1903 (St. 1903, c. 268) § 14, as amended by Street Law 1909 (St. 1909, c. 684) § 8, is applicable to proceedings pending when it was enacted.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 638-643; Dec. Dig. § 246.*]

Petition by the Title Insurance & Trust Company and others against R. M. Lusk and others for writ of mandate directing the city council to proceed to confirm, correct, or modify an assessment presented to them or to order a new assessment. On demurrer to the petition. Demurrer overruled.

Thomas C. Ridgway and Hatch, Lloyd & Hurst, for petitioners. John W. Shenk, City Atty., and C. E. Haas, Deputy City Atty., for respondents. Ward Chapman, amicus curiæ.

ALLEN, P. J. It appears from the petition and affidavit filed that heretofore, in 1907, under the provisions of the street improvement act of 1903 (St. 1903, c. 268), the city council of Los Angeles duly adopted an ordinance declaring its intention to order the widening of Eighth street, between Main street and Central avenue; that said ordinance further designated the land necessary and convenient to be taken for such improvement and fixed the boundaries of the assessment district, within which was included the property benefited by such improvement; that this ordinance was approved and published, and was followed by a subsequent ordinance ordering the improvement to be made and directing the city attorney to bring an action in the name of the city of Los Angeles for the condemnation of the property described in said ordinance necessary to be taken for the improvement mentioned. The action was instituted by said city attorney on July 3, 1907, against those whose lands were to be taken for such improvement. It is not shown at what date the trial was had or verdict returned, but it does appear that on January 3, 1910, an interlocu-

tory judgment was entered in favor of the several defendants for the sums determined as damages which should be awarded the various defendants by reason of the taking of the land for the contemplated improvement.

[1] It will be presumed, in view of section 6 of the street law, to the effect that actions for the condemnation of property brought thereunder shall in all respects be subject to and governed by such provisions of the Code of Civil Procedure now existing or that may hereafter be adopted, as may be applicable thereto, except in the particulars otherwise provided for in this act, that the judgment was entered by the clerk within 24 hours after the rendition of the verdict, as provided by section 664 of the Code of Civil Procedure. It further appears that after the entry of said interlocutory judgment, to wit, on the 29th day of July, 1910, a diagram of said improvement and of the property within the assessment district described in the ordinance with the assessment, was filed with the clerk of the city council of the city of Los Angeles; that thereafter protests were filed against such assessment on the ground that the same was inequitable; that upon the hearing of such protests, to wit, on the 15th day of November, 1910, the same were sustained by the city council; but that the city council have ever since failed and refused and now fail and refuse to either confirm, modify, or correct said assessment, or to order a new assessment, or to take any of the proceedings specified in section 19 of the act of 1903 (St. 1903, c. 268), justifying their action upon the claim that they desire to abandon the proceedings, and pursuant thereto have directed that an ordinance be prepared abandoning the proceedings and directing that said ordinance be presented for passage. Respondents interpose a general demurrer to the petition.

[2] The proceedings set forth in the petition were instituted under the provisions of the street law of 1903, under section 14 of which act the right to abandon the proceedings by ordinance and cause a dismissal thereof without prejudice was given at any time prior to the payment of the compensation awarded to the defendants. Section 8 of the act of 1909, approved April 21, 1909 (St. 1909, c. 684), provides that the city council may at any time prior to the entry of interlocutory judgment abandon the proceedings by ordinance and cause said action to be dismissed without prejudice. Section 11 of the act of 1909 provides that any proceeding or action for any improvement, as provided for in the act, already commenced and pending at the time the act takes effect, under and by virtue of any ordinance of intention theretofore passed, shall, from the stage of any such proceeding or action already commenced and in progress at the time of the act taking effect, be continued under the provisions of that act. It was insisted

upon oral argument that section 11 is violative of the Constitution in that it impairs a right once vested. This section affects a remedy as distinguished from a right. "Remedies must always be under the control of the Legislature" (Cooley, Const. Lim. p. 381); and where a reasonable remedy is provided it is immaterial that it alters one previously existing.

[3] No one may question the constitutionality of a legislative act unless its enforcement would work an injury to the complaining party.

[4] Whatever may be the effect which should be given this section in cases where the remedy is shown to be unreasonably impaired, the city in the case at bar is not in position to insist upon its unreasonable character, for it is apparent from the record that nearly nine months elapsed between the passage of the act of 1909 and the entry of the interlocutory judgment, during all of which time it had notice of the limitation upon the remedy of abandonment and dismissal imposed by section 14. It cannot, therefore, be said that this section unreasonably impaired the remedy in the case under consideration, and this case is brought within the rule of *Terry v. Anderson*, 95 U. S. 628, 24 L. Ed. 365, and the other cases cited in *Tuttle v. Block*, 104 Cal. 449, 38 Pac. 109.

[5] It follows, then, that all proceedings connected with the improvement by the council originally ordered were, after April 21, 1909, controlled by the act of that date, which must be construed as limiting the right of dismissal and abandonment to the time of the entry of the interlocutory judgment. This being established, the city council possessed no right, even though the proceedings were instituted under the act of 1903, to abandon the same or direct a dismissal of the condemnation or other proceedings, after it had procured to be entered the interlocutory judgment.

[6] There remains, then, but one question, which relates to the right of this court to direct a city council to proceed, as by section 19 of the act they are required to do, in passing upon and determining, as in their discretion and judgment is proper, the questions involved in the protests as to the assessment and the orders with reference to its confirmation or modification, or the ordering of a new assessment in lieu of the original assessment filed. We are of opinion that such action upon the part of the city council is a duty resulting from an office, and that under section 1085 of the Code of Civil Procedure a mandate may be issued to compel the performance of an act which the law specially enjoins as a duty resulting from an office; and that no plain, speedy, and adequate remedy in the ordinary course of law is open to the petitioners.

[7] We are not in sympathy with the contention of respondents that the act of 1909 is in contravention of the Constitution, which

prohibits special legislation. The procedure may not be said to be special because it is peculiar to the character of the action with reference to which it is prescribed. *Clute v. Turner*, 157 Cal. 73, 106 Pac. 240; *People v. Henshaw*, 76 Cal. 436, 18 Pac. 413; *Hellman v. Shoulters*, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057.

[8] Nor are we of the opinion that subsection 2 of section 581 of the Code of Civil Procedure in any wise affects the question here involved. The street law by express terms limits the control of the provisions of the Code of Civil Procedure to such cases as are not specially provided for in the act, and we find in the act of 1909 an express provision, which limits the right of dismissal in condemnation proceedings, different from the right accorded the court in the dismissal of actions under section 581. We are of opinion, therefore, that the street act and its various provisions with reference to the procedure connected with the condemnation of property by municipalities for street purposes is constitutional, and that under such act no dismissal of the action or abandonment of the proceedings could be had after the entry of the interlocutory judgment; that the petition here presented presents facts sufficient to entitle petitioners to a writ directing the city council to proceed and confirm, correct, or modify the assessment presented to them, or order a new assessment, as in their judgment is proper in the premises.

We do not desire to be understood as passing upon any questions sought to be raised as to the regularity of the proceedings before the city council anterior to the entry of the interlocutory judgment. We have heretofore by an order denied the right of those affected by the improvement to intervene and raise such questions in this proceeding, upon the theory that, if any irregularities in the proceedings connected with the ordinances or orders as affecting the jurisdiction of the city council to order the improvement in fact exist, a remedy full and complete may be had by appropriate equitable action in the superior court, and that this proceeding is inappropriate for the determination of such questions.

An order will be entered overruling respondents' demurrer to the petition.

We concur: SHAW, J.; JAMES, J.

15 Cal. App. 448

RUSHTON et al. v. HANDLEY, City Clerk of City of Los Angeles. (Civ. 929.)

(Court of Appeal, Second District, California. Feb. 20, 1911.)

1. MUNICIPAL CORPORATIONS (§ 108*)—CHARTER—CONSTRUCTION—INITIATIVE AND REFERENDUM—PETITION.

City Charter of Los Angeles (Laws 1903, c. 6) § 198a, permitting amendments to an

initiative petition after the expiration of a certain number of days, in case the petition is found insufficient, is inapplicable to a petition to invoke a referendum with reference to an ordinance already passed, notwithstanding section 198b, providing therefor, declares that the petition shall be in all respects, etc., in accordance with the provisions of section 198a, and shall be examined and certified by the clerk in all respects as therein provided, since such provision refers solely to the form and substance and certification of the original petition.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 108.*]

2. MUNICIPAL CORPORATIONS (§ 108*)—CITY CHARTER—REFERENDUM PETITION—INSUFFICIENCY.

Under City Charter of Los Angeles (Laws 1903, c. 6) § 198b, providing for a referendum with reference to ordinances passed by the city council on a petition executed in the prescribed manner, where a referendum petition is not properly executed within 30 days after the final passage of the ordinance sought to be referred the ordinance becomes effective, and is not subject to further reference.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 108.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Mandamus, on petition of G. W. Rushton and others, against Lorin A. Handley, substituted for Harry J. Lelande, City Clerk of Los Angeles. From a judgment discharging an alternative writ, relators appeal. Affirmed.

Milton K. Young, and John I. Stafford, for appellants. John W. Shenk, City Atty., and Emmet H. Wilson, Chief Deputy, for respondents.

ALLEN, P. J. [1] The petition, the basis for the issuance of the alternative writ, discloses that the freeholders' charter of Los Angeles city contains certain provisions with reference to the initiative and referendum; the first thereof having reference to the initiative is found in section 198a (Laws 1903, c. 6), which provides: "The signatures to the petition need not all be appended to one paper, but each signer shall add to his signature his place of residence, giving the street and number. *One of the signers of each such paper* shall make oath before an officer competent to administer oaths, that the statements therein made are true, and that each signature to the paper appended is the genuine signature of the person whose name purports to be thereunto subscribed. Within ten days from the date of filing such petition the city clerk shall examine and from the great register ascertain whether or not said petition is signed by the requisite number of qualified electors, * * * and he shall attach to said petition his certificate showing the result of said examination. If, by the clerk's certificate, the petition is shown to be insufficient, it may be amended within ten days from the date of such certificate. The clerk shall, within ten days

after such amendment, make like examination of the amended petition, and if his certificate shall show the same to be insufficient, it shall be returned to the person filing the same, without prejudice, however, to the filing of a new petition to the same effect."

Another provision of the charter, section 198b, is with reference to the referendum. This provides, with reference to the character of ordinances under consideration: "No ordinance passed by the city council * * * shall go into effect before thirty days from the time of its final passage and its approval by the mayor, and if during said thirty days a petition signed by electors of the city equal in number to at least seven per cent. of the entire vote cast for all candidates for mayor at the last preceding general election at which a mayor was elected, protesting against the passage of such ordinance, be presented to the council, the same shall thereupon be suspended from going into operation, and it shall be the duty of the council to reconsider such ordinance, and if the same is not entirely repealed, the council shall submit the ordinance, as is provided in section 198a of this charter, to the vote of the electors of the city. * * * Said petition shall be in all respects in accordance with the provisions of said section 198a, except as to the percentage of signers, and be examined and certified by the clerk in all respects as is therein provided."

Further that on April 22, 1910, a certain ordinance, having theretofore been passed by the city council, was approved by the mayor. That on May 20, 1910, plaintiff and others filed with the defendant, city clerk of Los Angeles, certain separate papers, the aggregate thereof constituting a petition, protesting against the passage of such ordinance; that such petition in the aggregate contained the percentage of electors required by section 198b, but the separate papers, or many of them, so filed as a petition, were not verified by one of the signers of such separate paper; that by reason thereof the clerk, on May 26, 1910, certified to the council the insufficiency of the petition. Thereafter, and after the lapse of more than 30 days from the approval of the ordinance, plaintiffs and others who had originally signed said papers asked to amend the same by adding thereto the name of the party verifying each separate paper, so as to make such party a petitioner in the separate paper so by him verified. This was denied, and thereafter, on June 4, 1910, plaintiffs presented to the clerk other papers containing the names of electors, each of which papers was verified by a signer thereof; but upon examination the clerk found that these signatures were in duplicate, that many of the persons verifying what was termed the "amended papers" were signers upon the original papers on file constituting the first petition, and for that reason the clerk declared the amended petition insufficient. Plaintiffs therefore

pray for a writ of mandate, directing the city clerk to allow the persons who filed written demands therefor to amend said petition by signing their names, streets, and numbers to the body thereof, and that the clerk be forthwith required to compare the names annexed to all the petitions filed with him with the great register of Los Angeles county, to ascertain whether or not said petition is signed by the requisite number of qualified electors, and, if so found sufficient, that he submit same to the city council without delay.

The proper construction to be given section 198b, and with reference to that portion thereof which provides, "said petition shall be in all respects in accordance with the provisions of said section 198a, * * * and be examined and certified by the clerk in all respects as is therein provided," presents the question for determination upon this appeal. It is insisted by appellants that this last-quoted portion of section 198b authorizes the amendment of a petition under that section in the manner and to the extent provided by section 198a. We are of opinion that such was not the intent of the framers of the charter, or of the electors who adopted the same; that the words "said petition shall be in all respects," etc., "and be examined and certified," etc., refer solely to the original petition provided for by section 198a, and refer solely to the form, substance, and certification of such original petition; that it is obvious that that portion of section 198a permitting amendments after 30 days cannot and does not apply to a petition which seeks to invoke the referendum.

[2] This is apparent from the provision of the section generally, to the effect that the ordinance passed shall not go into effect before 30 days, and that 30 days is the time given within which the electors shall file their protests, and upon the filing of which protests in the manner and form prescribed, and in no other event, is the ordinance suspended from operation beyond the 30 days. It is plain that, if the requisite petition constituting the protests be not filed within 30 days, the ordinance becomes effective, and, being so effective, the referendum no longer applies to it, and if the elector desires relief from its operation such relief must be worked out through the initiative section before referred to by a repeal of such ordinance, brought about by the manner therein provided. Otherwise an insignificant number of voters might present a protest to the passage of an ordinance on the twenty-ninth day after its approval, and the insufficient character thereof being apparent, they could then file other and additional protests, each of which would have to be examined and certified, and, if finally found insufficient, they should be returned to the protestants, without prejudice to the filing of a new petition to the same effect. In other words, by these obstructive methods a small minority

of the electors might prevent an ordinance from becoming operative for a long period of time after the expiration of the time provided by the charter when the same should become operative. The same reasons do not apply to the initiative; that provides for the inauguration of new and independent legislation. No rights are affected, and no steps required to be taken, until a petition of the requisite kind and character is on file. Interested parties might indulge in petitions without number, amend without limitation, commence and recommence proceedings under section 198a, without disturbing public affairs in the least. But such would not be the effect, were the clause with reference to amendment to be construed as applying to the referendum.

It is certainly beyond question that the original petition filed in this instance was not in the manner and form prescribed by the charter. Each separate paper was not verified by one of the signers thereof, which being true it was of no effect as a protest under this section of the charter. The demand to amend is a tacit admission of the insufficiency of the original; otherwise no reason suggests itself why a sufficient paper should be amended, or that a court should by its order compel consent thereto. There being, then, on file no protest or petition as by the charter provided, at the expiration of 30 days from the approval of the ordinance, the ordinance became effective and operative, and no amendment and no steps of any kind or character thereafter taken by the electors, under section 198b, could disturb the operative character of this ordinance so in effect. We think the court below properly determined that the original petition was insufficient, and that the clerk was warranted in so certifying. Being so insufficient, the ordinance taking effect 30 days after its approval, the clerk had no duty to perform in connection with so-called amendments of original petitions thereafter filed with reference to such ordinance, and, that the ordinance having taken effect within the time provided by the charter, no authority or jurisdiction reposed in the city council to order an election under section 198b, through which the electors might annul the operative ordinance.

Judgment affirmed.

We concur: JAMES, J.; SHAW, J.

15 Cal. App. 444

MERCHANTS' NAT. UNION v. BUISSE-
RET et al. (Civ. 918.)

(Court of Appeal, Second District, California.
Feb. 18, 1911.)

1. PROCESS (§ 96*)—ORDER OF PUBLICATION—
AFFIDAVITS.

Where affidavits for an order for the publication of summons showed that search had been made for defendant within the city of L.

and at and about his last place of residence, that members of his family had informed persons attempting to make service that defendant was not at home, that he was not in the state, and that they would not disclose where he was, they sufficiently showed that defendant after due diligence could not be found within the state, and authorized an order for service by publication.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 108-120; Dec. Dig. § 96.*]

2. JUDGMENT (§ 17*)—PERSONAL JUDGMENT—
NONRESIDENT.

Courts have no jurisdiction to render a money judgment against a nonresident on service by publication, unless property within the jurisdiction is held under a valid attachment at the time of the rendition of the judgment, in which case the judgment is considered valid as a judgment in rem in so far as it may be satisfied out of the property so held.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 25-33; Dec. Dig. § 17.*]

3. ATTACHMENT (§ 117*)—AFFIDAVIT—REQUI-
SITES.

Where an attachment affidavit recited that the "judgment" was not sought to hinder, delay, or defraud any creditor of the defendant, but did not state that the "attachment" was not sought for that purpose, as required by Code Civ. Proc. § 538, it was insufficient to sustain the writ.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 241; Dec. Dig. § 117.*]

4. ATTACHMENT (§ 141*)—ISSUANCE—DUTY OF
CLERK.

While the clerk in issuing an attachment performs but a ministerial duty, he has no authority to issue the writ where the affidavit fails to state the facts required by statute on which the writ exclusively depends.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 141.*]

Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by the Merchants' National Union against A. P. Buisseret and another. From orders denying motions made by defendant Buisseret to vacate a default judgment and to dissolve an attachment, he appeals. Reversed.

Walter J. Horgan, for appellant. D. Joseph Coyne, for respondent.

JAMES, J. Defendant Buisseret appeals from orders of the superior court denying motions made by him to vacate a default judgment, and to dissolve an attachment. The action was brought to recover the sum of \$5,241.04 from defendants for goods, wares, and merchandise sold to them. By the bill of exceptions it appears that both of the motions mentioned were presented at the same time. Among the grounds upon which the motions were made it was specified that the court had obtained no jurisdiction over the defendant entitling it to render judgment against him, and that the affidavit upon which the writ of attachment was issued was insufficient to authorize the issuance of such writ. It was specified as a further objection to the validity of the judg-

ment that the service of summons was made by publication thereof, and that the facts stated in the affidavit upon which the order for publication was based did not make out a sufficient case authorizing the summons to be so served. The files and records of the case were used on the hearing of the motions, including the affidavit on attachment, and the writ.

[1] The affidavits, upon which the order for publication of summons was based, showed that search had been made for defendant Buisseret in the city of Los Angeles and at and about his last place of residence, that members of defendant's family had informed persons who were attempting to secure service of summons that Buisseret was not at home, that he was not in the state, and that the informants refused to tell where the said defendant was. As a part of the showing, affidavits of four deputy constables who had attempted to make personal service of summons upon defendant were submitted. The facts shown in the affidavits for publication of summons were sufficient to justify the court in finding, as it did, that defendant could not after due diligence be found within the state, and to support the order that the service of summons be made upon him by publication. *Rue v. Quinn*, 137 Cal. 652, 66 Pac. 216, 70 Pac. 732; *People v. Wrin*, 143 Cal. 11, 76 Pac. 646.

[2] The judgment entered against defendant was in form a personal one for the recovery of the amount of money sued for. Assuming that service by publication of summons against a defendant who is a resident of this state may authorize the entry of a personal judgment against him, the affidavits for publication of summons used by plaintiff here, and the order of court based thereon, made it appear that the defendant was not within the state of California at the time the order for publication was made, and that he was a nonresident of the state. *De La Montanya v. De La Montanya*, 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165; *Boring v. Penniman*, 134 Cal. 514, 66 Pac. 739. There was no jurisdiction under the showing made to authorize the entry of a purely personal judgment against Buisseret. Such a judgment could have no vitality or effect at all, except where it appeared that the plaintiff held property under a valid attachment at the time of its rendition. If it was made so to appear, the judgment would be considered as one in rem in so far as it might be satisfied out of the property so held under attachment. There is clearly no authority for the entry of a money judgment against a nonresident upon service of summons by publication, where there is not shown to be property of such nonresident within this state, which the court has jurisdiction to cause its judgment and

decrees to operate upon. *Anderson v. Goff*, 72 Cal. 72, 13 Pac. 73, 1 Am. St. Rep. 34; *Bland v. Paymaster Min. Co.*, 95 Cal. 530, 30 Pac. 765, 29 Am. St. Rep. 149; *Brown v. Campbell*, 100 Cal. 641, 35 Pac. 433, 38 Am. St. Rep. 314; *De La Montanya v. De La Montanya*, supra; *Boring v. Penniman*, supra.

[3] Defendant was entitled to have his motion to vacate the judgment granted if it appeared that no valid attachment had been issued, and property levied upon thereunder, at the time the judgment was entered. The affidavit on attachment furnished by the plaintiff failed to state, as required by the statute, that the "attachment" was not sought to "hinder, delay, or defraud any creditor or creditors of defendant." Code Civ. Proc. § 538. The affidavit did recite that the "judgment was not sought * * * to hinder, delay, or defraud any creditor or creditors of said defendant." The affidavit was, therefore, fatally defective and was wholly insufficient to authorize the issuance of the writ of attachment. "The right to an attachment, and the mode of procedure for obtaining it, are the creatures of statute, depending for their existence and regularity upon the terms of the Code." *Kohler v. Agassiz*, 99 Cal. 12, 33 Pac. 742.

[4] While it is true that the clerk performs but a ministerial duty in issuing the writ of attachment, he has no authority to issue such writ where there is no statement in the affidavit of the facts plainly required by the statute to be set forth therein. *McCusker v. Walker*, 77 Cal. 212, 19 Pac. 382.

As no valid attachment had been levied against property of defendant at the time the judgment was entered, and this fact was made to appear by the records and files of the court, defendant Buisseret was entitled to have his motion to set aside the judgment granted; and also his motion to vacate and dissolve the attachment.

The orders are reversed.

We concur: ALLEN, P. J.; SHAW, J.

15 Cal. App. 347

JOHN M. C. MARBLE CO. v. MERCHANTS'
NAT. BANK OF LOS ANGELES.
(Civ. 868.)

(Court of Appeal, Second District, California.
Feb. 10, 1911. On Petition for Rehearing,
March 10, 1911.)

1. BANKS AND BANKING (§ 140*)—ASSIGNMENTS (§ 49*)—CHECKS BY DEPOSITOR—RIGHTS OF HOLDER.

Under Civ. Code, §§ 3254, 3255, declaring that a check is a bill of exchange subject to the provisions affecting bills of exchange, the drawing of a check by a depositor in a bank is not an assignment of the deposit or any part thereof, and the holder of the check is a mere bearer of an order drawn by the depositor, so the bank failing to pay the check, though hav-

ing sufficient funds, is liable only to the depositor.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 380-397; Dec. Dig. § 140;* Assignments, Cent. Dig. §§ 89-94; Dec. Dig. § 49.*]

2. BANKS AND BANKING (§ 134*)—RIGHTS AS BETWEEN BANK AND DEPOSITOR—COUNTERCLAIM.

Where one suing a depositor in a bank procures the service of an attachment on the bank, the bank must withhold for the satisfaction of plaintiff's demand sufficient money then owed the depositor if there is such money, but in ascertaining the amount it may deduct any matured indebtedness owing to it by the depositor which it could set up by way of counterclaim in case the depositor had sued for his deposit.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 353-374; Dec. Dig. § 134.*]

3. GARNISHMENT (§ 105*)—RIGHTS OF PARTIES.

An attaching creditor merely acquires the rights of the debtor, and a plaintiff in garnishment is in relation to the garnishee substituted merely to the rights of his own debtor, and he may enforce no demand against the garnishee which the debtor if suing could not enforce.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 216; Dec. Dig. § 105.*]

4. BANKS AND BANKING (§ 134*)—RELATION OF BANK TO DEPOSITOR—SET-OFF—STATUTES.

Under Code Civ. Proc. § 726, providing that there can be but one action for the recovery of any debt secured by mortgage, the right of a bank to set-off a matured indebtedness against the claim of a depositor or his creditor does not permit of an indebtedness secured by a mortgage being so used as an off-set.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 353-374; Dec. Dig. § 134.*]

5. BANKS AND BANKING (§ 134*)—RELATION OF BANK TO DEPOSITOR—SET-OFF—STATUTES—"PERSONAL PROPERTY."

An assignment by one of several purchasers of real estate conveyed to a trustee with directions to sell and divide the proceeds among the several purchasers of his interest in the trust agreement to a bank in which he is depositor as security for a note is an assignment by way of a pledge of a chose in action constituting personal property within Code Civ. Proc. § 17, and the bank notwithstanding section 726 may off-set its matured claim on the note against the deposit without proceeding to collect the security.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 353-374; Dec. Dig. § 134.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5346-5358; vol. 8, p. 7753.]

On Petition for Rehearing.

6. TRUSTS (§ 65*)—RESULTING TRUSTS.

Where several persons contributed to the purchase of real estate, the title to which was conveyed to a trustee with directions to sell and divide the proceeds among the purchasers, a resulting trust arose in favor of the purchasers on the invalidity of the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 94; Dec. Dig. § 65.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by the John M. C. Marble Company against the Merchants' National Bank of

Los Angeles. From a judgment granting insufficient relief, plaintiff appeals. Modified and affirmed.

Oscar A. Trippet, for appellant. O'Melveny, Millikin & Stevens and Horace S. Wilson, for respondent.

JAMES, J. This appeal is taken from a judgment by which plaintiff was awarded certain relief, and which provided that neither party recover costs. The matters sought to be reviewed are presented on the judgment roll alone.

As found by the trial court, the facts are as follows: On February 8, 1909, one John T. Donnell delivered to plaintiff his check drawn upon the defendant bank for the sum of \$2,685. The check was presented for payment on the following morning at the bank and payment was refused, the bank giving as a reason for the refusal that there was not sufficient funds to the credit of Donnell to cover the required amount. Thereupon plaintiff brought suit against Donnell, and had a writ of attachment issued therein on February 13, 1909, which writ he caused to be served upon defendant. Judgment was recovered on March 3, 1909, against Donnell in favor of plaintiff for the sum of \$2,697.02 and costs. Upon being served with the writ of attachment, defendant answered that it had in its possession the sum of \$1,175.92 belonging to Donnell and subsequently delivered this amount of money to the sheriff, who applied it on the execution which had been issued to secure satisfaction of plaintiff's judgment. Under proceedings supplemental to execution, plaintiff caused the defendant to answer further in court respecting the amount of Donnell's deposit as it stood at the time of the presentation of the check and the serving of the writ of attachment. Leave was thereafter obtained to bring suit against defendant to determine whether or not a greater sum should not have been accounted for by the latter. By the further findings of fact it appears that on the morning of February 9, 1909, there was credited to Donnell on general deposit with defendant the sum of \$2,839.02; that at that time Donnell was indebted to the bank on a promissory note then due in the sum of \$1,573.80; that at about the hour of 8:30 a. m. of February 9th the bank applied enough of Donnell's deposit credit to pay the note indebtedness so that when plaintiff's check was presented later in the day the deposit was insufficient to cover the amount required to cash it; that later, and before the writ of attachment was served, several checks for smaller amounts were drawn against the deposit by Donnell, so that, when the attachment was levied, there remained only the sum of \$1,175.92 to Donnell's credit.

Payment of the \$1,500 note had been secured by the assignment to defendant by

Donnell of an interest in a certain trust agreement, which will be noticed more particularly hereinafter. It is the contention of plaintiff that the application of the credit of Donnell from his general deposit, in extinguishment of the debt due on the promissory note, was unauthorized, and that it did not operate to defeat plaintiff's claim to sufficient of the deposit to satisfy its demand. It seems very clear that, if plaintiff acquired any right of action against the bank, it acquired such right only after service of the writ of attachment.

[1] A check holder is a mere bearer of an order drawn by the depositor. The making and delivery of a check does not work as an assignment of the deposit fund or any part of it, and is not binding on the bank against which it is drawn until accepted by it. The modern authorities are generally to the effect that, even though a bank refuses payment, where the deposit is sufficient to cover the amount of the face of the check, it becomes charged with no liability to the bearer of the check. The bank is in such a case responsible to the depositor only and may be sued by him for damages. In brief, a bank is responsible and accountable to its depositor, and the depositor, in turn, to the persons to whom he issues his checks. In the case of *Laclede Bank v. Schuler*, 120 U. S. 511, 7 Sup. Ct. 644, 30 L. Ed. 704, the Supreme Court of the United States has said: "The question of how far and under what circumstances a check of a depositor in a bank will be considered an equitable assignment to the payee of the check of all or any portion of the funds or deposits to the credit of the drawer in the bank is one which has been very much considered of late years in the courts, and about which there is not a unanimity of opinion. In this court it is very well settled that such a check, unless accepted by the bank, will not sustain an action at law by the drawee against the bank, as there is no privity of contract between them." See, also, *Zane on Banks and Banking*, § 146. By Civil Code, § 3254, a check is declared to be a bill of exchange, and by section 3255 of the same Code it is made subject to all of the provisions affecting bills of exchange, with certain exceptions which are immaterial to any question presented in this case. The rights of the holder of a bill of exchange in case of non-payment on presentment are as have just been defined. We conclude, then, preliminarily, that, even though there was sufficient money to pay plaintiff's check to the credit of Donnell at the time the check was presented, no right of action against the bank accrued in favor of plaintiff.

[2] When the writ of attachment was served, however, its effect was to require defendant bank to withhold for satisfaction of plaintiff's demand sufficient, if there was such, of any money it then owed Donnell. In ascertaining this amount, it would be the

right of the bank to first deduct any matured indebtedness owing to it by Donnell, which it would have been entitled to set up by way of counterclaim, in the event Donnell had sued to recover the sum of his deposit. *Zane on Banks and Banking*, § 140; *McKean v. German-Am. Savings Bank*, 118 Cal. 340, 50 Pac. 656.

[3] An attaching creditor is clothed with no greater rights than the debtor himself. He stands in the shoes of the debtor, and any offset which might be urged against the debtor by the garnishee is equally available against the attaching creditor. "The suing out of a process in garnishment does not in any manner change the rights of the parties to the proceeding further than to transfer the right of the defendant to his creditor to proceed against the garnishee for the collection of the debt due to the principal defendant. It is a rule of universal application that the plaintiff in garnishment is, in his relation to the garnishee, substituted merely to the rights of his own debtor, and can enforce no demand against the garnishee which the debtor himself, if suing, would not be entitled to recover. * * * Another effect of this rule is that the plaintiff is liable to be met by the garnishee on his own behalf with the same set-offs and other defenses that the garnishee might have interposed had an action been brought against him by his own creditor, the principal defendant in the garnishment proceedings." *Shinn on Attachment*, § 487; *Drake on Attachment*, § 536; *Bolles on Modern Law of Banking*, p. 741; *Schuler v. Israel*, 120 U. S. 506, 7 Sup. Ct. 648, 30 L. Ed. 707.

[4] The right of a bank to set off a matured indebtedness against the claim of its depositor or his creditor does not, however, permit of an indebtedness secured by a mortgage being so used as an offset. Section 726 of the Code of Civil Procedure provides: "There can be but one action for the recovery of any debt, or the enforcement of any right, secured by mortgage upon real or personal property."

[5] It is the contention of appellant that the assignment to defendant by Donnell of his interest in the trust agreement was an assignment of an interest in real property and constituted a mortgaging thereof. Certain real property had been transferred to a trustee by Donnell and eight others who had all contributed toward its purchase. The trustee took title with directions to sell and dispose of the property and divide the proceeds among the several purchasers, including Donnell, who was to be awarded an eleven one-hundredths share of such proceeds. Donnell when he assigned to the bank as security for the payment of the \$1,500 note his interest in this agreement assigned merely a chose in action, an interest in a fund of money to be realized in the future by the sale of real property. By the making of the trust agreement he had converted any un-

divided interest in the real property which he possessed into a right only to receive money in lieu thereof, and this right was undoubtedly personal property. "The words 'personal property' include money, goods, chattels, things in action, and evidences of debt." Section 17, Code Civ. Proc. This property was given as security by Donnell to the bank was by way of a pledge and not as a mortgage. As a pledgee, defendant would have the right to offset its matured claim on the \$1,500 note against Donnell's deposit without proceeding to collect on the security. "The pledgee may recover the amount of his debt from the debtor by an independent suit without foreclosing the pledge, whereas the mortgagee can maintain but one action for the recovery of the debt, and that must be an action of foreclosure." *Commercial Savings Bank v. Hornberger*, 140 Cal. 19, 73 Pac. 625. After applying sufficient money from Donnell's deposit to satisfy the \$1,500 note, the defendant had in its possession the trust agreement and assignment thereof. These documents the trial court by its judgment directed should be delivered to plaintiff, when its judgment should have become final. Plaintiff sought by its action to recover a money judgment against defendant, and, while it may be that the judgment as entered awards more and different relief than plaintiff was entitled to under its complaint, plaintiff can scarcely complain of this fact. Assuming that the judgment was a proper one to be entered, there would seem, however, to be no authority for the condition placed upon it, to wit, that the recovery be had of the documents mentioned only when the judgment should have become final.

It is ordered that the judgment be modified by striking therefrom the words "upon this judgment becoming final." As so modified, the judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

On Petition for Rehearing.

PER CURIAM. The petition of appellant for a rehearing is denied. The question as to whether or not the trust attempted to be created by Donnell and others was valid, we did not deem material to a decision of this case. [6] Of course, if the declaration of trust was invalid under the conveyance to the trustee, a resulting trust would have arisen in favor of Donnell and his associates who had contributed the purchase price of the real property; and, in that event, they might have demanded a reconveyance of their respective interests. The assignment to the bank did not purport to convey any interest in real property; it was not appropriate in form so to do, and the intent was clearly to the contrary; it was plainly an assignment of the right to share in the pro-

ceeds of the sale of the property, if the same was sold, and nothing more; the bank made no other claim; there was no attempt to mortgage the interest of Donnell in the real property. As was said in the opinion filed, the assignment was an assignment of an interest in personal property given by way of a pledge and not as a mortgage.

15 Cal. App. 459

PATTON v. KLEMMER. (Civ. 809.)

(Court of Appeal, Third District, California.
Feb. 23, 1911.)

1. ASSAULT AND BATTERY (§ 35*)—CIVIL LIABILITY — ACTIONS — EVIDENCE—SUFFICIENCY.

In an action to recover damages for an assault, evidence held to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 51; Dec. Dig. § 35.*]

2. APPEAL AND ERROR (§ 699*)—RECORD—INSTRUCTIONS—REQUESTS FOR INSTRUCTIONS.

The refusal of the trial court to give requested instructions will not be considered where the record, while showing that some instructions were given, does not show how many, or on what subjects, or upon what phases of the case they were given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2928-2930; Dec. Dig. § 699.*]

Appeal from Superior Court, Glenn County; John F. Ellison, Judge.

Action by John A. Patton against Lenus J. Klemmer. Judgment for plaintiff, and defendant appeals. Affirmed.

Seth Millington and W. T. Belieu, for appellant. F. H. Dam, for respondent.

CHIPMAN, P. J. This is an action to recover damages for an assault by defendant upon the person of plaintiff. The cause was tried by a jury and plaintiff had the verdict. Defendant appeals from the judgment entered upon the verdict, and from the order denying his motion for a new trial.

There is abundant evidence of the assault and of its permanent and injurious effects upon plaintiff's physical condition and to some extent upon his mental faculties. Defendant does not now contend that he did not assault plaintiff. He alleged in his answer and attempted to prove at the trial that plaintiff insulted him, "and by language and immediate demonstrations of force threatened an assault upon defendant," and that "for his proper protection and defense, and for no other reason, used such force and means as was necessary, and no more, to repel the assault which he reasonably apprehended was imminent and about to be made upon him by plaintiff." Defendant also alleged in his answer that he "delivered unto plaintiff certain sums of money, the same being for disputed rent, medical services, and all and singular the matters and things in controver-

sy between plaintiff and defendant; that defendant [doubtless meaning plaintiff] accepted said payments in full satisfaction and discharge of all claims and demands whatsoever against defendant, and particularly of the demand set up in the complaint herein."

[1] The evidence, without conflict, showed that defendant assaulted plaintiff without himself being assaulted. Upon the issue presented by the answer, that plaintiff used vile language towards defendant and threatened an assault upon him, the evidence is conflicting, as was also the evidence upon the issue, presented by the answer, that plaintiff accepted payments from defendant in satisfaction of any demands arising out of the assault. These issues having been fairly resolved by the jury and there having been evidence sufficient to justify their conclusion, this court is without power to interfere.

[2] Defendant complains that certain three instructions, requested by him to be given the jury, were refused. It appears from the record that instructions were given the jury by the court, but how many or upon what subjects, or upon what phases of the case does not appear, for they are not in the record. All that the record shows is that the court refused to give the instructions requested by plaintiff.

It is well settled that the refusal of the trial court to give certain instructions will not be considered by this court where the record fails to give all the instructions submitted to the jury, or does not show that the instructions refused were not substantially embodied in those given. *Buelna v. Ryan*, 139 Cal. 630, 634, 73 Pac. 466.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

15 Cal. App. 440

GODDARD et al. v. EMERSON, Sheriff.
(Civ. 813.)

(Court of Appeal, Third District, California.
Feb. 18, 1911. Rehearing Denied by
Supreme Court April 19, 1911.)

PUBLIC LANDS (§ 144*)—SCHOOL LANDS—REDEMPTION FROM JUDGMENT OF FORECLOSURE.

The right to redeem a certificate of purchase of school land from a judgment of foreclosure for default in interest is governed by St. 1881, c. 55, giving 12 months after the foreclosure in which to redeem, and not by Pol. Code, §§ 3550, 3551, requiring the district attorney to file copies of the judgment 20 days after the entry thereof, and authorizing the holder of the certificate of purchase to pay, at any time before the filing, the amount due and the costs, and, whether the district attorney discharges his duty before or after the expiration of 20 days from entry of judgment, the purchaser has 12 months from the entry within which to redeem.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 144.*]

Appeal from Superior Court, Lassen County; F. D. Burroughs, Judge.

Action by Louise B. Goddard and others against C. E. Emerson, as Sheriff of Lassen County. From a judgment for defendant, plaintiffs appeal. Affirmed.

Pardee & Pardee, for appellants. Rankin & Julian, for respondent.

CHIPMAN, P. J. This is an action to compel the defendant, by the writ of mandamus, to receive payment, by way of redemption, of the amount necessary to redeem a certain certificate of purchase for school land from a judgment of foreclosure. The trial court sustained a general demurrer to the complaint, and entered judgment for defendant, and plaintiffs appeal from said judgment.

It appears from the complaint that plaintiffs are heirs at law of one Clark L. Goddard, to whom, on July 15, 1904, the state issued a certificate of purchase of certain school land, situated in Lassen county, which certificate showed payment of 20 per cent. of the purchase price and legal interest to January 1, 1905; that in the month of —, 1907, the state, by the district attorney of said county, commenced an action to foreclose and annul the said certificate of purchase because of default in the payment of interest then due for the years 1905, 1906, and 1907, upon the unpaid balance of the said purchase price of said land; that on June 9, 1908, a judgment was given and made in said action against said Clark L. Goddard, of which a copy was filed in the office of the county recorder of said county on June 10, 1908, and another copy thereof was filed in the office of the register of the state land office on or about June 17, 1908; that no other or any certified copies of said judgment were ever or at any time filed in said recorder's or said register's office; that on December 29, 1909, plaintiffs tendered and offered to pay to defendant, by way of redemption of said certificate of purchase, under the provision of section 3551 of the Political Code, the sum of \$66.05, being the amount of said judgment and costs in said action and interest accruing thereon, and "then offered to pay said sheriff the full amount of all interest, costs, penalties, and claims of every kind which were then payable for the purpose of redeeming said certificate of purchase, and restoring and having said judgment vacated and said action dismissed, but said defendant refused to accept said payment, or to accept any payment by way of redemption, or to allow said certificate of purchase to be redeemed."

The validity of the judgment, as entered June 9, 1908, is not disputed. The question now presented arises out of what is claimed to have been a premature filing of the copies of the judgment in the recorder's and register's office. The filing was made in the recorder's office one day after the entry of

the judgment and in the register's office eight days after the judgment was entered. The statute law, as found in the Political Code, is as follows:

"Sec. 3550. Twenty days after the entry of judgment the district attorney must file in the office of the register, and in the recorder's office of the county in which the land is situated, certified copies thereof.

"Sec. 3351. The holder of the certificate of purchase may, at any time before such filing, pay to the sheriff the amount due the state, and the costs of suit that have accrued up to the time of payment; whereupon the district attorney must dismiss the suit or vacate the judgment, and the purchaser or holder of the certificate of purchase is restored to his rights in the premises."

The provisions relating to proceedings against delinquent purchasers of state land are found in title 8, c. 1, art. 6, §§ 3546 to 3556, of the Political Code, and appear to be a codification of parts of the act of March 28, 1868. St. 1868, p. 507. Section 66 of that act provided that: "When a decree shall have been obtained, and within twenty days after the entering up of said decree, the district attorney shall cause a certified copy of said decree to be filed in the office of the register of the state land office and another certified copy in the recorder's office of the county in which the land is situate. The holder of the certificate of purchase may, at any time before the expiration of the twenty days provided for filing a certified copy * * * pay to the sheriff," etc.; the provision being much the same as in section 3551 of the Political Code, supra. Section 66 of the act of 1868 is carried into the Political Code and made the subject of the two sections, supra.

On March 7, 1881 (St. 1881, p. 65), the Legislature passed an "act to enable purchasers of state lands to redeem the same, where their title has been or may hereafter be foreclosed for nonpayment of interest." It reads:

"Section 1. In all cases where the title of purchasers of land from the state has been foreclosed, or attempted to be foreclosed, for non-payment of interest, said purchasers, their executors, administrators, or successors in interest shall have, twelve months after said foreclosures are or have been completed, within which to redeem such land by paying to the county treasurer, for the benefit of the fund, or parties entitled thereto, all delinquent interest, and interest that would have accrued in case there had been no foreclosure; also all costs of foreclosure to be paid to the fund, or the parties who paid said costs. When said payments are made, and indorsed on the certificate of purchase, specifying the amount paid as interest and for costs, and duly reported to the register of the land of-

fice, the annulments shall be canceled by said officer, and the rights of the purchasers shall thereby be fully restored."

The act of 1881 seems not to interfere with or change the duty of the district attorney in the requirement of section 3550 to file copies of the decree as there directed, but it does appear to change and enlarge the right of redemption by the holder of the certificate of purchase. The right under the act of 1881 may be exercised at any time within 12 months "after said foreclosures are or have been completed," which would be upon the entry of judgment. In the case of *Marshall et al. v. Farmers' Bank of Fresno*, 115 Cal. 330, 42 Pac. 418, 47 Pac. 52, the copies "were filed within 20 days after the entry of the judgment" (Pol. Code, § 3550), and redemption was "before the expiration of a year from the entry of the judgment," under the act of 1881. The case, however, turned upon the conclusiveness of the patent thereupon issued, and did not determine the question here. It does, inferentially, nevertheless, seem to recognize the force of the act of 1881, as superseding the provisions of section 3551 of the Political Code. It seems to us that, in view of the later act, the right to redeem is no longer restricted to the time or conditions mentioned in section 3551, but is derived from the act of 1881, and is no longer to be governed by the filing or failure to file copies of the decree as provided in section 3550. A duty is by that section still cast upon the district attorney, and, whether he discharges it before or after the expiration of 20 days from the entry of the decree, the purchaser has 12 months, and no longer, from the completion of the foreclosure—i. e., the entry of the decree—within which to redeem. The act of 1881 changes the rule which would govern if the right of redemption depended wholly upon the two Code sections cited. Appellant did not offer to redeem until 18 months after the entry of the decree. This was too late.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

15 Cal. App. 453

SCOTT v. MONTE CRISTO OIL & DEVELOPMENT CO. (Civ. 889.)

(Court of Appeal, Second District, California. Feb. 23, 1911.)

1. CORPORATIONS (§ 406*)—AUTHORITY OF PRESIDENT.

Where the president of a corporation had general charge of the corporation's business in a county other than that in which its office was located, and, on a servant being injured, the president directed that medical treatment and nursing be furnished him at the expense of the corporation, which paid the expense of taking him from the corporation's works to a private hospital, where he was cared for, such facts, in the absence of anything to the con-

trary, were sufficient to justify an inference that the president acted within the scope of his authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1611-1614; Dec. Dig. § 406.*]

2. PHYSICIANS AND SURGEONS (§ 13*)—EMPLOYMENT—CONTRACT—CONSIDERATION.

The moral obligation resting on an employer to furnish assistance and care to an injured employé, though the employer was not responsible for the injury, constituted a sufficient consideration for the agreement of the employer's president to pay a physician for professional services rendered such servant.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 18-20; Dec. Dig. § 13.*]

3. PHYSICIANS AND SURGEONS (§ 13*)—EMPLOYMENT.

Where the president of a corporation employed a physician to care for an injured employé, the fact that the injury was not received while the servant was performing the duties of his employment did not prevent a recovery for the physician's services.

[Ed. Note.—For other cases, see Physicians and Surgeons, Dec. Dig. § 13.*]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by W. P. Scott against the Monte Cristo Oil & Development Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Henry Ach, Geo. E. Whitaker, and G. E. Lawrence, for appellant. Matthew S. Platz, for respondent.

SHAW, J. Plaintiff is a physician and surgeon and brought this action, both in his own behalf and as assignee of other claims, to recover for professional services rendered and medicines furnished to an employé of defendant, which services and medicines are alleged to have been rendered and furnished at defendant's request. Defendant is a corporation having its principal place of business at San Francisco, but at the times mentioned in the complaint was engaged in mining oil and the development of oil lands in Kern county. No question is made as to the rendition or value of the services alleged to have been performed, but defendant denies that the same were rendered at its request. The chief question therefore presented is whether defendant authorized plaintiff to render the services.

It appears from the findings that on or about the 22d day of February, 1908, one Leslie Ingalls was in the employ of defendant as a laborer upon certain oil lands which defendant was then engaged in developing; that while so in the employ of defendant, and while performing the duties of his said employment, said Ingalls received great bodily injury and was so dangerously hurt that he lost all consciousness and was absolutely helpless and unable to do or act for himself by reason thereof; that on said date defendant requested plaintiff, in his capacity of physician and surgeon, to attend said Ingalls and

to care for and furnish all medical aid necessary in the treatment of his said illness caused by the injuries so received while in the employ of defendant; that the president of the corporation, in the presence of the field superintendent thereof, promised and agreed on behalf of said corporation that it would pay him for such services so rendered and to be rendered on behalf of said Ingalls, who was totally unable to act for himself and in a helpless condition; that plaintiff did attend said Ingalls and gave him medical aid and surgical assistance during the period extending from February 22d to and including April 5th, which services were of the reasonable value of \$500; that one Anderson was the proprietor of a sanatorium, known as the Bakersfield Sanatorium, to which the president of the corporation, in the presence of the field superintendent, ordered the said Leslie Ingalls to be taken and to be there nursed and cared for during his said illness, and the president of said corporation did promise and agree on its behalf that it would pay to said Anderson the expense and cost of the care and nursing of said Ingalls during his said illness; that from said 22d day of February to and including the 5th day of April the said Anderson did care for, shelter, attend, and nurse said Ingalls during his said illness, the reasonable value of which service was the sum of \$456, which claim was duly assigned to this plaintiff. A like finding is made with reference to the claim of the drug company which is alleged to have furnished medicines and drugs for the use of said Ingalls during his said illness. It is further found that the corporation partially ratified the acts of its president in ordering medical aid, care, and nursing of said Ingalls, by paying part of the expense that was incurred, in that the corporation paid the bill for the hire of the wagon wherein said Ingalls was conveyed from its property in the oil fields to the Bakersfield Sanatorium.

Judgment went for plaintiff for the sum of \$966.90, from which, and an order denying its motion for a new trial, defendant appeals.

Defendant offered no evidence, but at the close of plaintiff's case moved for a nonsuit upon the ground that the evidence failed to show that Henry Ach, the president of the company, had authority to make contracts on its behalf. This motion was denied.

As disclosed by the record, the evidence tended to establish the following facts: Jones was superintendent of the company in charge of its local affairs. Ach was president of the company, and Jones received his orders and instructions pertaining to the management of the local affairs of the company from Ach as president acting for and on its behalf. All of the business transacted in the community, other than that attended to by the superintendent, was transacted through Ach, its president. "What the superintendent

said generally went." On February 22d, Ingalls, then in the employ of the company, in some manner not disclosed by the record, was seriously injured; his skull being fractured, necessitating an operation of trephining. In response to a telephone message, plaintiff went to the plant of defendant, located in the Kern county oil fields, where he found Ingalls in an unconscious condition in the bunkhouse, at which time Ach, for and on behalf of the corporation, as its president, ordered Ingalls transferred to the private sanatorium of Louise Anderson, the expense of making such transfer being paid by defendant, and then stated to plaintiff, in the presence of the superintendent, that defendant would pay the bills. Thereafter, Ach, in his capacity as president, authorized the employing of nurses to attend Ingalls, and ordered the superintendent to see that everything possible was done for him. During the period from February 22d to April 5th Ingalls remained at the hospital, where he was attended by nurses employed for that purpose, and was treated by plaintiff, who procured drugs and medicines required for his use, all of which was done in reliance upon the promises made by the president of the corporation for and on its behalf, and by the superintendent of the corporation pursuant to instructions given him by the president of the corporation.

The contention of appellant is that the evidence fails to show any authority, either express or implied, on the part of the president or superintendent of the corporation to act for it in making such agreement or incurring such liability.

[1] No question of ultra vires is involved. The superintendent received his orders and instructions on behalf of the corporation from Mr. Ach. Jones, the superintendent, testifies that Ach instructed him "to put on an extra nurse." "That was his instruction, to do all that I could for the boy. That was his instruction always." "That was the drift of the whole thing at all times, even to the letters. If any mention was made of the boy in any letter, it was to see that everything possible was to be done for the boy." There is also evidence to the effect that plaintiff, after dressing the wounds of Ingalls at the bunkhouse, asked whether they would send him to the hospital as a county charge or to the private sanatorium, where the hospital charges would be \$25 per week. If the injury to Ingalls was due to the negligence of the corporation, then, in the absence of contributory negligence on his part, the corporation would be liable to him for these claims and he might recover therefor. Such circumstances would constitute a sufficient consideration for the making of the agreement and raise a presumption that it was in the interest of the corporation to do what it could to reduce its liability for damages on account of such injury. It could not be said that an agreement of this character made under such conditions would not be within the scope of au-

thority vested in one charged with the general power shown to have been exercised by Ach as president of the corporation. The directors did not meet in Kern county, all of its business there was transacted through Ach, its president, and, since he was held out by the corporation as possessing full power to act in its behalf in all matters arising and transacted in that vicinity, then, in the absence of anything to the contrary, the evidence was sufficient to raise a presumption that he was vested with the authority which he purported to exercise in making the agreement. Under the circumstances disclosed by the record, we deem it but a reasonable inference to conclude that the making of this agreement by Ach as president of the company was within the scope of the powers vested in him by the corporation. *Toledo, W. & W. Ry. Co. v. Rodrigues*, 47 Ill. 188, 95 Am. Dec. 484; *Mt. Wilson Gold & Silver Min. Co. v. Burbidge*, 11 Colo. App. 487, 53 Pac. 826; *Railroad Co. v. Taft*, 28 Mich. 294; *Union Pac. Ry. Co. v. Winterbotham*, 52 Kan. 433, 34 Pac. 1052; *Scott v. Oil Co.*, 144 Cal. 140, 77 Pac. 817; *Crowley v. Genesee M. Co.*, 55 Cal. 273.

Conceding that defendant was not responsible for the injuries received by Ingalls and might have refused to assist or care for him in any way, nevertheless the company recognized an obligation to do something towards relieving his suffering and assisting him and did send him to the sanatorium and paid for the services rendered in such transportation, which, however small, constituted some ratification of the acts of its president. In the case of *Railway Company v. McVay*, 98 Ind. 391, 49 Am. Rep. 770, it is said: "There is no evidence as to how Barnett was injured; but inasmuch as the general manager ratified contracts for taking care of him, and the company paid for such service (except the claim of appellee), it should be presumed—there being no evidence to the contrary—that the injury was so inflicted as that the contract for his care was not ultra vires."

[2] The case at bar is not unlike that of *Fraser v. San Francisco Bridge Co.*, 103 Cal. 79, 36 Pac. 1037, where it was held under the circumstances of that case that the moral obligation resting on the defendant to furnish assistance and care to an injured employé, for which the corporation was in no wise responsible, constituted a sufficient consideration for the agreement made by the president of the company to pay a physician for professional services rendered such employé.

[3] The finding to the effect that the injury was received by Ingalls while performing the duties of his employment finds no support in the evidence; but, under our view of the case, the error is not prejudicial and hence should be disregarded as immaterial.

We find no merit in appellant's contention as to the commission of other alleged errors. The judgment and order are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

15 Cal. App. 435

RUTZ v. OBEAR et al. (Civ. 863.)

(Court of Appeal, Second District, California. Feb. 17, 1911. Rehearing Denied by Supreme Court April 18, 1911.)

1. APPEAL AND ERROR (§ 193*)—QUESTION RAISED FOR FIRST TIME ON APPEAL—SUFFICIENCY OF COMPLAINT.

Defendants cannot object for the first time on appeal that the complaint does not state a cause of action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1232; Dec. Dig. § 193;* Pleading, Cent. Dig. § 1348.]

2. BROKERS (§ 85*)—ACTION FOR COMPENSATION—EVIDENCE.

In an action to recover for services in securing a tenant for hotel property and in procuring a bond from such tenant to secure the payment of the rent, evidence offered by defendant tending to show that, after the lease was procured, plaintiff loaned the tenant money to inaugurate and carry on his business was properly excluded, as it related to a matter arising after the execution of the lease and the completion of the contract involved in the action.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 85.*]

3. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—SUSTAINING GENERAL OBJECTION TO EVIDENCE.

The sustaining of a general objection to evidence is not prejudicial error, where the immateriality of the proffered testimony is apparent from its subject-matter.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

4. BROKERS (§ 65*)—RIGHT TO COMPENSATION—INDIVIDUAL INTEREST.

That a broker, after procuring a tenant, and causing him to furnish a bond to secure the rent, advanced money to the tenant either before or after the execution of the lease, in order that the tenant might procure fixtures used in the leased premises, does not show bad faith on the part of the broker, or tend to establish an interest inconsistent with his duty to his principal; the broker having in fact no interest in the lease.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 48-50; Dec. Dig. § 65.*]

5. BROKERS (§ 74*)—COMPENSATION.

Where defendant, who employed a broker to procure a tenant for corporate property, owned all the stock of the corporation, and stated to the broker that he individually owned the property and that the execution of the lease in the corporate name was for the purpose of affording protection against personal liability, defendant was personally liable to the broker for his commission.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 74.*]

6. EVIDENCE (§ 222*)—ADMISSIONS—STOCKHOLDER OF CORPORATION.

Where defendant, on employing a broker to procure a tenant for property held in the name of a corporation, stated to the broker that he individually owned the property and that the execution of the lease in the corporate name was to avoid personal liability, defendant's admissions were competent to bind himself personally.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 768-808; Dec. Dig. § 222.*]

7. ESTOPPEL (§ 65*)—REPRESENTATIONS AS TO OWNERSHIP OF PROPERTY.

Where one procured services to be performed in connection with property based upon a belief of ownership from representations of the party sought to be charged, such party is estopped, after such services have been performed, to deny ownership.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 155-158; Dec. Dig. § 65.*]

8. ESTOPPEL (§ 98*)—PERSONS AFFECTED.

Where one person owns all the stock of a corporation, the separate entity of the corporation is destroyed, and statements and admissions by such owner may be received as establishing facts from which an estoppel might arise as to the corporation.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 290; Dec. Dig. § 98.*]

9. BROKERS (§ 87*)—COMPENSATION—EXTENT OF RECOVERY.

In an action to recover compensation for procuring a tenant and securing the execution of a bond to secure the rent, which amounted to \$96,000 for the term of the lease, judgment for \$960 *held*, under the evidence, not excessive.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 131; Dec. Dig. § 87.*]

Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by George A. Rutz against W. H. Obeare and another. From a judgment for plaintiff, defendant Obeare appeals. Affirmed.

Archibald Barnard (Crittenden Thornton, of counsel), for appellant. W. W. Butler, for respondent.

ALLEN, P. J. The action was one to recover for the value of certain services rendered by plaintiff to defendants in securing a tenant for a certain hotel, and in procuring a bond from such tenant to secure the rents during the life of the lease. The complaint alleged "that within two years last past defendants became indebted to plaintiff in the sum of \$1,920 for the reasonable value of services rendered to the defendants at their special instance and request; that such services consisted of securing a tenant for the Hotel Savoy, Santa Monica, Cal., and a bond to secure the rents of the same"; demand and nonpayment being alleged. The defendants answered jointly denying the indebtedness within the two years last past, or at any other time, or at all, of either of them to plaintiff, either in the sum demanded, or in any other sum, on account of the reasonable value of services rendered. No demurrer was interposed to the complaint, nor was there any objection made at the trial to the receipt of evidence in support thereof. The parties seem to have assumed that the issues were properly presented. Evidence was received, without objection, and the court finds that within two years preceding the commencement of the action the services were performed for defendant Obeare; that they were of the char-

acter stated in the complaint and their reasonable value was \$1,200; that no payments had been made thereon; and that demand had been made as alleged in the complaint. Judgment was ordered in plaintiff's favor against defendant Obear; plaintiff having dismissed the action as to the corporation.

[1] Defendant upon this appeal for the first time raises a question as to the sufficiency of the complaint to state a cause of action, and this upon the authority of *Fairchild v. King*, 102 Cal. 323, 36 Pac. 649. It is unnecessary for us here to determine whether the case last cited is an existing authority, or whether a different rule is recognized in later cases, notably *McDonald v. Pacific Debenture Co.*, 146 Cal. 667, 80 Pac. 1090, and *Salinas Valley Lumber Co. v. Magne-Silica Co.*, 112 Pac. 1089, in which last case it is said, in referring to a complaint employing a common-law count: "Whatever may be thought of the sufficiency of such a pleading, we will not undertake to overthrow it at this late day." Irrespective of the effect of such decisions, we are of opinion that another well-established rule may be invoked, namely, that where the parties have proceeded to trial upon a pleading, without objection to its sufficiency to raise a particular issue, and evidence has been received as to the facts and the issue found upon, the party whose duty it was to object will not be heard in this court to say that the finding is not within the issue. *Illinois T. & S. Bank v. Pac. Ry. Co.*, 115 Cal. 297, 47 Pac. 60; *Wilkins v. Stidger*, 22 Cal. 232, 83 Am. Dec. 64.

[2] Appellant next claims that error intervened by reason of the action of the trial court in sustaining an objection to evidence tending to show that after the lease was procured plaintiff loaned the tenant money to inaugurate and carry on his business. We see no error in this ruling. It related solely to matters arising after the execution of the lease and the completion of the contract involved in this action.

[3] The fact that the objection to this evidence was general and did not specify the particulars wherein the same was incompetent could not prejudice the appellant, when, as in this case, its immateriality was apparent from the question itself.

[4] The mere fact that plaintiff advanced money to the tenant, either before or after the execution of the lease, in order that he might procure fixtures to be used in leased premises, would not evince bad faith upon the part of the plaintiff, or even tend to establish an interest inconsistent with the duty he owed defendant, more especially when the uncontradicted evidence is to the effect that plaintiff had and owned no interest in the lease so procured to be executed.

[5] It is further contended that the evidence is insufficient to support the finding

that the services were performed for appellant Obear, but, on the contrary, that the same were shown to have been performed for the corporation alone. The record discloses evidence tending to show that appellant owned all of the stock of the corporation, that he represented that he individually owned the property, and that the execution of the lease in the corporate name was done for the purpose of affording some personal protection to appellant. The evidence further tends to show that the whole contract was between appellant and plaintiff as individuals; that the promise to pay on the part of appellant was a personal one.

[6] Appellant's admissions were competent to bind himself personally.

[7] *Relley v. Campbell*, 134 Cal. 175, 66 Pac. 220, is authority for the statement that where one individual owns all the stock of a corporation the same is but the corporate double of the owner of the stock, and such proof destroys the separate entity of the corporation, and in such event the statements and admissions of the sole owner of the stock may be received as establishing facts from which an estoppel might arise as to the corporation.

[8] It must be the rule that where one procures services to be performed in connection with property, based upon a belief of ownership from representations of the party sought to be charged, that such party is estopped, after such services have been performed, to deny ownership.

[9] Appellant finally contends that the judgment is excessive. The action was to recover the reasonable value of services in procuring a tenant and a bond securing the rental. There is evidence in the record to the effect that \$960 is the usual and ordinary charge for procuring a tenant alone for a like term at a similar rental, and other evidence to the effect that the sum found by the court was the reasonable value for services in procuring a tenant and a bond securing the rental. There is evidence in the record to the effect that after the tenant had been procured and a bond executed securing the rental, afterwards accepted by appellant as satisfactory, appellant offered plaintiff a thousand dollars if he would procure a brewing company to guarantee the entire \$96,000 of rental. It is obvious from the fact that services had already been performed of the value of \$1,200 that, if this offer of a thousand dollars was made, it was intended to be and was in addition to the reasonable value of the services theretofore rendered; but such particular surety was not furnished, nor was there any contract made in connection with the offer of a thousand dollars, and the same is in no sense material.

We find no prejudicial error in the record, and the judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

(159 Cal. 420)

KING v. CHASE. (L. A. 2,332.)

(Supreme Court of California. Feb. 25, 1911.)

1. EXECUTORS AND ADMINISTRATORS (§ 468*)—
SETTLEMENTS OF ACCOUNTS OF A DECEASED
EXECUTOR—REMEDY.

Since the enactment of Code Civ. Proc. § 1639, in 1905 (St. 1905, c. 235), a bill in equity to compel the representative of an executor or administrator to settle the accounts of decedent will not be the only procedure, as such statute provides another remedy by authorizing the superior court, sitting in probate, to settle such accounts.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1999; Dec. Dig. § 468.*]

2. EXECUTORS AND ADMINISTRATORS (§ 469*)—
COURTS OF PROBATE JURISDICTION—CONSTITUTIONAL AND STATUTORY PROVISIONS—
"MATTERS OF PROBATE."

Code Civ. Proc. § 1639, providing that on the death of an executor his accounts may be presented to and settled by the court in which the estate of which he was executor is being administered, and that upon petition of his successor such court may compel the personal representatives of the deceased executor to render an account of the administrator of their testa-

tor, and to settle such account as in other cases, is a "matter of probate," jurisdiction of which may, under Const. art. 6, § 5, be conferred upon the superior court, sitting in probate.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 469.*]

For other definitions, see Words and Phrases, vol. 5, p. 4417.]

3. EXECUTORS AND ADMINISTRATORS (§ 468*)
—ACCOUNTING BY REPRESENTATIVE OF DECEASED EXECUTOR—NATURE OF REMEDY.

The jurisdiction conferred by Code Civ. Proc. § 1639, on the superior court, to compel an accounting by the representatives of a deceased executor in settlement of the accounts of such executor, excludes the equity powers of such court to compel such accounting.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1999; Dec. Dig. § 468.*]

4. EXECUTORS AND ADMINISTRATORS (§ 468*)
—ACCOUNTING—NATURE AND FORM OF REMEDY—PROCEEDING IN REM.

As a probate proceeding in the superior court, under Code Civ. Proc. § 1639, to compel an accounting by the representatives of a deceased executor, with notice to all persons interested, as required by Code Civ. Proc. §§ 1626, 1633, is a proceeding in rem, binding upon all persons, a bill in equity to compel such accounting, though brought in the same court, is not the equivalent of such probate proceeding, and hence does not confer jurisdiction to compel such accounting.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1999; Dec. Dig. § 468.*]

In Bank. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by Charles W. King, administrator with the will annexed of the estate of Cornelia R. Chase, deceased, against Charles A. Chase, executor of the estate of Levi Chase, deceased, and individually. Judgment for plaintiff, and defendant appeals. Reversed, with directions to dismiss the action.

James E. Wadham and Stearns & Sweet, for appellant. Davis, Kemp & Post and Paterson Sprigg, for respondent.

SLOSS, J. Cornelia A. Chase died on January 23, 1896, leaving a will wherein her husband, Levi Chase, was appointed executor. The will was admitted to probate in the superior court of San Diego county, and letters testamentary issued to the executor named. Levi Chase entered upon the performance of his duties as executor, and continued to act as such until his death, which occurred on May 30, 1906. Thereafter the defendant, Charles A. Chase, offered for probate the will of Levi Chase. The will was duly admitted to probate, and letters testamentary thereon issued to said Charles A. Chase. In August, 1906, the court in which the administration of Cornelia A. Chase's estate was pending, appointed Charles W. King administrator with the will annexed of said estate.

This action was begun by King, as such administrator, against Charles A. Chase, as executor of the will of Levi Chase, and in-

dividually, to obtain an accounting of the property belonging to the estate of Cornelia A. Chase, which came to the possession of defendant as executor of the will of Levi Chase, and for the recovery of such property when ascertained and determined.

The complaint alleges that the estate of Cornelia A. Chase consisted of a large amount of money, real estate, and personal property, which was, prior to the death of the said Levi Chase, in his possession, as executor of said Cornelia A. Chase, and that upon the death of Levi Chase said money, real estate, and personal property passed into the possession and control of Charles A. Chase, executor of the will of Levi Chase. These allegations, denied by the answer, were found to be true by the court, which thereupon made an interlocutory order, requiring the defendant executor to make, within 30 days, an accounting of the executorship of Levi Chase, as executor of the last will of Cornelia A. Chase. An account was filed accordingly, and the court made further findings, to the effect that at the time of the death of Levi Chase there was in his possession as executor of his wife's will the sum of \$17,599.02, which sum passed into the possession and control of Charles A. Chase, as executor of the will of Levi Chase. There are similar findings concerning certain items of specific personal property, consisting of jewels and securities. A judgment was entered, requiring the defendant, Charles A. Chase, as executor, to turn over and deliver to plaintiff, as administrator, the specific personal property remaining in his hands, and that plaintiff have and recover judgment against defendant (executor) for the sum found to be in his possession. The defendant, as executor, appeals from the judgment and from an order denying his motion for a new trial.

This action was commenced after the enactment of section 1639 of the Code of Civil Procedure in its present form. It is in the nature of a bill in equity to compel a rendition and settlement of the accounts of a deceased executor. Prior to 1905, when section 1639 was adopted (St. 1905, c. 235), the statutes of this state contained no provision authorizing the superior court, sitting in probate, to settle such accounts. Nor was any such power conferred on the probate court, as that court existed under the Constitution of 1849. For this reason, it was uniformly held that a bill in equity to compel the executor or administrator of an executor or administrator to settle the account of his testator or intestate, with the estate in which the decedent had been acting, was the appropriate, as it was the only, procedure. *Bush v. Lindsey*, 44 Cal. 121; *Chaquette v. Ortet*, 60 Cal. 594; *In re Thompson*, 101 Cal. 349, 35 Pac. 991, 36 Pac. 98, 508; *Vance v. Smith*, 124 Cal. 219, 56 Pac. 1031; *Slater v. McAvoy*, 123 Cal. 437, 56 Pac. 49; *Zurfluh*

v. Smith, 135 Cal. 644, 67 Pac. 1089; Guardianship of Wells, 140 Cal. 349, 73 Pac. 1065. The power of a court of equity to entertain a suit of this character is, in these cases, based upon the very ground that there is no other method of compelling the accounting. Thus, in *Bush v. Lindsey*, supra, the court said: "We are referred to no provision of the probate act which authorizes the probate court to cite the administrator of an administrator to settle the account of his intestate with the estate of which he was the administrator, and, after a careful examination of the act, we find none which confers that authority. The power must be lodged in some tribunal to require such an account to be taken and settled; and, if the probate court does not possess it, it must reside in the district court, as a branch of its equitable jurisdiction." So, in *Chaquette v. Ortet*, supra, the court states that: "There is no provision of the statute providing for the settlement of the account of an administrator who dies before rendering an account. It is because of the absence of such statutory provision, that the right and duty to compel such accounting belongs to a court of equity."

It would seem, therefore, that, upon the enactment of a statute giving to the court, sitting in probate, the power and duty of compelling an accounting in such cases, the occasion and ground for the interposition of a court of equity must have ceased. Such a statute came into being by the adoption, in 1905, of section 1639 of the Code of Civil Procedure, reading as follows: "If any executor or administrator dies, his accounts may be presented by his personal representatives to, and settled by, the court in which the estate of which he was executor or administrator is being administered, and, upon petition of the successor of such deceased executor or administrator, such court may compel the personal representatives of such deceased executor or administrator to render an account of the administration of their testator or intestate, and must settle such account as in other cases." (There had been a prior section of the same number, but this was, at the session of 1905, repealed and reenacted as section 1527 [Stats. 1905, p. 242].) While the power of the court, sitting in probate, was limited, under the pre-existing law, to a settlement of the accounts of a living administrator or executor, this statute extends the authority to cover the entire field of accounting by executors or administrators, so long as the estate itself remains subject to the jurisdiction of the court. That this is a wise and reasonable provision is not to be doubted. The court which has taken charge of the administration of the estate of a decedent is the proper forum for the determination of all questions incidental to that administration. The settlement of the accounts of the personal representative appointed to conduct the administration is one of the principal functions of the probate

court. It certainly conduces to simplicity and an orderly direction of the affairs of a decedent if the entire subject of the relations between the estate and the trustee appointed to manage the administration is placed in the hands of a single court, and forms a single proceeding.

The jurisdiction granted by section 1639 is, we have no doubt, a power which may, under article 6, § 5, of the Constitution, be conferred upon the superior court as a "matter of probate." The Constitution does not declare what shall constitute the "matters of probate" which are placed within the jurisdiction of the superior court. The extent of this grant has been defined by the sections of the Code of Civil Procedure, laying down a minute and elaborate system for the settlement and distribution of the estates of decedents. Any provision coming fairly within the scope of such system, as the same has existed in this state before and since the adoption of the present Constitution, is included within the phrase "matters of probate." In *Toland v. Earl*, 129 Cal. 148, 61 Pac. 914, 79 Am. St. Rep. 100, this court gave extended consideration to the nature of our probate jurisdiction, and reached the conclusion that the creation of a probate proceeding for the settlement of all questions relating to the distribution and settlement of the estate is exclusive of the power of a court of equity to entertain a bill for the adjudication of the very matters committed to the court in probate. There the complainant (administrator) sought a decree "for the purpose of having the probate court instructed as to what distribution shall be made of the estate under the will." It was held that the action should be dismissed, as it sought to control the probate court in the determination of questions placed in its jurisdiction. The same principle applies here. The settlement of the account of the deceased executor is now, by the terms of section 1639, placed in the hands of the court, sitting in probate. The power of the court in equity to require such settlement has been ended. Such power, when it did exist, was based solely on the lack of any statutory method of accomplishing the same end by proceeding in probate. Now that this lack has been remedied, the foundation of the equity jurisdiction is gone.

It is urged that, inasmuch as the equity and the probate jurisdictions are exercised by the same court, it is unimportant that the proceeding is entitled as an original action, rather than as a step in the administration of *Cornelia A. Chase's* estate. It has been held in this court that, where a bill in equity was the proper practice, a proceeding entitled "in the matter of the estate" would be upheld, where the pleadings contained the necessary allegations to entitle the moving party to relief in equity, more particularly where no objection to the procedure had been raised in the court below. In *re Thompson*, 101 Cal. 353, 35 Pac. 991, 36 Pac. 98, 508; In *re*

De Leon, 102 Cal. 537, 36 Pac. 864; In re Clary, 112 Cal. 292, 44 Pac. 569; In re Wells, 140 Cal. 349, 73 Pac. 1065. But, in the first place, the appellant here did not appear and account without objection. The account filed by him expressly declared that it was rendered pursuant to the order of the court, and, "without waiving any of the rights of said defendant to object to the jurisdiction, power and authority of this court to make such order to so account." Furthermore, while a petition bearing the title of a probate proceeding may well contain all the essential averments of a bill in equity, it can hardly be said that this action, binding only the parties to it, is the equivalent of the probate proceeding for the settlement of an account. That is a proceeding in rem, after notice (Code Civ. Proc. § 1633) to all persons interested. Code Civ. Proc. § 1626.

For these reasons, regardless of other points urged by the appellant, it must be held that the court below was without power to entertain this proceeding.

The judgment and order appealed from are reversed, and the superior court is directed to dismiss the action.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; MELVIN, J.; HENSHAW, J.

(159 Cal. 549)

KING v. PAULY et al. (L. A. 2,409.)

(Supreme Court of California. March 14, 1911. On Rehearing, April 13, 1911.)

1. JUDGMENT (§ 710*)—CONCLUSIVENESS—NATURE OF PROCEEDINGS—TITLE TO REAL PROPERTY—SURVIVORSHIP.

Code Civ. Proc. § 1723, declares that, if any person at the time of his death was the owner of a life estate terminable at death, or if such person at the time of his death was one of the spouses holding land as a homestead which, by reason of his death, vested in the surviving spouse, or if such person was a married woman who at the time of her death was the owner of community property which passed on her death to the surviving husband, any person interested might file a petition; and if it appeared that such life estate terminated at decedent's death, or such homestead or community property vested in the survivor, the court should make a decree to that effect, and a certified copy thereof should have the same effect as a final decree of distribution. *Held* that, where, in a proceeding by a surviving husband to establish his title as survivor of a community, neither the wife's personal representatives nor all her heirs appeared, or were served, a decree for the husband was effective as against those interested, who neither appeared nor were served, only to determine the death of the wife, though it might be conclusive as a determination of title if all those interested in the wife's estate had appeared.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 710.*]

2. JUDGMENT (§ 743*)—CONCLUSIVENESS—QUESTIONS DETERMINED.

Code Civ. Proc. § 1723, provides that, if any person be dead who is the owner of a life estate in property, or was one of the spouses

owning land as a homestead, or held title to community property, any person interested may file a petition to terminate the homestead or community interest, etc. *Held*, that such proceeding was only intended to determine that the person was dead, on whose death the asserted right of another person depended, and did not contemplate a conclusive adjudication of the validity of the petitioner's claim, and in a suit to quiet title was of no effect as establishing title in the petitioner.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 743.*]

3. COURTS (§ 92*)—DECISIONS—DICTUM.

Where an appellate court places its decision on two or more distinct grounds, each is as much an authoritative determination as the other, and neither can be disregarded as obiter dictum.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 335; Dec. Dig. § 92.*]

In Bank. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by Charles W. King, as administrator with the will annexed of the estate of Cornelia A. Chase, deceased, against Charles W. Pauly and another, as executors of the will of Levi Chase, deceased. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

See, also, 115 Pac. 207.

Davis, Kemp & Post and Patterson Sprigg, for appellant. Stearns & Sweet, James E. Wadham, and Wadham & Pritchard, for respondents.

ANGELLOTTI, J. This is an action to quiet plaintiff's title to certain real property in the city of San Diego. Defendants had judgment, and plaintiff appeals.

Plaintiff's claim was that the property in question was the separate property of his intestate, Cornelia A. Chase, at the time of her death, January 23, 1896. Said Cornelia was, at the time the property was acquired (November 12, 1868), the wife of Levi Chase, the executor of whose will is one of the defendants, and was named as the grantee in the deed by which the property was acquired, and the title to said property thenceforth and to the time of her death stood in her name. One of defendants' claims was that the status of such property as community property and the consequent absolute vesting of the same as such community property, in said Levi Chase, her surviving husband, at the time of her death, without administration, was conclusively determined by the decree made and given in a certain proceeding instituted by the surviving husband in the year 1903, under the provisions of section 1723, Code of Civil Procedure. This action was determined in the trial court, solely upon this claim; it being held, in accord with defendants' contention, that the effect of such decree was to foreclose inquiry of the question whether this property was, in fact, separate property of said Cornelia, and to vest the same as com-

munity property in the surviving husband. The question is thus squarely presented as to the effect of the proceedings had by such surviving husband under section 1723, Code of Civil Procedure.

That section provides: "If any person has died or shall hereafter die who at the time of his death was the owner of a life estate which terminates by reason of the death of such person, or if such person at the time of his death was one of the spouses owning lands as a homestead, which lands by reason of the death of such person, vest in the surviving spouse, or if such person was a married woman who at the time of her death was the owner of community property which passed upon her death to the surviving husband, any person interested in the property, or in the title thereto, in which such estates or interests were held, may file in the superior court of the county in which the property is situated, his verified petition setting forth such facts, and thereupon and after such notice by publication or otherwise as the court may order, the court shall hear such petition and the evidence offered in support thereof, and if upon such hearing it shall appear that such life estate of such deceased person absolutely terminated by reason of his death, or such homestead or community property vested in the survivor of such marriage, the court shall make a decree to that effect, and thereupon a certified copy of such decree may be recorded in the office of the county recorder, and thereafter shall have the same effect as a final decree of distribution so recorded."

In the proceedings instituted in the superior court of San Diego county by the surviving husband under this section, the matter was entitled "In the matter of the title to certain real estate, being community property, and standing of record in the name of Cornelia A. Chase, deceased." His verified petition alleged the death of his wife and other facts showing that the property was community property. It alleged the names and residences of the heirs of deceased, 12 in number, and all except one being nonresidents of the state. It asked for a decree adjudging that said property was community property, and that the same vested absolutely in petitioner upon the death of his wife. The court, on February 12, 1903, made its order, reciting the filing of said petition, with a statement describing the property and showing the relief asked by petitioner, fixing March 13, 1903, at 2 o'clock p. m. and the courtroom of the court as the time and place for hearing the petition, "at which time and place any person interested may appear and show cause, if any they have, why the prayer of said petitioner should not be granted," and directing that a copy of the order be forthwith mailed to the heirs named in said petition at their respective places of residence, and published in the "San Diego Union and Daily Bee" at least

once a week for four consecutive weeks. The judgment given June 24, 1903, establishes that notice was given in the manner and for the time fixed by this order, and also that "certain heirs" answered, and by their counsel appeared at the hearing. The answer is not set forth, and which or how many of the heirs thus subjected themselves to the jurisdiction of the court does not appear; but it is clear that all the heirs did not do so, and there is no claim that any legal representative of the deceased appeared in the proceedings. The court found in accord with the allegations of the verified petition, and decreed that the property was community property of said Levi and Cornelia A. Chase at the time of the death of the latter, and at such death vested absolutely in Levi Chase as the surviving husband. A certified copy of this decree was recorded in the office of the county recorder of San Diego county on June 28, 1903.

We have no doubt that, if all of the persons interested in the estate of Cornelia A. Chase had actually appeared and submitted themselves to the jurisdiction of the court in the proceeding brought by Levi Chase, the decree would have the effect claimed for it by defendants. As in the Matter of the Estate of De Leon, 102 Cal. 537, 36 Pac. 864, the facts stated in the petition filed in the superior court were such as to entitle the petition to be treated as an ordinary complaint in equity, and the court had jurisdiction of the subject-matter of an action in equity to determine the title to real property in the county, and of such parties as personally appeared and submitted themselves to its jurisdiction, as well as of such parties as were regularly brought within its jurisdiction by service of process in the manner and form prescribed by such actions. See Estate of De Leon, supra. But, in view of what we have heretofore said, this cannot avail here, as neither any legal representative of the deceased Cornelia A. Chase nor all of her heirs were shown to have appeared, or to have been so served with process. And we are therefore bound to consider the decree relied on solely as one given in the special proceeding provided by section 1723, Code of Civil Procedure, and to give to it, in the event that the proceedings had were all in strict accord with the requirement of the section, only such effect as upon a proper construction of the section, must be given to a decree made under its provisions.

It was squarely decided by Department 2 of this court, in the case of Hansen v. Union Savings Bank, 148 Cal. 157, 82 Pac. 768, that the proceeding provided by section 1723, Code of Civil Procedure, was only intended as a proceeding to have it determined that a certain person is dead, upon whose death the asserted right of another person depends, and not one to have the validity of the right conclusively adjudicated. The court further said: "The decree in the proceeding merely

determines that, if the party petitioning has any asserted right or title accruing on the death of another person, such asserted right or title has accrued," and also: "Of course, it is often convenient and important to those interested in or examining a title to have some record evidence of the death of a life tenant, a homestead claimant, or other person upon whose death some right or estate vests."

It is urged that what was here said as to the construction of the section and the effect of the decree was mere dictum, but clearly this is not so. It was one of two grounds upon which the court held that a decree given under this section, adjudicating the validity of a homestead right asserted by the petitioner to have existed as to the lands involved at the time of the death of her husband, did not establish the validity of the asserted right, and that a court in a subsequent action to quiet title was free to pass upon the question of the validity of the alleged homestead right, and declare it invalid, which it did. The first ground was, it is true, that proper notice had not been given of the hearing of the petition presented under section 1723, Code of Civil Procedure, and that the court therein had therefore not acquired jurisdiction to make the decree. The second ground was, assuming proper notice to have been given, the ground we first stated. There is no more reason for saying that what was said therein as to the first ground constitutes the real decision, and that what was said as to the second was mere dictum, than there is for saying that what was said as to the second ground is the vital part, and what was said as to the first obiter dictum. While it is not "necessary" to the decision of a question by an appellate court that there should be more than one good ground or reason, there may be more than one, and, where the court bases its decision on two or more distinct grounds, each ground so specified is, as much as any of the others, one of the grounds, a ruling upon questions involved in the case, and not "mere dictum."

To hold here in accord with the contention of defendants as to the conclusive effect of the decree on the question of the validity of the asserted right would be, therefore, to repudiate the doctrine of *Hansen v. Union Savings Bank*, supra, on that question for there is no material distinction in this regard between an asserted homestead right and an asserted community property right. This, of course, the court in bank would not hesitate to do if satisfied that the doctrine was wrong and that property rights had not been acquired in reliance on the former decision which could be affected by the repudiation thereof. We are, however, not satisfied that the views expressed in this decision as to the proper construction of section 1723, Code of Civil Procedure, are erroneous. It is true that the question is by no means free from doubt in view of some of the language

used; but the construction adopted is not necessarily inconsistent with the language used, and, when we consider the method of procedure provided, appears much more reasonable. A proceeding, the decree in which would have the effect of conclusively determining that certain real property standing in the name of a deceased married woman was community property of herself and her husband at the time of her death, and not her separate property, is practically nothing more than a proceeding to quiet an alleged title of one claiming property as or under the survivor of the community against others claiming, or who may claim, the same property under the deceased wife, on the theory that it was her separate property. If it was, in fact, her separate property, it vested upon her death subject to administration, in her heirs or devisees, and if community property it vested in her surviving husband, without administration, and never constituted any part of her estate. The proceeding by or under the survivor of the community would practically be one against those who succeed to or are interested in the wife's estate, to have it determined that by reason of certain alleged facts they have no interest in the particular property described.

It is not to be supposed that the Legislature contemplated that a conclusive adjudication as to these alleged facts might be made against those claiming under the wife without such notice to them and opportunity to defend as would comply with the requirements of our federal and state Constitutions as to due process of law. Yet section 1723, Code of Civil Procedure, provides that the court may hear the petition and make the decree contemplated by its terms "after such notice by publication or otherwise, as the court may order." A publication of a notice in proper form in one issue of a local newspaper on the day before the time fixed for hearing, or a posting of such notice at the courthouse door one day before the time fixed for hearing, would apparently conform to the requirements of this section, if such was the notice prescribed by the court. We do not believe that it can seriously be claimed that such notice would constitute due process in a proceeding of the character this is claimed by defendants to be, especially as against nonresident defendants. In any action against known defendants, personal service of summons is essential under the statutes of this state whenever it can be had, and publication of summons where personal service cannot be had, and where it is sought to obtain jurisdiction as to a defendant residing out of the state or absent therefrom the publication must not be less than two months. In the light of these statutory requirements as to ordinary actions, it appears almost incredible that the Legislature could have contemplated that a proceeding which in its whole effect and scope would be

nothing less than an ordinary action to quiet title could be had and conclusively determined upon such notice to those interested in the property as is authorized by the section. It is much more reasonable to conclude that it merely contemplated a proceeding having for its object, as said in the Hansen Case, the establishment of some record evidence "of the death of a life tenant, a homestead claimant, or other person upon whose death some right or estate vests." The importance of such evidence is as apparent in the case of the death of a wife, where there is community property, as in the other cases included in section 1723, in view of the restrictions imposed by section 172 of the Civil Code upon the husband in the matter of the conveyance of community property during the life of his wife.

As originally adopted in the year 1881, section 1723 was confined to the determination of the question of the termination of a life estate held by a deceased, which life estate terminated by reason of his death. The section then provided, as it does now, that, if on the hearing it shall appear "that such life estate of such deceased person absolutely terminated by reason of his death, the court shall make a decree to that effect," and contained a provision as to the filing of a certified copy of the decree in the office of the county recorder, and that the same shall thereafter "have the same effect as a final decree of distribution so recorded." It was held, in the Matter of Tracey, 136 Cal. 390, 69 Pac. 20, that under the provisions relating to life estates a court had no power "to declare in whom upon termination of a life estate title is vested absolutely," and that it was empowered simply to make a decree that such life estate of a deceased person has absolutely terminated. As to such a case, it may very reasonably be said that the only thing intended to be determined was the fact of death of the owner of such life estate, so that some record evidence might exist of a death upon which the rights of other parties depended, and that it was not intended to provide thereby for a conclusive adjudication of the question whether the deceased had only such a life estate in the property. The provision as to the effect of the decree means no more, of course, than that it shall have such effect simply in regard to the matters intended to be determined by the proceedings. The provisions as to the contents of the petition and the findings of the court thereon may be accounted for on the theory that it was intended that the petitioner must allege and establish such an interest in the matter as would give him a right to have the fact of death established of record. The provisions as to homestead and community property were inserted by amendment in the year 1897, and it is not unreasonable to assume that they

were intended solely for the same purpose as the provision in regard to life estates.

As we have said, the question as to the true meaning of section 1723, Code of Civil Procedure, is not free from doubt, and were it a new question in this court a different conclusion might reasonably be reached. But we consider it one definitely determined by a prior decision, and are not satisfied that the doctrine established thereby is erroneous.

The judgment is reversed, and the cause remanded for a new trial.

We concur: SLOSS, J.; LORIGAN, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

BEATTY, C. J. I concur. Considered by itself, section 1723 of the Code of Civil Procedure would seem to demand the construction contended for by the respondents. But that construction, in my opinion, would bring it in conflict with the Constitution, and therefore I think we are bound to confine its operation within the more restricted limits indicated by our former rulings.

On Rehearing.

PER CURIAM. In denying the petition for modification of the judgment, it is proper to say that the question whether the decree had in the proceeding under section 1723, Code of Civil Procedure, is conclusive against such of the persons interested in the estate of Cornelia A. Chase, deceased, as actually appeared in that proceeding and submitted themselves to the jurisdiction of the court, while not conclusive against other persons interested who did not appear, has not been argued by counsel for any party, or considered by the court. There is nothing in the opinion that can be taken as foreclosing this question in future proceedings in this cause.

The petition for a modification of the opinion is denied.

159 Cal. 623

SHAW v. TOWN OF SEBASTOPOL et al.
(S. F. 5,394.)

(Supreme Court of California. April 4, 1911.
Rehearing Denied May 4, 1911.)

1. WATERS AND WATER COURSES (§§ 118, 119*) —SURFACE WATER—OBSTRUCTION.

An owner of land over which surface water is accustomed to flow may not obstruct the flow to the injury of the owner of the land from which it comes, and the owner of the upper land may not change the flow of the water, to the injury of the lower land.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 128-134; Dec. Dig. §§ 118, 119.*]

2. MUNICIPAL CORPORATIONS (§ 835*)—OBSTRUCTING SURFACE WATER—LIABILITY.

A municipal corporation may not collect surface water and discharge it on private premises to the injury thereof, and, where it by repairing a street alters the natural conditions

and discharges on the land of an individual a larger volume of water than would naturally flow there, he may enjoin the continuance thereof.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1785; Dec. Dig. § 835.*]

3. WATERS AND WATER COURSES (§ 150*)—DISCHARGE OF SURFACE WATER—ACQUISITION OF RIGHTS—PRESCRIPTION.

One may not acquire by prescription any right to divert from his land surface water, and discharge it on a public road.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 153; Dec. Dig. § 150.*]

4. MUNICIPAL CORPORATIONS (§ 846*)—ALTERING CONDITIONS IN STREETS—CHANGE OF FLOW OF SURFACE WATER—LIABILITY—EVIDENCE.

In a suit to restrain a city from improving a street and thereby diverting surface water and discharging it on the land of an individual, evidence held to support a finding that the work done by the city did not materially increase the flow of the surface water, so that the individual could not complain.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 846.*]

Department 1. Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by Mary Jane Shaw against the Town of Sebastopol and others. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

W. F. Cowan, for appellant. L. G. Scott, for respondents.

SLOSS, J. The town of Sebastopol, one of the defendants herein, was incorporated as a town of the sixth class in 1902. One of its streets is Petaluma avenue, which runs southerly from the center of the town to the corporate limits and then continues as a county road in a general southerly direction to the city of Petaluma. Prior to the incorporation of Sebastopol, Petaluma avenue had existed as "Petaluma road" for a period of many years.

The plaintiff is the owner of a tract of land lying on the easterly line of Petaluma avenue and extending along said avenue, within the town limits, for about 800 feet northerly from the southerly boundary of the city. Shortly prior to the commencement of this action, Petaluma avenue was improved by a macadam pavement. The plaintiff, contending that the effect of this work, if carried to completion according to the plans made therefor, would cause a large quantity of surface waters to be collected and discharged upon her land, brought this action against the town, its trustees, and the contractor who had charge of the work to obtain an injunction restraining the defendants from maintaining a culvert constructed across the road, or from filling up, or closing a trench and conduit by means of which

the plaintiff had theretofore diverted water from her land. The defendants had judgment, and from this judgment, as well as from an order denying a motion for new trial, the plaintiff appeals.

[1] There is no substantial difference between the parties regarding the law governing the case. It is the well-settled law of this state that the owner of land over which surface water is accustomed to flow may not obstruct such flow to the injury of the owner of the land from which it comes, and that the owner of the upper land has not the right to change the flow of the water to the injury of the lower owner. *Ogburn v. Connor*, 46 Cal. 346, 13 Am. Rep. 213; *Cushing v. Pires*, 124 Cal. 663, 57 Pac. 572.

[2] A municipal corporation has no more right than has an individual to collect surface water and precipitate it upon private premises to the injury of the owner. *Stanford v. San Francisco*, 111 Cal. 198, 43 Pac. 605. If, then, the effect of the repairing of Petaluma avenue was to alter the natural conditions and discharge upon the land of the plaintiff a larger volume of water than would naturally have flowed there, the plaintiff is in a position to complain of the injury so done and to enjoin its continuance. (We are assuming in this discussion that the work was, in effect, done by or for the city.) But, while the complaint states a cause of action for an injunction under this theory, the court has found a state of facts contrary to the plaintiff's allegations. For over 20 years there has been across the road, at a point near plaintiff's house, a culvert which carried the water from the westerly side of the road to the easterly side adjoining plaintiff's premises. In 1904 the Petaluma and Santa Rosa Railway Company, acting under a franchise from the city, constructed an electric railroad along Petaluma avenue. By agreement with the plaintiff it constructed its road along the easterly line of said avenue instead of the center thereof, encroaching in part upon the land of plaintiff. One of the terms of the agreement between plaintiff and the railway company was that the latter should construct a ditch and conduit from the mouth of the aforesaid culvert northerly along the line of plaintiff's property in order to carry away the water which would go through the culvert. The plaintiff had theretofore maintained a ditch for the same purpose. The work was accordingly done, and the water so crossing from the westerly to the easterly side was carried northerly for a distance of some 800 feet, and was there discharged, a large quantity thereof flowing onto Petaluma avenue. In the paving of the street, the west end of the culvert was extended to, and perhaps somewhat beyond, the property line on that side. The defendants were about to fill up or cut through the ditch theretofore con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

structed by the railroad company along plaintiff's land to permit the water going through the culvert to flow onto plaintiff's land instead of following the course of such ditch.

To the extent of the foregoing statement, the facts are not in any material degree disputed. The court, however, made further findings that the changes in the construction of the culvert did not cause it to take or discharge more water than it had theretofore taken and discharged; that the grading and macadamizing of Petaluma avenue did not change the flow of water on said avenue or the land adjoining the same, and did not cause more water at any time to flow over the land of plaintiff than flowed over her land before the said grading and macadamizing was done; that all of the water flowing prior to said grading and macadamizing found its way to said culvert; that the ditch and conduit running along the easterly line of the road northerly from the mouth of the culvert is in the sidewalk laid between the roadbed of the railroad company and the lands of the plaintiff except a small portion thereof; that there is no ancient waterway or natural water course along Petaluma avenue except through said culvert; that the waterways that have heretofore existed in and along said avenue as claimed by said plaintiff, are temporary and artificial, and that the natural course of all of the water which passes through the culvert in question is onto and across plaintiff's land to a lagoon which is a tributary of the Russian river.

If these findings correctly state the facts, the plaintiff clearly has no cause of complaint. The court has found that the culvert takes no more water than would naturally cross the road at the point where the culvert is situated, and that all of such water would, in the absence of any obstruction or improvement, naturally flow onto and across plaintiff's land in the same course which it will follow if the ditch constructed by the railway company be closed.

[3] It is not claimed, nor can it be, that the plaintiff has acquired by prescription any right to divert from her land water which would naturally flow there, and to discharge it upon the public road. Indeed, no such right can be acquired in property set apart for public use. *People v. Kerber*, 152 Cal. 731, 93 Pac. 878, 125 Am. St. Rep. 93; *Visalia v. Jacob*, 65 Cal. 434, 4 Pac. 433, 52 Am. Rep. 303; *Cloverdale v. Smith*, 128 Cal. 230, 60 Pac. 851; *Southern Pacific Co. v. Hyatt*, 132 Cal. 240, 64 Pac. 272, 54 L. R. A. 522.

[4] The contention on this appeal is that the findings to the effect that the culvert does not discharge more water than naturally flowed onto plaintiff's land are contrary to the evidence. The testimony in the case is quite voluminous, and we shall not undertake to state it in detail. There is no doubt considerable testimony tending to support

the plaintiff's claim that the culvert in question is the only one now remaining to conduct water from the westerly to the easterly line of the road; that originally there were two other points at which, by means of culverts or natural depressions, water crossed the road from the westerly to the easterly side and passed thence onto lands bordering the road south of the mouth of the culvert here in question. There is also ample evidence from which the court might have found that all of the water flowing on the westerly side of the road now finds its way to the culvert in question and that the volume of water discharged through this culvert is considerably in excess of the flow that naturally came there before the grading or paving was undertaken. But, as against this, there is evidence which would support the contrary conclusion. This evidence was evidently believed by the trial court and with its conclusion in determining the conflict presented to it we cannot interfere. For example, one of the witnesses for defendant testified that there is no more water now coming through the culvert than there ever was, and explained this by the further statement that Green's Hill, which lies to the south of Sebastopol and forms a part of the watershed from which the water ran down upon the road, had now, by grading, been brought "nearer to town," so that the amount of water flowing from the northerly side of said hill was less than it had formerly been. It was shown that the trend of all the land to the west of the road was towards the intake end of the culvert, and that, in the absence of any improvement, the great bulk of the water would cross at this place and run through plaintiff's land. There was also testimony to the effect that all the culverts and other waterways crossing the street at points south of the culvert of which plaintiff complains had naturally filled with sand and had carried no water for 25 years or more, and that during all this time the culvert in question had afforded the only method for carrying water from the west to the east side of the road. All of this testimony, taken together, fully warranted the finding that the work done on the road had not materially increased the flow of water through the culvert. If this be so, the plaintiff is really seeking to divert from her land the waters which would naturally flow thereon and turn them through an artificial channel back upon the road at a point north of her premises. As we have seen, she could not, by so diverting the water for any length of time, gain the right to continue to do so.

The appellant raises no points that are not sufficiently covered by what we have said.

The judgment and the order denying a new trial are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

159 Cal. 639

HAMMOND v. McCOLLOUGH. (L. A. 2,324, 52,998, 52,999.)

(Supreme Court of California. April 7, 1911.)

1. HUSBAND AND WIFE (§ 131*)—WIFE'S SEPARATE PROPERTY—PRESUMPTIONS.

Under the express terms of Civ. Code, § 164, a conveyance in writing to a married woman is presumed to vest a separate estate in her.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 478; Dec. Dig. § 131.*]

2. HUSBAND AND WIFE (§ 264*)—COMMUNITY PROPERTY—EVIDENCE—SUFFICIENCY.

Evidence held to show that property left on death of a husband and wife was community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 916; Dec. Dig. § 264.*]

3. DEEDS (§ 66*)—DELIVERY—QUESTION OF FACT.

Whether a deed was delivered is a question of fact.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 127, 633; Dec. Dig. § 66.*]

4. DEEDS (§ 108*)—TIME OF TAKING EFFECT—DELIVERY.

Delivery of a deed to one's husband immediately vests title in him.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 294-308; Dec. Dig. § 108.*]

5. DEEDS (§ 108*)—TIME OF TAKING EFFECT—DELIVERY.

Since delivery of a deed from one spouse to another, with understanding that it is not to be recorded, but is to be destroyed on the grantee dying first, tends to fraud, the transaction will be given its strict legal effect as absolutely vesting title in the grantee, regardless of lack of fraudulent intent.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 294-308; Dec. Dig. § 108.*]

6. FRAUD (§ 41*)—PLEADING.

To constitute a defense, fraud must be pleaded.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 36, 37; Dec. Dig. § 41.*]

7. DEEDS (§ 178*)—RELINQUISHMENT OF RIGHTS—DECLARATIONS OF GRANTEE.

The legal effect of a conveyance from a wife to her husband is not affected by his declaring, before dying that a will was unnecessary, since he had left everything to her.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 550; Dec. Dig. § 178.*]

8. HUSBAND AND WIFE (§ 262*)—COMMUNITY PROPERTY—PRESUMPTIONS.

Blocks of stock issued to husband and wife separately and indorsed generally by them, respectively, notes payable to the order of either, and gold found secreted in the residence after their death are presumed to constitute community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 913, 914; Dec. Dig. § 262.*]

Department 2. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Actions by W. T. S. Hammond, Merrill A. Weir's administrator, against A. M. F. McCollough, Nancy Weir's administrator. Judgment for plaintiff, and defendant appeals. Affirmed.

Valentine & Newby, for appellant. Hunsaker & Britt, for respondent.

HENSHAW, J. In case numbered 52,998, W. T. S. Hammond, administrator of the estate of Merrill A. Weir, deceased, brought action against A. M. F. McCollough, administrator of the estate of Nancy A. Weir, deceased (wife of Merrill A. Weir), to quiet title to real property situated in the city of Los Angeles, claimed by plaintiff administrator to be a part of the estate of his intestate and by the defendant administrator to be a part of the estate of his intestate. In case numbered 52,999, the action was between the same parties to recover possession of certain personal property under the same contention of plaintiff and against the same answer thereto by defendant. The cases were tried together. Judgment in both passed for plaintiff and defendant appeals.

They will be considered in one opinion.

Case No. 52,998. Certain evidentiary facts and considerations are applicable to both cases, and may thus be summarized. Merrill A. and Nancy A. Weir married in Indiana when he was 22 years of age and she 18. They "started on nothing." The husband engaged actively in business and was successful. They came to San Diego, Cal., in 1892, and there resided for four or five years, when they moved to Los Angeles. They there lived together until Mr. Weir died intestate on November 14, 1905. His wife survived him but a few months, and died also intestate on the 7th of March, 1906. Thus their marriage relationship had existed for over 50 years. During this long period they had acquired property, real and personal, of much value. It does not appear that either succeeded to any property by gift, devise, or descent, and, presumptively, therefore, all their property was community property. They died childless. Mr. Weir transacted all business, and, except in the particulars hereinafter to be considered, retained title, dominion, ownership, and control over all the property. Mrs. Weir was quite ignorant of business, and transacted none except as hereinafter noted. The whole controversy between the representatives of the estates of the husband and of the wife arises over the fact that during their lifetime they formulated a plan and attempted to put it in operation whereby upon the death of either the other should succeed to all of the property without probate. Their effort was the not uncommon one of attempting to avoid the delay and expense of probate by the execution of papers, the one to the other, which were either to be destroyed or placed of record, according as the one or the other should happen to die first. Such attempts are sometimes successful by the suppression of one form of evidence and the destruction of another. The law never favors them;

nor can it do so since they are in the nature of a fraud upon it which may and sometimes does lead to great wrong. When such transactions are brought to light and subjected to the dissecting knife and probe of the law, the transactions themselves must stand or fall, not in accordance with the intention of the parties, not in contemplation of the innocence of their purpose, but solely in consideration of what by their acts they legally accomplished.

The land which is in controversy in the case under consideration was purchased from Rachel Elliott who made her deed on September 14, 1901, to Nancy A. Weir, the wife. This deed was placed of record, and at the time of the husband's death, and later, at the time of the wife's death, the record title remained in the latter. On this land in the following year a dwelling house was erected, and this dwelling house was the home of the Weirs until their death. The court found relative to this property that it was community property; that the title to it was taken in the name of the wife with the intent on the part of herself and husband that it should be and remain community property; and that previous to the death of the husband, namely, on the 21st day of June, 1905, the wife executed and delivered her deed of grant to the husband of the premises, conveying to him the land in controversy.

[1] Appellant insists that under section 164 of the Civil Code here was a conveyance to the wife of property by an instrument in writing; that the presumption is therefore that title to this property vested in her as her separate property. This is quite true. It is further argued that if it be shown, or if it is admitted, that the property was paid for out of the community funds, there must follow the added presumption to support the presumption of separate property, that the husband intended it as a gift. *Alferitz v. Arrivillaga*, 143 Cal. 646, 77 Pac. 657. The evidence touching the purchase establishes clearly that the property was purchased and paid for out of community funds, that it was purchased for and used as the family home, and that there was no surrender of exclusive possession to the wife. *Nilson v. Sarment*, 153 Cal. 524, 96 Pac. 315, 126 Am. St. Rep. 91. There was evidence in abundance showing that all business was transacted by Mr. Weir and none by his wife; that in the case of other lands, title to which stood also in the name of Mrs. Weir, the husband made the contracts for their sale, and that the wife made deeds pursuant to his contracts; that in other instances where promissory notes were taken in the name of Mrs. Weir the moneys for which the notes were given were paid over by Mr. Weir out of the community funds, and, when payments were made on the notes they were made to Mr. Weir and receipted for by him.

[2] Without further exposition of the evidence, it is sufficient to say that under the rule and doctrine of *Fanning v. Green*, 156 Cal. 279, 104 Pac. 308, the finding that the property was community property is fully supported. But, if any doubt could be entertained upon this, there can be none over the fact that Mrs. Weir subsequently executed to her husband a deed of this same property. It is said by appellant that, if this be so, then the property became the separate property of the husband. For this respondent does not contend, and appellant cannot be injured by the finding that it continued to be community property after the conveyance from Mrs. Weir to her husband. Respondent's position in this regard is throughout consistent. His position is that the property was community property, and, when conveyed to Mrs. Weir, continued as community property while the title stood in her name and did not change its character as community property by the transfer of that title to the husband in whom the general control over community property resides. The facts establishing the conveyance are in evidence, principally from the testimony of Miss Hammond, a daughter of a niece of Mr. Weir, who from time to time resided with the Weirs. At the time of the making of the deed she was about 20 years of age, was a student at Stanford University, and had been financially assisted by Mr. Weir in maintaining herself at that university. She testifies that she was present at a conversation between her uncle and his wife, when, taking advantage of the fact that she would remain at the Weir home, Mrs. Weir proposed to visit some friends in San Diego and to execute a deed to her husband before a Mr. Mouser (a notary public of San Diego whom the Weirs knew well) of the Westlake residence. Miss Hammond testifies: "She said to him that she was going to San Diego and execute this deed before Mr. Mouser of the Westlake residence. That was the last piece of property that was not deeded back to Mr. Weir." Mr. Mouser testifies that Mrs. Weir came to his office on June 21, 1905, to execute this deed. His notarial record establishes the execution of a deed from Nancy A. Weir to Merrill A. Weir, her husband, granting the property in controversy. Mr. Mouser testified that Mrs. Weir signed the deed in his presence, and acknowledged it, that the deed was in the handwriting of her husband, and that he "instructed her, and talked the matter over with her, that it would be necessary to deliver the deed to him in order to vest title. I further told her that, in the event of his death prior to hers, the deed need not be recorded, if delivered, and would vest the title in him, and, should he die first, that she could destroy the deed and nobody would be injured by it, and the record of the title to the property would stand in her name." Mrs. Weir, Mr. Mouser testified, left with

the intention of delivering the deed to Mr. Weir, and then, if he died first, to destroy it. Upon her return from San Diego Miss Hammond testifies that Mrs. Weir said: "Uncle Merrill has the paper that I brought back from San Diego with me, and he is looking it over now, and I hope that it is all right, for it is the first time that I ever executed anything of the sort alone." Miss Hammond saw her uncle looking over the paper. He folded it up, put it in his pocket, and, in answer to Mrs. Weir's question if it was all right, said: "Nan, you did just as I told you. It is all right." Mrs. Weir told Miss Hammond that she had executed the deed, and that the paper which Mr. Weir had and was reading was that deed. The deed was not placed of record, but possession of it was retained by Mr. Weir, and it was probably placed by him in the tin box which was the receptacle of his private papers and other cherished personal effects. The deed was not found after his death, but the evidence leaves no doubt but that Mrs. Weir in furtherance of the understanding between herself and her husband took it from his papers after his death and destroyed it, thus leaving the record title to the property still in herself. The method and plan of the Weirs to avoid probate in the event that either of them should die is thus outlined in the testimony of their confidential friend Mr. Mouser: "He (Mr. Weir) said that he intended to keep control of the ownership of his property so long as he lived. He only wanted this instrument (referring to a bill of sale) so that his wife, in case that he died first, might be in condition to claim the property, and make such disposition of it as they had mutually agreed upon. He further stated in the same conversation that he did not propose to have his property in shape that, in case of her death before his, he would have to go through court and probate to get it back. He proposed to keep control of it while he lived. * * * He said that he proposed to keep it himself as long as he lived, and keep control of it and the interest of it as long as he lived. He did not propose to have to go into probate court to get back his own property."

Appellant, however, earnestly contends that there was a failure of evidence to show a delivery by Mrs. Weir to her husband of the deed with an intent to divest herself of her dominion and control over the property beyond power of recall, or immediately to vest him with title to it.

[3] Whether the delivery of an instrument has actually been made or not is a question of fact. The finding in this case is that the delivery was so made. If that finding receives substantial support from the evidence, our inquiry here is at an end. What that evidence does disclose, epitomized, is this: That Mrs. Weir took a deed drawn by her husband to the property in question from

herself, as grantor, to him, as grantee, and went to an intimate friend, a notary in San Diego, for the purpose of acknowledging it before him. She did acknowledge it, and she was instructed by the notary that, in order to vest title in her husband, it would be necessary for her to deliver the deed to him. She was further told that the deed, if delivered, would vest title in him without the need of recordation, but if so delivered and not recorded, and her husband died first, she could destroy the deed, and "nobody would be injured by it, and the record title would stand in her name." Mrs. Weir with this knowledge comes back to her husband with the instrument and gives it to him. She desires to know if she has correctly obeyed his instructions, and is informed that she has done so. Mr. Weir retains possession of the deed, does not place it of record, and upon his death it is destroyed by his wife.

In support of the contention of non-delivery, appellant relies on *Kenney v. Parks*, 125 Cal. 146, 57 Pac. 772; *Id.*, 137 Cal. 527, 70 Pac. 556, and *Elliott v. Murray*, 225 Ill. 107, 80 N. E. 77. In *Kenney v. Parks*, the court found that an intent to deliver and thus presently to vest title was absent for several reasons: (1) That both parties believed that the deeds could have no effect to transfer title until recorded; (2) that the deeds "were placed in the possession of her husband upon the understanding that they were to have effect only and upon the contingency of her death before that of her husband." In *Elliott v. Murray* there was a like situation. Says the Supreme Court of Illinois: "The deed was made, not with the intention that it should immediately take effect and pass title to said farm, but that it should only take effect in case he survived his wife, and, in the event that his wife should survive him, it was never to take effect, but was to be destroyed. * * * We think it clear that the parties to this deed intended it to operate as a will, and that the possession of the deed by the grantee did not have the effect to vest the title to said farm in him." In the case at bar, however, no such mistake of fact or misunderstanding of the law is disclosed.

[4] The wife was correctly informed that the delivery by her of the deed to her husband would immediately vest title to the property in him; that, if the husband should die while her deed to him remained unrecorded, she could by destroying the deed destroy all evidence of the transfer of title, and the record title to the property would thus stand in her name, and "nobody would be injured by it." It was under these circumstances that the delivery was made. It was a delivery designed to effect a present transfer of title. There is not here even shown the not uncommon mistake of supposing that by a destruction of the unrecorded

instrument title would revest. It was the typical case above adverted to whereby by the destruction of evidence, namely, the unrecorded deed, and by the suppression of other evidence, namely, by the silence of the wife, title would apparently stand of record in the wife, and, as under such circumstances an innocent purchaser would be protected, therefore, "nobody would be injured."

[5] But, as has been said, such transactions as this which are in their essence frauds upon the law, and may operate to work great wrong upon creditors and other parties in interest, when subjected to analysis before a court of law will be given only their legal force and value without consideration of the innocence of the design or the absence of an actual fraudulent intent. *Kenney v. Parks* rests, and must rest, for the soundness of its decision upon the elements of fraud and upon the mutual mistake of the parties whereby neither believed that even a delivered deed operated to transfer title until recordation, a mutual mistake which conclusively established the absence of an intent to create a present and a new vestiture of title. *Elliott v. Murray* is in conflict with our own uniform rule of decision. Thus in *Mowry v. Heney*, 86 Cal. 471, 25 Pac. 17, the trial court found that the intent of the grantor was that the deed should not take effect at all except in case of her death, and that in such case it should operate in lieu of a will and take effect after her death, and, further, that it was executed "to avoid an administration of her estate in the event of her death and for no other purpose," the very facts and circumstances which, to the minds of the supreme court of Illinois, established nondelivery. Yet by this court in bank it was said: "Here was an absolute deed to the property, delivered to the grantee. Its legal effect was to vest in the plaintiff the title to the property, free from any conditions. The effect of the finding, if upheld, is to vary the terms of the deed and render it one upon condition, and defeat its operation by parol proof on the part of the grantor that it should have an effect different from that apparent on its face. This cannot be done. Mr. Devlin, in his work on Deeds, says: 'Whether a deed passes a title or not must be determined by its legal effect. If it has been executed and delivered, its effect is determined by its language. When so executed and delivered, its legal effect as to the passing of the title is not altered by the fact that one objection to the transaction was to save the expense and trouble of administration upon the grantor's estate after his death. And, where a grantor executed a deed for this purpose to his wife, the fact that she placed the deed after delivery where her husband, equally with herself, could have access to it, does not change its legal effect as a conveyance.' *Devlin on Deeds*, § 284."

In *Dimmick v. Dimmick*, 95 Cal. 323, 30 Pac. 547, the controversy was over the effect of a deed delivered by a husband to the wife. This court said: "Conceding he believed that, if she should die first, he could conceal or destroy the deed and thereby revest the title in himself, still such fact does not militate against the sufficiency of the delivery at the date of the conveyance, or destroy his clear intention to part with the title and vest the same in her." In *Tyler v. Currier*, 147 Cal. 31, 81 Pac. 319, the wife executed a deed in favor of her husband, the defendant, and afterwards died. The plaintiff, an heir at law of the wife, sued to have the deed annulled on the ground, among others, that it was not delivered in the lifetime of the wife. It was shown that the deed had been placed in the possession of the husband. He gave testimony that he had not recorded the deed "for fear that he might die first," and that his "idea was that if it was not recorded his wife could destroy the deed and revest herself with the title." Upon this evidence the plaintiff insisted, as here, that the delivery was not made with intent to pass title, but this court said: "There is no merit in this contention. The fact that respondent had the erroneous notion that if he should die before his wife, and that after his death she should get possession of the deed and destroy it, the title would revest in her, has no pertinency to the issue of the delivery of the deed."

Thus it is plain that, even if Mrs. Weir had mistakenly supposed that by the destruction of her deed to her husband after its delivery she could reinvest herself with title, nevertheless, her mistake could not be permitted to impair the legal effect of such delivery. But this case is weaker than those cited, in that it is made to appear that Mrs. Weir was not laboring under any mistake, that she was correctly informed as to the law, and thus knew that the destruction of the deed would only accomplish an apparent re-establishment in her of the title.

[6] Some consequence is attached by appellant to the declaration of a witness that in 1894 he heard a statement by Mr. Weir to Mrs. Weir to the effect "that he was transferring his property in her name in order to protect himself against the liabilities that might occur in the banks in the East." The only significance that could pertain to this testimony is that it was designed to show that the deed taken by Mrs. Weir to the property at the instance of her husband was so taken in fraud of the rights of eastern creditors. But no such defense was pleaded, and it is well settled that when fraud is relied on as an element of defense and invoked as conferring a right against the plaintiff it must be alleged. *Frink v. Roe*, 70 Cal. 297, 11 Pac. 820; *Wetherly v. Straus*, 93 Cal. 283, 28 Pac. 1045. Moreover, the deed by which

Mrs. Weir obtained title to the property here in controversy was made seven years after. This property could not have been in the mind of Mr. Weir as a part of the property which he proposed to transfer to avoid liabilities, and there being no proof in the case even that the liabilities existed, much less that they continued, there can be no possible ground for saying that Mr. Weir's business transactions years after were influenced by their suppositive existence.

[7] Reliance is placed upon certain death-bed declarations of Mr. Weir to the effect that it was unnecessary that he should make a will, that his wife had everything, and that he had given or had left everything to his wife. Suffice it to say that these were but expressions of the belief of Mr. Weir as to what he had done or accomplished and could exercise no controlling influence in determining what in fact he had or had not done or accomplished.

It is urged that the court erred in overruling defendant's objection to the admission of the notarial record of Notary Mouser, which record, it will be remembered, showed his acknowledgment to the deed by Mrs. Weir to her husband; and also that the court erred in admitting the parol evidence of Mr. Mouser touching the contents of the deed. It is not here contended, as, of course, it could not successfully be, that the evidence was not admissible to show the terms and nature of a written instrument admitted or proved to have been lost or destroyed, but it is said that there is no evidence in the record to identify the "paper" which Miss Hammond testified was handed by Mrs. Weir to her husband on her return from San Diego with the deed of conveyance. But the evidence is abundant to show that she went to San Diego with such a deed, that she executed such a deed before Mr. Mouser, that she told her (the witness) that she had executed the deed, and that that was the paper, "that" referring to the paper which she had handed to her husband which he read, approved and placed in his pocket. It is further in evidence that after the death of her husband she stated that she had destroyed her deed to him. The evidence was, therefore, clearly admissible.

[8] Case numbered 52,999. The personal property in controversy in this case consisted of stock in mining companies, water companies, industrial companies, and banks, certain bonds of the United States government, promissory notes, household furniture and moneys in bank; also \$880 in gold coin found secreted in the cellar of the Weirs' residence after the death of both spouses. Of the stock some of it was issued to M. A. Weir and bore his general indorsement. Other shares were issued to Nancy A. Weir and bore her general indorsement. The promissory notes for the most part were made payable to the "order of M. A. Weir or Nancy A. Weir." The court found as to all this

that it was community property. No useful purpose, we think, would be subserved by treating the items separately. Under the circumstances shown the presumption of the law is that it was community property. *Fennell v. Drinkhouse*, 131 Cal. 447, 63 Pac. 734, 82 Am. St. Rep. 361; *Freese v. Hibernia, etc., Society*, 139 Cal. 394, 73 Pac. 172; *Bashore v. Parker*, 146 Cal. 525, 80 Pac. 707. The facts of compelling force in support of the finding are those above adverted to; that the property was acquired by the spouses during coverture, and not by gift, devise, or descent; that Mr. Weir attended to all business and maintained to the end the absolute dominion and control of the property in all its phases; that his wife was utterly ignorant of, and unversed in business, so that she did not know the difference between a deed and a mortgage and a promissory note; that, when a promissory note would be taken in the name of Mrs. Weir as payee, the money which the note represented was community money, Mr. Weir would retain the possession of the note, would receive the money on account of it, and indorse the payments in his own hand. In January, 1903, Mr. Weir made and acknowledged before Mr. Mouser an instrument purporting to be a bill of sale to his wife of all the personal property owned by him at the date of the instrument, or which he might thereafter acquire. The circumstances attending the making of this bill of sale were testified to by Mr. Mouser, and his testimony has been previously quoted. The paper was given by Mrs. Weir to the defendant with other papers after Mr. Weir's death. There is no evidence of a delivery of the paper to Mrs. Weir in the lifetime of her husband, and there is the strongest inferential evidence that it was not delivered. This evidence is found both in the testimony of Mr. Mouser and from the fact that Mr. Weir after its execution retained full and complete dominion and control over all his personal property down to the very day of his death. It is apparent that this bill of sale was meant to aid in effectuating the plan of the Weirs whereby upon the death of either the other might succeed to all the property without probate. But it was no part of that plan that Mr. Weir should ever actually part with title, dominion and control of any of his property. It was still to remain community property and the evidences and indicia of a change of ownership were not real, but were feigned to aid the result sought to be accomplished. In the case of the land, the evidence is strong and convincing that Mrs. Weir delivered the deed which transferred the title to her husband. In the case of the personal property, it is equally strong that the husband did not deliver the bill of sale nor any part of the personal property, nor in any way surrender the full rights of dominion and control over it which as community property he was au-

thorized to exercise. The rulings of the court in admitting and rejecting evidence were sound and without prejudice to the appellant.

The judgments and orders appealed from are therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

159 Cal. 663

MOUSNIER v. SUPERIOR COURT OF ALAMEDA COUNTY et al.

(S. F. 5,849.)

(Supreme Court of California. April 7, 1911.)

PROHIBITION (§ 3*)—APPEALABLE ORDER.

Under the express provisions of Code Civ. Proc. § 1616, an order of court directing a payment of attorney's fees by an executor or administrator out of the estate of the decedent whose will is offered for probate is an order directing the payment of a claim against the estate, and is appealable.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4-19; Dec. Dig. § 3.*]

In Bank. Application by Elise Mousnier, administratrix, for a writ of prohibition against the Superior Court of Alameda County, and F. B. Ogden, Judge thereof. Writ denied.

R. B. Tappan and E. K. Taylor, for petitioner.

PER CURIAM. The application for a writ of prohibition is denied. In explanation, we take this occasion to say that if the superior court should make an order directing the payment of attorney's fees incurred by the proponent of the will of Therese Berthol, payable out of the assets of the estate, it would be an order directing the payment of a claim against said estate, and, under subdivision 3 of section 963 or under section 1616 of the Code of Civil Procedure, it would be an appealable order.

The applicant has therefore an adequate remedy by appeal, and prohibition is unnecessary.

159 Cal. 193

BELL et al. v. STAACKE et al. (L. A. 2,530.)

(Supreme Court of California. Jan. 9, 1911.)

1. CONTINUANCE (§ 1*)—SEVERAL DEFENDANTS—CONTINUANCE AS TO PART.

Under Code Civ. Proc. § 579, providing that, in an action against several defendants, the court may render judgment against one or more of them, leaving the action to proceed against the others, the court may continue the hearing of an accounting by the foreman of a ranch who made no claim of title or ownership to the land in an action to dispossess persons in possession of the land, and may proceed with the case against the other defendants.

[Ed. Note.—For other cases, see Continuance, Dec. Dig. § 1.*]

2. APPEAL AND ERROR (§ 415*)—MOTION FOR NEW TRIAL—SEVERAL DEFENDANTS—NOTICE OF APPEAL.

In an action to dispossess persons occupying a ranch, the foreman of the ranch, against

whom an accounting was asked, and who made no claim of title or ownership to the land, was not entitled to notice of appeal from an order denying the defendant's motion for a new trial of the issue of ownership, as under Code Civ. Proc. § 579, the court may in its discretion render judgment against one or more defendants, leaving the action to proceed against the others.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 415.*]

3. APPEAL AND ERROR (§ 394*)—UNDERTAKING—SEVERAL JUDGMENTS.

A single undertaking on appeal is sufficient to confer jurisdiction on the Supreme Court to review a judgment and an order denying a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 394.*]

4. WITNESSES (§ 198*)—EVIDENCE (§ 215*)—PRIVILEGED COMMUNICATION.

A letter from an attorney of record in response to a motion for writ of assistance saying that he forwarded the motion to his client, with advice that there was no defense to the motion, is admissible as an admission of the attorney of record, and is not a privileged communication.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 198;* Evidence, Cent. Dig. §§ 754-759; Dec. Dig. § 215.*]

Department 2. Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by John S. Bell and another against George Staacke and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Sullivan & Sullivan and Theo. J. Roche, for appellants. T. Z. Blakeman, for respondents.

HENSHAW, J. This is an appeal by John S. Bell and his wife, Kate M. Bell, from an order made by the superior court of the county of Santa Barbara, directing the issuance of a writ of assistance to dispossess appellants of about twenty acres of land, upon which is a residence and outbuildings connected therewith. It is one phase of protracted litigation between the parties, the full history of which will be found in Bell v. Staacke, 137 Cal. 307, 70 Pac. 171; Bell v. Staacke, 141 Cal. 186, 74 Pac. 774; Bell v. Staacke, 148 Cal. 404, 83 Pac. 245; Bell v. Staacke, 151 Cal. 544, 91 Pac. 322.

Louis Jones was made a party defendant to the litigation. He was foreman in charge of the 10,000-acre ranch of which the 20 acres here in controversy is a part, and was called upon for an accounting of his stewardship. He answered, declaring the nature of his employment, that he had managed the ranch, made leases, collected rents, and expressed his willingness and desire to account. At the commencement of the first trial (Bell v. Staacke, 141 Cal. 186, 74 Pac. 774) plaintiff moved for a continuance on the ground that the defendant Louis Jones was absent, and not represented. The defendants Staacke and Teresa Bell, as administratrix, requested that the case be continued as to defendant Louis Jones, and that

the trial proceed as between the other parties. The court so ordered, and this was done. The first trial resulted in a judgment in favor of the plaintiff for the 10,000 acres, directing the defendants to convey the same to plaintiff's grantees free from any claim or lien of the estate of Thomas Bell. A judgment in favor of the administratrix on the cross-complaint in the sum of \$51,120.15 was given against Bell personally, but it was declared not to be a lien upon the realty. Staacke and the administratrix appealed from the order denying their motion for a new trial upon all issues except those relating to the indebtedness of John S. Bell to Thomas Bell deceased; in other words, as to all issues excepting the finding that plaintiff John S. Bell was indebted to the estate of Thomas Bell in the sum of \$51,120.15. On that appeal this court reversed the order denying a new trial except as to the issues relating to the indebtedness of John S. Bell to Thomas Bell. *Bell v. Staacke*, 141 Cal. 203, 74 Pac. 774. Upon the new trial the cross-complaint of the defendants was dismissed as to the defendant Louis Jones, and the trial of the action between the plaintiff and the defendant Jones was continued. The trial resulted in findings and decree in favor of the administratrix on her cross-complaint to the effect that a lien existed in favor of the administratrix upon the land in question for the full amount of the debt of plaintiff John S. Bell to Thomas Bell, deceased, that Staacke held the title to the land in trust, first, as security for the payment of the indebtedness; and, second, in trust for the use and benefit of John S. Bell, the plaintiff. The judgment further decreed that the defendants have and recover of the plaintiff their costs. The plaintiff appealed from the judgment and the appeal was dismissed. *Bell v. Staacke*, 148 Cal. 404, 83 Pac. 245. He also appealed from the order denying his motion for a new trial and the order was affirmed. *Bell v. Staacke*, 151 Cal. 544, 91 Pac. 322. The land in controversy was sold under the last judgment and purchased by the administratrix Teresa Bell, the respondent herein. In due course she received a commissioner's deed of conveyance. John S. Bell and Kate M. Bell, his wife, having refused to deliver possession of the land in controversy after demand properly made, or to recognize in any way the title so purchased by the administratrix, the latter finally moved for a writ of assistance, and from the order of court directing its issuance this appeal is taken.

The principal contention of the defense upon this appeal is that the judgment of the superior court of Santa Barbara county made and given upon the first trial in July, 1901, was and is a final and conclusive determination of the rights of all the parties hereto. This is based upon the argument that because of the failure to serve Louis Jones with notice of appeal from the order refusing

their motion for a new trial this court was without jurisdiction to entertain the appeal and to render the judgment which, in fact, it did render in the 141 Cal., 74 Pac. Necessarily this, in turn, is founded upon the contention that Louis Jones was such an essential party to the controversy that this court could do nothing with the appeal from the order denying the new trial unless jurisdiction over him had been attained by service. But Louis Jones had been but the foreman and to that extent custodian of the property and the collector of its rents. He made no claim to any title or ownership or interest therein and stood in the position of a mere stakeholder, willing and anxious to render his account and to pay over any money found due to the person whom the court should designate. The trial as to him was continued, and properly continued, under section 579, Code Civ. Proc., which provides that in an action against several defendants the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper. The court therefore had ample authority to do as it did—continue the hearing so far as Jones' account was concerned, and proceed to a trial of the issues between the principal parties litigant. It was not necessary, therefore, that Jones should have been served with a notice of appeal, and nothing which was decided upon the appeal could or did affect in any way any of Jones' rights.

It is next contended that defendants undertaking on the appeal reported in 141 Cal., 74 Pac., was insufficient to confer jurisdiction upon this court to entertain and decide it, in that after reciting the appeal from the judgment and from the order the single undertaking declared that appellants would pay damages awarded against them on the appeal or on a dismissal thereof, not exceeding \$300. This precise point upon this precise undertaking was passed upon and decided by this court adversely to appellants' contention in *Bell v. Staacke*, 137 Cal. 307, 70 Pac. 171. It is in legal effect exactly the undertaking considered and held sufficient also in *Granger v. Robinson*, 114 Cal. 631, 46 Pac. 604, and *Buchner v. Malloy*, 152 Cal. 486, 92 Pac. 1029.

Mr. Thomas has been acting as attorney for plaintiffs and notice of the motion for a writ of assistance was served upon him. In response, he wrote to the attorney for the moving party (respondent herein), saying that he had "forwarded the notice to Mr. Bell at Las Alamos, with my statement that there was no defense to the motion, and suggested that perhaps the most you people wanted was them to sign a written agreement of title of the Bell estate to the land referred to in the notice. I gave this advice months ago to Mr. and Mrs. Bell." It is contended that it was error to admit in evidence at the hearing this letter. But at the hear-

ing it was admitted that "Mr. B. F. Thomas is and for some time has been the attorney of record for the plaintiff herein." The letter was admissible in evidence as an admission of the attorney of record of the appellant made while he was such attorney. It could not be regarded as a private communication. It does not purport to be a private communication, and there is nothing in the circumstances attending its writing which would estop opposing counsel from having it admitted in evidence wherever the matter of it became pertinent.

The order appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

159 Cal. 623

SMITH v. GOETHE et al. (Sac. 1,686.) (Supreme Court of California. April 4, 1911.)

1. APPEAL AND ERROR (§ 637*)—FAILURE TO SERVE BILL OF EXCEPTIONS—EFFECT.

Under Code Civ. Proc. § 650, as amended in 1907 (St. 1907, c. 379), and as repealed by St. 1909, c. 657, which required service of a bill of exceptions on the adverse party after certification, an appeal will not be stricken from the record for want of such service, where it does not appear that the bill as printed in the record is incorrect, unfair, or incomplete.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2784; Dec. Dig. § 637.*]

2. APPEAL AND ERROR (§ 1097*)—LAW OF CASE.

Decisions on appeal are binding on a subsequent appeal in the same case so far as the facts are the same.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368; Dec. Dig. § 1097.*]

3. TRUSTS (§ 89*)—RESULTING TRUSTS—EVIDENCE—WEIGHT.

Evidence in an action to establish a resulting trust held insufficient to show that notes and mortgages were purchased by defendants' predecessor before the transaction under which the trust arose, or that the predecessor did not make a loan.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 134-137; Dec. Dig. § 89.*]

4. EVIDENCE (§ 424*)—PAROL EVIDENCE—ADMISSIBILITY TO VARY WRITING.

The prohibition against admitting parol evidence to vary a writing applies only to controversies between parties to the instrument and those claiming under them.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1966-1968; Dec. Dig. § 424.*]

5. EVIDENCE (§ 596*)—PAROL EVIDENCE—VARYING WRITING—WEIGHT.

Uncertain testimony given years after a transaction evidenced in writing should not prevail against recitals in the writing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2448; Dec. Dig. § 596.*]

6. TENANCY IN COMMON (§ 19*)—PURCHASES BY CO-TENANT—RIGHT TO BENEFIT.

The right of one cotenant to claim the benefit of a purchase by another depends upon his election and an offer within a reasonable time to pay his share of the purchase money.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 55-59; Dec. Dig. § 19.*]

7. EVIDENCE (§ 231*) — DECLARATIONS BY GRANTOR OF PERSONALTY—ADMISSIBILITY.

An admission or declaration by the grantor of personality, while owning it, is admissible against the successors of the parties, notwithstanding Code Civ. Proc. §§ 1848-1853, 1870, relating to the admissibility of declarations by persons not parties.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 835-839, 852-859; Dec. Dig. § 231.*]

In Bank. Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by S. B. Smith, administrator, against H. J. Goethe and others. From a judgment for defendants, plaintiff appeals. Reversed.

A. L. Shinn and P. S. Driver, for appellant. Devlin & Devlin, for respondents.

PER CURIAM. Upon the former submission of this appeal the judgment was reversed for reasons stated in an opinion which, except for some minor alterations, reads as follows:

"This is an appeal taken from a judgment within 60 days after its rendition. The transcript contains a bill of exceptions setting forth the evidence and proceedings on the trial.

"In support of his appeal the appellant assigns errors of law occurring at the trial and the insufficiency of the evidence to support the decision. This makes it necessary to consider the motion of the respondents, made to this court, to strike the bill of exceptions from the record on appeal. At the time the bill was proposed, settled and certified, the amendment of 1907 to section 650 of the Code of Civil Procedure was in force. It provided that when a proposed bill of exceptions, with proposed amendments, was settled by the judge, it should be engrossed and certified 'and upon being certified must within five days thereafter be served upon the adverse party.' St. 1907, p. 715. The clause quoted was stricken from the section in the subsequent amendment of 1909. St. 1909, p. 993. But as it was in force, in 1908, when this bill was certified, it is necessary to consider the effect of the provision quoted. The bill in question was duly proposed, amendments thereto were proposed, the bill and amendments were settled, and the bill, after being engrossed, was certified by the judge. It was not thereafter served upon the respondents, and for the failure to serve it the respondents now move to have it stricken from the record and excluded from consideration in the decision of the appeal. The purpose intended to be accomplished by the requirement that the certified bill be served on the adverse party is not clearly apparent. It may have been intended to give such party a check against accidental or fraudulent alterations in the bill as printed

in the transcript on appeal. Its short life indicates that it did not prove useful.

[1] "Inasmuch as no penalty is imposed by the section for a failure to make the service required, we feel justified in holding that in a case such as that now before the court, where there is no claim or suggestion that the bill, as settled and certified by the judge and printed in the transcript on appeal, is in any respect incorrect, unfair, or incomplete, the party in fault should not be visited with a punishment so severe as that of striking the bill from the record and practically defeating his appeal. The motion is denied.

"The case comes to this court for the second time. The first trial resulted in a judgment in favor of the estate of Ann Thomas. That judgment and an order denying a new trial were reversed. *Smith v. Goethe*, 147 Cal. 725, 82 Pac. 384. The facts are somewhat complicated, and will, in a general way, sufficiently appear from the opinion filed on the former appeal. When the case was again in the superior court, amended pleadings were filed, and a second trial was followed, as has been said, by a judgment in favor of the defendants. The present appeal is taken by plaintiff from this judgment.

"Of the amendments to the pleadings we shall say merely that the essential character of the action was not changed from that presented by the original complaint and answer. Many of the facts found on the first trial are again found (or admitted) here. The one important difference is connected with the transaction of April 5, 1900, between Frank Thomas and Curtis, Carmichael & Brand, referred to in the former opinion at page 728 of 147 Cal., page 385 of 82 Pac. That opinion describes the transaction thus: 'On April 5, 1900, for the purpose of discharging part of the indebtedness of himself and the estate of Ann Thomas, Frank Thomas borrowed from Curtis, Carmichael & Brand, a corporation, the sum of \$8,400, and as security therefor executed to Brand, as trustee for said corporation, a deed absolute in form to all his interest in the said seven parcels of land, and at the same time, and as part of the same transaction, executed a written contract with Carmichael, who was acting in behalf of and for said corporation, so far as his duty under the contract was concerned.' Basing its reasoning upon the premise that the \$8,400 (which was used to purchase the Cadwallader and other mortgages) was loaned by Curtis, Carmichael & Brand to Frank Thomas, the court concluded that the mortgages were, in equity, bought by Thomas, so far as they affected the property of the estate. We need not here retrace the steps by which the conclusion was reached that on the facts stated the defendants, if they purchased at the foreclosure sale with knowledge of the relations between Frank Thomas, as administrator, and Curtis, Carmichael &

Brand, took the legal title to the property of the Ann Thomas estate in trust for the estate. The opinion to which we have referred contains a careful and complete analysis of the legal status of the parties as affected by their various dealings.

"[2] Under the doctrine of the 'law of the case' the legal propositions declared on the first appeal would, so far as the facts are the same, be binding now, even if their correctness were open to question, of which there is no suggestion. But the basis upon which the entire argument of a trust relation rested was the fact that the \$8,400 was loaned to Frank Thomas, and that the purchase of the Cadwallader mortgage was, therefore, made with his money. At the first trial the finding was in favor of plaintiff on this issue. On the second trial, however, the court made findings in support of defendants' denial of the averment that the money was so loaned and found that the purchase of the Cadwallader and other mortgages was made by the corporation of Curtis, Carmichael & Brand with its own funds and for its own account. It found that on April 5, 1900, Frank Thomas executed a written agreement with Carmichael, whereby Carmichael was appointed Thomas' agent for certain purposes connected with the property. This writing, which is mentioned on page 728 of 147 Cal., page 385 of 82 Pac., the former opinion, recites that Carmichael has loaned to Thomas upon certain securities the sum of \$8,400. The court finds that the Cadwallader and other notes and mortgages had been purchased by Carmichael for his corporation with its moneys on March 30, 1900; that these purchases had been fully consummated before the execution of the instrument of April 5th; that Frank Thomas did not borrow either from said Carmichael, or the corporation of Curtis, Carmichael & Brand, directly or indirectly, the sum of \$8,400, or any other sum, and that the recital in the said instrument to that effect was untrue; that the said recital was inserted therein through and by inadvertence and mistake.

[3] "Of course, if these findings state the facts, there is an end of plaintiff's case, so far as it depends upon the theory that the purchase of the mortgages was made with the money of Frank Thomas and for his account. But the appellant contends with much vigor that the evidence wholly fails to sustain the findings. This contention, we think, must be upheld.

"At the time of the trial Frank Thomas was dead. The only witness who could testify to the facts of the transaction was Carmichael. The writing was prepared in the office of Curtis, Carmichael & Brand, and was signed by Thomas in the form in which it was presented to him. Its recitals unquestionably made out a prima facie showing in support of plaintiff's averment that the \$8,400 had been loaned to Thomas. The re-

spondents must look to Carmichael's testimony to find support for the finding to the contrary.

[4] "We may here note briefly plaintiff's claim that this testimony was incompetent under the rule prohibiting the admission of oral evidence to vary the terms of a writing. We think, however, that the case comes within at least one of the exceptions to the rule. It is well settled that the prohibition applies only to controversies between parties to the instrument, and those claiming under them. *Smith v. Moyuahan*, 44 Cal. 53; *Hussman v. Wilke*, 50 Cal. 250; *Dunn v. Price*, 112 Cal. 46, 44 Pac. 354. If the respondents are not strangers to the contract between Frank Thomas and Carmichael, the estate of Ann Thomas certainly is such stranger. But, even though it was open to the defendants to contradict the recitals of the writing, we are satisfied that Carmichael's testimony was insufficient to raise such a substantial conflict as to put the finding of the trial court beyond the power of review here. It amounted, at most, to vague statements, in answer to leading questions put by counsel for the respondents, that the recital of a loan was a mistake. For example, there were questions and answers as follows: 'Q. I notice in this contract the statement, Mr. Carmichael, that it recites that you had loaned to Frank Thomas \$8,400. Now, in view of what you have said, that statement in this contract is incorrect to that extent? Ans. Yes, sir. Q. You mean by that statement that the statement you loaned Frank Thomas \$8,400 is incorrect? Ans. Well it is incorrect so far as I remember. * * * And, further: 'Q. Now, Mr. Carmichael, did you ever loan any money to the estate of Ann Thomas for the purpose of buying these mortgages from Goethe? Ans. No, sir.' (This, it will be observed, is not a statement that the money was not loaned to Frank Thomas individually.) Preceding this the witness had stated that the deed from Thomas to Brand was taken 'so as to secure us for money we had advanced and that he was owing us at the time I purchased these other mortgages' and that he had bought the mortgages for Curtis, Carmichael & Brand. Standing alone, this statement was entitled to little weight. It did not purport to recite the terms of any conversation or agreement between the witness and Thomas, but merely the conclusion or opinion of the former regarding the effect of the transaction. And that this was the meaning in the mind of the witness is shown by his later answers on redirect examination. Upon the court asking 'Was the money you paid to Goethe, was it a loan?' Carmichael replied, 'No, sir; it was not. I never considered it was.' He then went on to say that his agreement with Thomas was that 'at any time he paid me my money I was to return him all that property, all the papers. * * * Mr. Thomas told me that he was making arrangements at that time

with a building and loan in San Francisco to advance him all the money that was necessary to take up all of those claims, and I agreed with him he could take them up at any time he wanted to by paying me my money and interest on it. That is about the understanding as I understood it. * * * I never intended it as a loan to Thomas.' So far as this testimony shows an agreement—a meeting of minds—it is in no way inconsistent with an agreement for a loan. Nothing really points to the contrary except Carmichael's statements that he 'understood' or 'intended' that there should be no loan. There is no intimation that Thomas 'understood' that it was not a loan. His written agreement, with its recitals, shows that he understood the contrary.

[5] "The uncertain statements of Carmichael, made years after the event under examination, should not be permitted to prevail against the formal written declaration of the parties, made at the time of the transaction and as a part of it. In *re Irvine*, 102 Cal. 606, 36 Pac. 1013; *Moore v. Grayson*, 132 Cal. 602, 64 Pac. 1074. In saying this we are not unmindful of the finding that the payment of the money was completed before the signing of the contract of April 5th. But a reading of Carmichael's testimony makes it entirely clear that the payment of the \$8,400 and the contract of agency were parts of a single transaction between Thomas and Carmichael, and that the finding to the contrary has no support in the record. Add to these considerations the fact that on the first trial Carmichael had testified that he paid for the mortgages with money he loaned to Thomas, that he kept them as security for this money owed by Thomas, and took an assignment of them to himself for the purpose of getting such security, and also the far greater probability, under all the circumstances, of this arrangement than of the one found by the court, and we may well say that the case is one of an apparent, rather than a real conflict of evidence.

"The holding that the findings on this subject are not sustained by the evidence makes a new trial necessary. Of the respondents' contention that the foreclosure judgment constitutes an estoppel against the present claim of plaintiff it is enough to say that the contrary was distinctly laid down by this court in deciding the former appeal. This declaration is the law of the case.

"There is, we think, no occasion to discuss any of the points made by the appellant in attacking rulings on evidence with the exception of the one permitting oral testimony to contradict the recitals of the writing of April 5, 1900, and this has already been disposed of.

"One of plaintiff's assignments of error is the failure of the trial court to find on the issue whether the defendants had notice of the relations between Frank Thomas and Carmichael. If the finding that the \$8,400

was not a loan had stood, the question of notice would be immaterial, but, if it should on another trial be found that plaintiff's claim regarding the transaction between Thomas and Carmichael was correct, a finding on the issue of notice would be highly important.

"The appellant contends that the facts alleged and found entitle him to judgment, and that this court should order such judgment in his favor, instead of directing a new trial. He bases this claim on the theory that the estate of Ann Thomas and the defendants were tenants in common of part of the property, and that the estate was entitled to share in the benefits of any purchase by its cotenants of an outstanding title or incumbrance. 'A cotenant cannot take advantage of any defect in the common title by purchasing an outstanding title or incumbrance and assert it against his companions in interest. The purchase is, notwithstanding his design to the contrary, for the common benefit of all the cotenants. The legal title acquired by him is held in trust for the others if they choose within a reasonable time to claim the benefit of the purchase by contributing or offering to contribute their proportion of the purchase money.' *Freem. on Cotenancy and Partition* (2d Ed.) § 154. Whether or not this rule is applicable where (as here) the cotenants acquired their interests at different times and under different instruments is a question concerning which there has been some diversity of opinion in the courts. It has, however, never been decided in this state (see *Stevenson v. Boyd*, 153 Cal. 630, 96 Pac. 284, 19 L. R. A. [N. S.] 525), and we prefer to leave it open, since the case at bar may be disposed of on other grounds.

[6] "As is said in the above quotation from Mr. Freeman's work, the right of one cotenant to claim the benefit of a purchase by another is conditional upon his election and tender, within a reasonable time, to pay his share of the purchase money. *Mandeville v. Solomon*, 39 Cal. 125; *Stevenson v. Boyd*, *supra*. The complaint alleges the making of an offer of payment by plaintiff to defendants. If we assume that this was an allegation of a tender sufficient for the purpose under discussion, the plaintiff is met by the difficulty that his allegation is denied, and that the finding of the court is against him. We find nothing in the answer which in our judgment obviated the necessity of proving a reasonably prompt tender as a condition of claiming the benefit of the purchase made by the cotenant. The appellant's contention that he is entitled to judgment on the findings cannot, therefore, prevail.

"The judgment appealed from is reversed."

Upon motion of the respondents, a rehearing was granted. One of the grounds advanced was that this court had erred in holding that the recitals in the paper signed by Frank Thomas under date of April 5, 1900, "unquestionably made out a prima facie

showing in support of plaintiff's averment that the \$3,400 had been loaned to Thomas." In the briefs preceding the former decision, there had been considerable discussion over the question whether these recitals were or were not conclusive against the defendants. Their effect as prima facie evidence had not been challenged. In the petition for rehearing it was, however, strenuously urged that these recitals were not evidence at all against the defendants. The rehearing was ordered for the purpose, principally, of considering this point which, if sustained, would have a decisive effect upon the appeal.

[7] The instrument of April 5th was prepared in the office of Curtis, Carmichael & Brand, the then owners of the legal title to the notes and mortgages over which this controversy arose. Such notes and mortgages (which were personal property) were afterwards transferred to the H. J. Goethe Company, one of the defendants herein. Treating the recitals as an admission or declaration by Carmichael on behalf of Curtis, Carmichael & Brand, the question is whether such declarations or admissions made by the grantor of personal property while he is the owner thereof may be given in evidence against the grantee. That such declarations are proper evidence if made by one holding the title to real estate is not questioned. *Code Civ. Proc.* § 1849. It is argued, however, that the rule permitting declarations to be used against a grantee of the declarant is not applicable to statements made by one holding title to personal property.

The respondents cite a number of cases in support of this distinction. But an examination of further authorities shows that the rule limiting the admissibility of such declarations to cases affecting real property has not of late been generally followed in either England or the United States. It has, indeed, been repudiated in some jurisdictions in which it had formerly been applied. With but one or two exceptions, the recent decisions supporting the respondents' contention have been rendered in the state of New York. In that jurisdiction the doctrine urged has undoubtedly received consistent recognition ever since the case of *Paige v. Cagwin*, 7 Hill, 361. *Truax v. Slater*, 86 N. Y. 630; *Merkle v. Beidleman*, 165 N. Y. 21, 58 N. E. 757; *Flannery v. Van Tassel*, 127 N. Y. 631, 27 N. E. 393. An isolated decision of the Supreme Court of the United States (*Dodge v. Freedman's Sav. & Trust Co.*, 93 U. S. 379, 23 L. Ed. 920) follows the rule in *Paige v. Cagwin*, but in *Fourth Nat. Bank v. Albaugh*, 188 U. S. 734, 23 Sup. Ct. 450, 47 L. Ed. 673, the same court reached a conclusion which cannot easily be harmonized with the rule declared in *Dodge v. Company*, although the earlier case is not mentioned in the opinion. Of the cases cited by respondents from other jurisdictions only one—*Shober v. Jack*, 3 Mont. 351—seems to be clearly in point. That case was decided while Montana was

still under the territorial form of government. The court followed the Dodge Case, deeming itself bound by the precedent established by the Supreme Court, but did so reluctantly, declaring the holding to be contrary to the weight of authority.

"The English courts and most of the American courts * * * receive without question all admissions by the vendor of personalty made while title was in him." 2 Wigmore on Ev. § 1083; *Ivat v. Flinch*, 1 Taunt. 141; *Jennings v. Blocker*, 25 Ala. 415, 422; *Randegger v. Ehrhardt*, 51 Ill. 101; *King v. Wilkins*, 11 Ind. 347; *Forsyth v. Kreakbaum*, 7 T. B. Mon. (Ky.) 97; *Holt v. Walker*, 26 Me. 107, 45 Am. Dec. 98; *Magee v. Raiguel*, 64 Pa. 110; *Hayward Rubber Co. v. Dunklee*, 30 Vt. 29; *Alger v. Andrews*, 47 Vt. 238.

Some of the decisions hereinbefore cited on either side of the question are cases of declarations made by a prior holder of negotiable paper. In this class of cases a distinction is to be drawn between the effect of these declarations as against subsequent holders who have taken before and those who have taken after maturity. In the case of the former the subsequent holder takes the negotiable instrument free of equities affecting prior parties. His title is not identical with that of the first holder. Admissions of the holder are therefore not receivable against him. "But wherever the element of negotiability is wanting—as where the transfer was made after maturity—this distinction ceases; identity of title is found; and the admissions are receivable." 2 Wigmore, § 1084, and cases cited. As in the case of admissions by the owners of personalty generally, admissions by holders of negotiable paper as against subsequent holders taking after maturity (as in the case at bar) are now, except in New York, generally recognized as proper to be given in evidence.

On the main question here discussed there appears to be no direct authority in this state except in two or three cases in which, a transfer of personalty having been attacked as made with intent to defraud creditors, it was held that the acts or declarations of the transferor while in possession and tending to show a fraudulent intent on his part were admissible, although not brought home to the knowledge of the transferee. *Landecker v. Houghtaling*, 7 Cal. 391; *Visher v. Webster*, 8 Cal. 109, 113. See, also, *Eppinger v. Scott*, 112 Cal. 369, 42 Pac. 301, 44 Pac. 723, 53 Am. St. Rep. 220. It would be difficult to reconcile these decisions with a rule of exclusion as rigid as that contended for by the respondents. The subject of the admissibility of acts or declarations of persons not parties to the action is covered by various sections of the Code of Civil Procedure. (1848-1853, 1870.) Without reviewing these sections in detail, we believe that, read in their entirety, they do not require us to hold

that the recitals of the instrument in question (which was admitted without objection) did not constitute evidence as against the successors in interest of the parties.

Upon the whole case, we think the former opinion was correct in its declaration that these recitals made out a prima facie showing that the \$8,400 had been loaned to Thomas. We have also re-examined the record in the light of the criticisms made by respondents upon other portions of the opinion, and, with such modification as has been made in the copy hereinbefore set forth, are satisfied with the views expressed in that opinion.

The judgment is reversed.

BEATTY, C. J., does not participate in the foregoing.

(159 Cal. 610)

CORDANO v. WRIGHT et al. (SONOMA COUNTY, Intervener). (S. F. 5,205.)

(Supreme Court of California. April 3, 1911.)

1. PLEADING (§ 291*)—ADMISSIONS.

Where defendants filed an answer setting up a deed, failure of plaintiff to file an affidavit of denial as provided by Code Civ. Proc. § 448, constituted an admission of the genuineness and due execution of the deed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 864-879; Dec. Dig. § 291.*]

2. PLEADING (§ 291*)—ADMISSIONS.

Under Code Civ. Proc. § 448, providing that when a copy of a written instrument on which a defense is founded is contained in the answer, etc., the genuineness and due execution of such instrument are deemed admitted, unless plaintiff file an affidavit denying the same, etc., an admission of the due execution of a conveyance by a married woman amounts to an admission that it was acknowledged as required, though the certificate attached to the deed appears to be defective.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 864-879; Dec. Dig. § 291.*]

3. PLEADING (§ 291*)—EXECUTION—ADMISSIONS.

The effect of the failure to file an affidavit under Code Civ. Proc. § 448, is merely to admit the genuineness and due execution of the conveyance pleaded, and, notwithstanding such admission, it may be shown that the instrument was executed under undue influence and by mistake, that there was no consideration for it, or that, though absolute in form, it was in fact a mortgage.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 864-879; Dec. Dig. § 291.*]

4. HUSBAND AND WIFE (§ 15*)—DEEDS—REQUISITES—PARTIES.

A conveyance, to be effective, must contain, not only the names of the parties, but also words indicative of an intent to transfer an interest in the property from one to another, and a deed, signed and acknowledged by persons named therein as grantors and by others, is not the deed of those not named in the body of the instrument, and hence, where a husband and wife each owned an undivided half interest in land, the wife's interest could not be transferred by her by her mere signature to a deed purporting to convey the property of the husband alone.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 15.*]

5. HOMESTEAD (§ 118*)—CONVEYANCES.

Since, under Civ. Code, § 1242, as construed by the courts, neither spouse may transfer the homestead, except in the mode provided by the homestead law—that is, by a joint and concurrent execution of an instrument—where both husband and wife own the property declared on as a homestead, an instrument conveying it cannot be effective, unless by its terms it purports to convey the interest of each of the owners.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 203-209, 216, 217; Dec. Dig. § 118.*]

6. DEDICATION (§ 16*)—FRAUDS, STATUTE OF (§ 63*)—FORM.

In dedication no particular formality is necessary; it is not affected by the statute of frauds, and may be made, either with or without writing, by any act of the owner indicating a clear intention to dedicate.

[Ed. Note.—For other cases, see Dedication, Dec. Dig. § 16; * Frauds, Statute of, Dec. Dig. § 63.*]

7. HOMESTEAD (§ 110*)—CONVEYANCES—DEDICATION OF STREET.

A dedication of property as a public street creates an incumbrance, and, where the property is covered by a homestead, cannot be made by the husband alone.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 176; Dec. Dig. § 110.*]

8. DEDICATION (§ 41*)—EVIDENCE—PRESUMPTIONS.

Dedication must be made by the owner of the land, and exists only when he has manifested some intention to make the dedication; it being never presumed without evidence of unequivocal intention.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 80-82; Dec. Dig. § 41.*]

9. HOMESTEAD (§ 118*)—INCUMBRANCE—EVIDENCE.

Where a husband gave a county a deed granting a strip for highway purposes over land owned by the husband and wife as a homestead, which deed on its face purported to affect the property of the husband alone, that the wife signed the deed could not be said to manifest a clear intent to subject her property to the burden of the road.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 203-209, 216, 217; Dec. Dig. § 118.*]

10. HIGHWAYS (§ 88*)—RIGHT TO USE.

A temporary deposit of part of a load of wood on the top of a hill in a road, for the purpose of enabling the teamster to bring up the remainder, and then reload the whole for further carriage, is not necessarily an invasion of the rights of the owner of the fee; such use being in furtherance of the purpose for which the public has an easement.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 88.*]

In Bank. Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by G. Cordano against John Wright and others, wherein Sonoma County intervened. From the judgment, both plaintiff and defendants appeal. Reversed and remanded for new trial.

T. J. Butts, W. F. Cowan, and James W. Oates, for appellants. Clarence F. Lea, Dist. Atty., and Geo. W. Hayes, Asst. Dist. Atty., for respondent.

SLOSS, J. This action was commenced by G. Cordano against John Wright and

four others to recover damages for trespasses alleged to have been committed on plaintiff's land, and to enjoin the defendants from entering upon said land and committing further trespasses thereon. The allegation is that the defendants erected wire fences on the northerly and southerly sides of a 60-foot strip running over plaintiff's land from east to west. The defendants answered, denying the allegations of damage, and alleging as an affirmative defense that the strip described in the complaint was and for many years had been a public highway of Sonoma county. They further averred that, on August 16, 1879, John McDonald and Catherine McDonald were the owners in fee of the tract of land now owned by plaintiff, and that on said day they made and executed a deed conveying said 60-foot strip to the county of Sonoma as and for a public highway. A copy of the deed is attached to the answer. Answering an allegation of the complaint that they had torn down gates maintained by plaintiff across said strip, the defendants justified the removal of said gates by virtue of an order of the board of supervisors, authorizing such removal.

The plaintiff did not file any affidavit, denying the genuineness and due execution of the deed set up in the answer. Code Civ. Proc. § 448.

After the issues had been thus framed as between the plaintiff and the defendants, the county of Sonoma filed a complaint in intervention in which it averred that the said strip of land constituted a public highway, and relied, among other things, upon the conveyance by John and Catherine McDonald which had been set up by the defendants in their answer. A copy of said conveyance was made a part of the complaint in intervention. The plaintiff filed a verified answer, denying the execution of the deed, averring that at the date of said alleged deed the property was the separate property of Catherine McDonald, and denying that the public had ever used said strip of land 60 feet in width, or had used for purposes of travel across plaintiff's land any road exceeding 15 feet in width.

The court found: "That on the 16th day of August, 1879, John McDonald and Catherine McDonald, the predecessors in interest of the plaintiff in said premises, and who were then and there the owners of said premises, dedicated by a good and sufficient instrument in writing to the county of Sonoma, state of California, which instrument was duly executed, acknowledged, delivered, and accepted a strip of land over the said premises now so owned by the plaintiff 60 feet wide, * * * for highway purposes; that the said instrument was entitled to be recorded and was duly recorded on the 8th day of October, 1879; * * * that said

Sonoma county immediately accepted such dedication and used the same henceforth and up to the present time as and for a public highway. * * * That the said strip has been used continuously by said county and the public for such highway uses and purposes from the making of said dedication to the present time, under said instrument, and by and with the knowledge and acquiescence of said McDonalds, and each and every successor in interest to them, down to the commencement of this action, including the plaintiff herein."

Upon these and other findings the court gave judgment, decreeing that the strip of land which had been fenced by the defendants, with the exception of a length of about two chains at the westerly end thereof, is a public road; that the plaintiff be enjoined from maintaining gates across said road; that the defendants be enjoined from using the aforesaid westerly end of the strip, and that plaintiff recover from the defendants the sum of \$200 as damages for injuries to his trees, vines, and hay. From this judgment, both the plaintiff and the defendants appeal; the appeal of the defendants being limited to that part of the judgment which allows a recovery of \$200 against them.

The principal point arises upon the plaintiff's attack on the findings above quoted that John and Catherine McDonald, owners of the land, dedicated the strip in question as a highway by a good and sufficient instrument in writing, executed and delivered to and accepted by the county of Sonoma.

It was shown that John and Catherine were husband and wife. Prior to the execution of the deed in question, they had made, acknowledged, and recorded a declaration of homestead covering the property described in the complaint. The deed set up by the defendants and by the county of Sonoma, as set forth in the respective pleadings, appears to be signed by both John and Catherine, and has attached to it a certificate of acknowledgment in the following form: "State of California, County of Sonoma—ss.: On this 16th day of August in the year one thousand eight hundred and seventy-nine, before me, Thos. McQuiston, a Justice of the Peace in and for said county of Sonoma, personally appeared John McDonald, Catherine McDonald, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that he executed the same. In witness whereof," etc. Under the provisions of sections 1093, 1186, and 1191 of the Civil Code, as they read at the date of this instrument, no estate in real property of a married woman passed by any grant, unless the grant or instrument was acknowledged by her after an examination, without the hearing of her husband. *Joseph v. Dougherty*, 60 Cal. 358; *Tolman v. Smith*, 74 Cal. 345, 16 Pac. 189; *Bollinger v. Manning*, 79 Cal. 7, 21 Pac. 375. A form of certificate of acknowledg-

ment showing such separate examination was prescribed. Civ. Code, § 1191. The certificate above quoted fails to comply with these requirements.

No proof of the execution of the instrument, other than such as was afforded by its production, was offered by either the defendants or the intervener. If the execution of the instrument by Catherine McDonald was in issue, there was, therefore, no evidence to sustain the finding of the court that it had been executed, or that it had been so acknowledged as to be entitled to record.

[1] It appears, however, as above stated, that, after the defendants had filed their answer setting up the conveyance, the plaintiff failed to file an affidavit of denial as provided by section 448 of the Code of Civil Procedure. The result of such failure was to admit the genuineness and due execution of the instrument. This does not apply to the averments concerning the deed contained in the complaint in intervention; these averments being denied by an answer under oath. As to such intervener, it must be held that the findings of the execution and record of the deed are unsustained by the evidence, and that the judgment in favor of the intervener, in so far as it depends upon such findings, cannot stand.

[2] So far, however, as the defendants are concerned, the plaintiff must be treated as having admitted the genuineness and due execution of the deed. During the time when the law required a special form of acknowledgment as one of the elements necessary to a conveyance by a married woman of an interest in her real property, such acknowledgment was treated by this court as a part of the execution of her conveyance. *Wedel v. Herman*, 59 Cal. 507; *Joseph v. Dougherty*, 60 Cal. 358; *Danglarde v. Elias*, 80 Cal. 65, 22 Pac. 69. If the acknowledgment was in fact made as required by the statute, the certificate of the officer was not necessary to the validity of the deed. *Banbury v. Arnold*, 91 Cal. 606, 27 Pac. 934. An averment that a married woman executed the instrument was therefore a sufficient averment that she acknowledged the execution as required. *Joseph v. Dougherty*, supra. Upon the same reasoning it must be held that an admission, under section 448 of the Code of Civil Procedure, of the due execution of a conveyance by a married woman amounts to an admission that it was acknowledged as required, and this, notwithstanding the fact that the certificate attached to the deed appears to be defective. In support of the admission of the pleadings, it must be presumed that there was some further acknowledgment than that recited in the certificate.

[3] But the effect of the failure to file an affidavit under section 448 is merely to admit the genuineness and the due execution of the instrument. Notwithstanding such

admission, it may be shown that the instrument was executed under undue influence and by mistake (*Moore v. Copp*, 119 Cal. 429, 51 Pac. 630), or that there was no consideration for it (*Brooks v. Johnson*, 122 Cal. 569, 55 Pac. 423), or that the transfer, although absolute in form, was in fact a mortgage, *Clarke v. Fast*, 128 Cal. 422, 61 Pac. 72. "The effect of an admission of the genuineness and due execution of an instrument pleaded by a defendant, and not denied, as provided by section 448 of the Code of Civil Procedure, is to avoid the necessity of proof of its genuineness and due execution, and nothing more; and whether it is proven or its due execution is admitted, its terms and legal effect are to be determined by an inspection of the instrument. It stands as an exponent of the facts therein set out, to be construed by the court, and the conclusions of law are to be deduced therefrom." *Carpenter v. Shimmers*, 108 Cal. 359, 362, 41 Pac. 473, 474.

It is therefore still open to the plaintiff to claim that, for any cause not going to the question of genuineness or due execution, the instrument was ineffectual to convey any interest. Two such grounds are here urged. First, it is claimed that the deed on its face does not purport to transfer or bind any interest of Catherine McDonald. The further contention is made that the description of the strip of land purporting to be granted as a highway is so indefinite that it is impossible to locate the same upon the ground.

[4] We think the first of these contentions is well founded. The deed reads as follows:

"This indenture made the 16th day of August, A. D. 1879, by John McDonald, of the first part, and the county of Sonoma, state of California, of the second part, witnesseth:

"That the said party of the first part, for and in consideration of the sum of two hundred dollars to me in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, for their heirs, executors, administrators and assigns, has covenanted and granted, and by these presents do covenant and grant, with and unto the said party of the second part, that from and after the date of these presents the said party, of the second part shall, without let, hindrance or molestation by said party of the first part, perpetually to have, use and enjoy as, and for a public road, and highway of said county and for that purpose to be laid out and opened by said party of the second part, and that it shall be lawful for the inhabitants of said county and all other persons at any time therein being from time to time, and at all times hereafter, and for all purposes to go, return, pass and repass, * * * and in any manner otherwise used as and for a public way:

"All that certain piece and belt of land (here follows the description).

"In witness whereof, the said party of the

first part has hereunto set his hand and seal the day and year first above written."

Following these words appear the names of John McDonald, Winfield S. Jones, C. Q. McCoy, and Catherine McDonald, and attached is the certificate of acknowledgment hereinabove quoted, and a second certificate, witnessing the acknowledgment of Winfield S. Jones and C. Q. McCoy. In the body of the deed the name of Catherine McDonald does not appear as a grantor. The only grantor named is John McDonald, and the instrument purports to be a grant from him alone. The only connection of Catherine McDonald with the instrument appears from the fact of her signature and the certificate showing an acknowledgment by her. But this certificate declares merely that John and Catherine McDonald acknowledged that "he executed the same." The clear weight of authority is to the effect that a deed signed and acknowledged by persons named therein as grantors, and by others as well, is not the deed of those not named in the body of the instrument. 13 Cyc. p. 621; *Agricultural Bank v. Rice*, 4 How. 225, 11 L. Ed. 949; *Batchelor v. Brereton*, 112 U. S. 396, 5 Sup. Ct. 150, 28 L. Ed. 743; *Adams v. Medsker*, 25 W. Va. 127; *Harrison v. Simons*, 55 Ala. 510; *Gaston v. Weir*, 84 Ala. 193, 4 South. 258; *Johnson v. Goff*, 116 Ala. 648, 22 South. 995; *Peabody v. Hewitt*, 52 Me. 33, 83 Am. Dec. 486; *Cox v. Wells*, 7 Blackf. (Ind.) 410, 43 Am. Dec. 98; *Catlin v. Ware*, 9 Mass. 218, 6 Am. Dec. 56; *Lufkin v. Curtis*, 13 Mass. 223; *Merrill v. Nelson*, 18 Minn. 366 (Gil. 335); *Stone v. Sledge*, 87 Tex. 49, 26 S. W. 1068, 47 Am. St. Rep. 65; *McFarland v. Febiger's Heirs*, 7 Ohio, 194, pt. 1, 28 Am. Dec. 632; *Bankston v. Crabtree Min. Co.*, 95 Ky. 455, 25 S. W. 1105.

The rule is supported by reason, as well as authority. A conveyance to be effective must contain not only the names of the parties, but also words indicative of an intent to transfer an interest in the described property from one to another. A deed which declares that A. thereby grants certain property to B. is the deed of A. alone. If, in addition to the signature of A., there is affixed that of C., C. does not thereby bind himself to anything more than is declared on the face of the instrument, which is that A. transfers his interest. As was said in *Batchelor v. Brereton*, supra, referring to the holding in *Agricultural Bank v. Rice*, supra, "in order to convey by grant, the party passing the right must be the grantor, and use apt and proper words to convey to the grantee."

These views are not inconsistent with the decisions in *Ingoldsby v. Juan*, 12 Cal. 564, and *Dentzel v. Waldie*, 30 Cal. 138. In the first of these cases it was held that, under a statute providing that the separate property of a married woman might be conveyed by an instrument in writing signed by the husband and wife, a deed purporting to convey

the wife's interest, and properly signed and acknowledged by her, was sufficiently executed, if signed and acknowledged also by the husband, although the name of the latter was not mentioned in the body of the deed as grantor or otherwise. In *Dentzel v. Waldie*, supra, the holding was similar. In each of these cases the wife was the sole owner of the property sought to be conveyed. The husband had no interest therein, and his concurrence in the instrument was required merely "as a precaution against imposition, or to afford her his protection, or similar reasons of policy, or to evidence his renunciation of the right to manage or control it." *Ingoldsby v. Juan*, supra. No words purporting to convey his estate were required, because he was conveying no estate. Here, however, the question is a different one. On the findings of the court, which declared that John and Catherine McDonald were the owners of the property, an undivided one-half interest belonged to Catherine, and the question is whether this interest could be transferred by her by her mere signature to an instrument purporting to convey the property of John alone. On the authorities above quoted, this question must be answered in the negative.

[5] If we look beyond the findings to the evidence, the reasons for this view become even stronger. As has been stated, a homestead had been declared upon this property by John and Catherine McDonald. The husband and wife thereby acquired a common interest in the property, an interest which was, during the life of both, somewhat akin to a joint tenancy of husband and wife (Civ. Code, § 1265; *Barber v. Babel*, 36 Cal. 14; *Burkett v. Burkett*, 78 Cal. 310, 20 Pac. 715, 3 L. R. A. 781, 12 Am. St. Rep. 58; *Gleason v. Spray*, 81 Cal. 217, 22 Pac. 551, 15 Am. St. Rep. 47; *Hannon v. S.*, P. R. R. Co., 12 Cal. App. 350, 107 Pac. 335), and after such declaration the homestead could not be conveyed or incumbered, except by an instrument executed and acknowledged by both husband and wife (Civ. Code, § 1242; *Barber v. Babel*, supra; *Flege v. Garvey*, 47 Cal. 375; *Tipton v. Martin*, 71 Cal. 325, 12 Pac. 244). The effect of the provisions of sections 1242 of the Civil Code, as that section has been construed by this court, is to make it impossible for either spouse to transfer or incumber the homestead, "except by the joint act of both in the mode provided by the homestead law"; that is, by means of a joint and concurrent execution of an instrument. *Hart v. Church*, 126 Cal. 472, 58 Pac. 910, 59 Pac. 296, 77 Am. St. Rep. 195. If the property covered by the homestead were the separate property of either of the spouses, it might, on the reasoning of *Ingoldsby v. Juan*, supra, be said that the requirement of the law would be complied with if the one owning the property executed a conveyance purporting to carry his or her interest, and the other spouse manifested assent to the convey-

ance by signing and acknowledging it. But where both husband and wife are owners of the property an instrument conveying or incumbering it cannot be effective, unless by its terms it purports to convey or incumber the interest of each of the owners.

[6] The defendants argue that, even if the instrument was ineffectual as a conveyance, it was still good as evidencing the intent of the owners of the land to dedicate a road. "In dedication no particular formality is necessary; it is not affected by the statute of frauds; it may be made, either with or without writing, by any act of the owner * * * indicating a clear intention to dedicate." *Harding v. Jasper*, 14 Cal. 642, 647. It may be questioned whether there can be a dedication of land selected as a homestead by a married person in any manner other than by an instrument executed and acknowledged by both spouses.

[7] A dedication of property as a public street creates an incumbrance, and, where the property is covered by a homestead, cannot be made by the husband alone. *San Francisco v. Grote*, 120 Cal. 59, 52 Pac. 127, 41 L. R. A. 335, 65 Am. St. Rep. 155. But we need not here decide whether this incumbrance can be created by any act short of the jointly executed and acknowledged instrument described by section 1242 of the Civil Code. The court does not find any dedication or any attempt to dedicate, other than "by a good and sufficient instrument in writing," executed by John and Catherine McDonald. That writing, as we have shown, does not purport to transfer or incumber any interest of Catherine McDonald. If it is ineffectual as a conveyance of her interest, it is not good as a dedication by her, and for the same reason, viz., that the instrument does not indicate such intent on her part.

[8] "Dedication must be made by the owner of the land, and exists only when he has manifested some intention to make the dedication. 'It is never to be presumed without evidence of unequivocal intention on the part of the owner.' *Quinn v. Anderson*, 70 Cal. 456 [11 Pac. 746]." *Huffman v. Hall*, 102 Cal. 26, 30, 36 Pac. 417, 418.

[9] The signature by the wife to a deed, which, on its face, purports to affect the property of the husband alone, cannot be said to manifest a clear intent to subject her property to the burden of a public road.

Whether the defendants might show or have shown a state of facts estopping Catherine McDonald and her successors from denying the existence of the road as claimed is a question not now before us. The court below has not undertaken to find such estoppel, but has based its conclusion solely upon a dedication declared by the deed set up in the answer; that is to say, upon an express dedication. The same consideration furnishes an answer to the claim that the existence of the road is established by proof

of user. Whatever may be the extent of a right so acquired (see *People v. County of Marin*, 103 Cal. 223, 231, 37 Pac. 203, 26 L. R. A. 659), the findings made limit us to a review of the evidence for the purpose of determining whether the execution and acceptance of the deed of 1879 constituted a dedication. It may, however, be remarked in this connection that the plaintiff does not question the right of the public to travel over his land upon the road that has heretofore existed. The dispute is over the claim of the county that it has a right to extend such road to a width of 60 feet.

In view of these conclusions, it will be unnecessary to consider at length the contention of the plaintiff that the description contained in the deed was insufficient to identify any property. By reason of the necessity for another trial, it may be said, briefly, that the description, read literally, certainly shows serious inaccuracies and uncertainties. As against this, however, we have the fact, admitted by stipulation of the parties, that the defendants employed a surveyor to locate the strip referred to in the deed, and that the surveyor, using the description in said deed, did locate such strip along the center of a roadway which was actually in use across plaintiff's premises, and had been so used prior to the date of the deed. In so doing he was, no doubt, compelled to vary some of the distances contained in the description by inserting decimal points where no such points appeared in the original deed. In view, however, of all the surrounding circumstances and of the fact that the deed may, without any undue stretch of construction, be interpreted as intended to describe a strip following the line of an existing road, we think that it cannot be said that the court was without justification in its conclusion that the deed described a strip of land 60 feet wide, extending 30 feet in either direction from the center line of the traveled road across plaintiff's premises.

The foregoing covers the principal points arising on plaintiff's appeal. Upon a new trial the question of the right of the plaintiff to maintain gates will be determined by the findings relative to the road. If a highway exists by dedication or abandonment to the public (Pol. Code, § 2618) the supervisors are vested with power to permit gates or to order their removal (Pol. Code, §§ 2643, 2736). If the right of the public is one derived from user alone (prior to the enactment of section 2621 of the Political Code in 1883) the right is no broader than the use. Such use over a road with gates would not authorize the removal of the gates.

[10] Concerning the plaintiff's complaint that the defendants piled wood on the road, we think a limited and temporary deposit of part of a load on the top of a hill, for

the purpose of enabling a teamster to bring up the remainder, and then reload the whole for further carriage (a practice that is said to have been followed here) is not necessarily an invasion of the rights of the owner of the fee. Such use of the road is in furtherance of the purposes for which the public has an easement. If the defendants did more than this, their acts would constitute an invasion of plaintiff's rights. The facts in this regard can be determined by the trial court. The foregoing sufficiently covers the points made upon the plaintiff's appeal.

The defendants' appeal is from the parts of the judgment allowing plaintiff \$200 damages. The findings apportion the damages as follows: For destroying 45 prune trees, \$45; for damage by sheep to hay, \$80; for damage to 150 grape vines, \$75. But there are further findings that the defendants did not destroy any grape vines, but merely built a fence which inclosed such vines within the 60-foot strip, and that the defendants had no connection with the damage caused by sheep to plaintiff's hay. There seems to be, therefore, no support for these two elements of damage.

The judgment is reversed, and the cause remanded for a new trial, without costs to either party.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

158 Cal. 390

SACRAMENTO BANK et al. v. MURPHY.
(Sac. 1,738.)

(Supreme Court of California. Sept. 20, 1910.)

1. MORTGAGES (§ 113*)—TRUSTEES—APPOINTMENT.

Under a trust deed to secure a note to a bank providing that the bank may from time to time appoint other trustees to execute the trust, it may appoint other trustees on the death of those named in the deed.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 113.*]

2. MORTGAGES (§ 113*)—TRUSTEES—APPOINTMENT—ACTION TO CONFIRM.

A trust deed to secure a note to a bank having provided that the bank might from time to time appoint other trustees to execute the trust, and that on such appointment and a conveyance to the appointees by the trustees named in the deed the new trustees shall be vested with the title and powers of the old trustees, the bank having appointed new trustees after the death of the old trustees, so that a conveyance from them was impossible, it was proper to apply to the court to confirm the appointment, to obtain a decree that they were invested with the title and powers of their predecessors, and to authorize them to proceed with the execution of the trust according to its terms.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 113.*]

3. MORTGAGES (§ 113*)—TRUSTEES—ACTION FOR APPOINTMENT—COMPLAINT.

Even if under a trust deed to secure a note to a bank providing that the bank might from

time to time appoint other trustees to execute the trust, and that, on a conveyance to them by the original trustees, they shall be vested with all the title and powers of their predecessors, the bank has no power to appoint trustees on the death of those named in the deed, but such power must be exercised by the court; yet the allegation of such appointment, in a complaint setting forth the trust deed and all the facts, and praying that such appointment be ratified and adopted by the court, and that such appointees or such other trustees as the court may appoint be directed to sell, does not detract from the sufficiency of the complaint as one for appointment of trustees, in doing which the court can either select its own trustees or choose those appointed by the bank; the other facts alleged showing a case for interposition of the court under Civ. Code, §§ 2287, 2289, to appoint trustees.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 113.*]

4. MORTGAGES (§ 113*)—TRUSTEES—ACTION TO APPOINT AND HAVE TITLE AND POWERS DECREED.

It is not necessary in case of death of the trustees named in a trust deed to bring an action to have trustees appointed, or the appointment by the beneficiary confirmed, and then a separate action to have it decreed that they were invested with all the title and powers of the original trustees; but all such matters being of equitable cognizance may properly be embraced in one action.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 113.*]

5. MORTGAGES (§ 138*)—TRUST DEED—VESTING TITLE—LIEN.

A trust deed vests the legal title to the property in the trustees for the purpose of the execution of the trust; so that it is impossible for them in their fiduciary capacity to have a lien on the property.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 277; Dec. Dig. § 138.*]

6. LIMITATION OF ACTIONS (§ 36*)—TRUST DEED—ACTION TO FORECLOSE.

The action by a bank whose debt is secured by a deed of trust is not rendered one for foreclosure of the deed as a mortgage, and so subject to the statute of limitations, by the complaint, which alleges the death of the original trustees, and the appointment of successors by the bank, and prays that such appointment be ratified, or other trustees be appointed, that it be adjudged that they have succeeded to the title and powers of the original trustees and that an accounting be had, also praying that the amount found due be adjudged a lien on the property, and that the trustees be directed to sell the property to pay the bank's claim, and by a decree being made as prayed; the prayer not asking, and the decree not directing, the sale of the property as in actions for foreclosure, but in the manner and in accordance with the terms of the deed of trust, and the prayer and decree for the lien, while technically incorrect, being a matter which may be disregarded.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 178; Dec. Dig. § 36.*]

7. LIMITATION OF ACTIONS (§ 36*)—CONSTRUCTION OF TRUST DEED.

An action being one to construe a trust deed, to have trustees appointed in place of the original trustees who have died, and to have enforcement of the deed directed according to its terms is not subject to the statute of limitations; a trust deed conveying the title to the trustees for the purpose of the trust, and it remaining there till the debt is paid or the prop-

erty is sold under the trust deed for that purpose, and the power of sale to enforce the debt being enforceable, when the statute might be interposed to defeat an action on the debt.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 171; Dec. Dig. § 36.*]

Department 2. Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by the Sacramento Bank and others against J. W. Murphy, administrator of Ellen M. Murphy, deceased. From a judgment for plaintiffs and an order denying a motion for new trial, defendant appeals. Affirmed.

P. H. Griffin, for appellant. A. A. De Ligne, for respondents.

LORIGAN, J. On August 27, 1887, Ellen M. Murphy borrowed from the plaintiff bank \$13,400, giving to it her promissory note. The note provided for the payment of the principal four years after date, or on August 27, 1891, but it was provided also therein that, if the note was not paid at maturity, the loan might be renewed from year to year at the option of the holder of the note. A trust deed in the ordinary form was given by Ellen M. Murphy to secure the payment of the note, and W. P. Coleman and E. R. Hamilton were designated in the instrument as trustees. The trust deed provided as to trustees that "it is expressly covenanted that the party of the third part (the bank) may by resolution of its board of directors from time to time appoint other trustee or trustees to execute the trust hereby created; and upon such appointment and a conveyance to them by the parties of the second part, the survivor of them, their successors or assigns, the new trustees shall be vested with all the title, interest, powers, duties and trusts in the premises hereby vested in or conferred upon the parties of the second part." Ellen M. Murphy died in 1893, and the defendant was appointed administrator of her estate. In due time thereafter, no part of the principal of the note having been paid, the bank presented its claim thereon to the administrator, and it was regularly allowed and approved by him and the judge of the superior court in which the proceedings in the estate were pending. One of the trustees appointed by the trust deed—Coleman—died in 1901, and, as the trust deed provided that the title to the trust property should vest in his successor, said trustee Hamilton thereafter solely exercised all the duties and powers of trustee. Hamilton died in 1904. By his death a vacancy in the trusteeship was created, and thereafter the bank, as was provided in the trust deed, by resolution of its board of directors, appointed the plaintiffs Gordon and Henderson to fill such vacancy.

The complaint set forth the above facts,

and alleged, further, that on account of no conveyance having been made by the original trustees to those subsequently selected by the bank, as provided for in the deed of trust, a doubt had arisen as to the authority of the substituted trustees to make a valid sale of the property, the existence of which doubt would retard purchasers from bidding freely and for the full value of the property. The prayer was that the appointment by the bank of the plaintiffs Gordon and Henderson, as trustees in place of the original trustees, be ratified, approved, made, and adopted by the court; that it be adjudged that they had succeeded to the title and powers of the original trustees under said trust deed; that an accounting be had, and that the sum found due be adjudged a lien upon the lands described in the trust deed; and that Gordon and Henderson, as trustees, or such other trustees as the court might appoint, be directed to sell the land to pay the claims of the bank. A demurrer to the complaint was overruled, and defendant answered, interposing as a sole defense to the action the plea of the statute of limitations. Plaintiffs were awarded a decree in terms as prayed for, and defendant appeals from the judgment and an order denying his motion for a new trial.

It is insisted that the complaint stated no cause of action, and that the demurrer thereto should have been sustained. The principal claim in this regard is that, before the action could be maintained, it was necessary that the plaintiff bank should have applied to the superior court and obtained an order appointing trustees in place of the original trustees who had died; that the bank had no power by a resolution of its board of directors to substitute trustees under the terms of the original deed of trust.

We do not think this point well taken. By reference to the provisions of the trust deed heretofore quoted, general power was given the board of directors of the bank to substitute at any time other trustees for those specially named in the deed of trust. The original trustees having died, and hence a conveyance from them impossible, it was eminently proper to apply to the superior court having jurisdiction in such matters, to confirm the appointment of the trustees selected, to obtain a decree that they were invested as successors to the original trustees of all the title in the trust property, and clothed with all the powers conferred on their predecessors, and to authorize them to proceed with the execution of the trust in conformity to its terms. That the superior court had such power cannot be questioned.

But if it be conceded that the bank had no power to appoint the trustees selected by it, but that such power must be exercised by the court, still the demurrer did not lie. The complaint set forth the trust deed in full, alleged the death of the original trustees, a

vacancy in the trusteeship, and asked for the appointment of other trustees to execute the trust, and requested the appointment of Gordon and Henderson as the selection of the bank. Assuming that the bank had no right to appoint trustees, the allegation that it had, in view of all the other allegations in the complaint, did not detract from the sufficiency of that pleading. The other facts alleged show a case for the interposition of the superior court, under sections 2287 and 2289 of the Civil Code, to appoint trustees. All parties in interest were before the court, and in the exercise of that power it could either select its own trustees or choose those appointed by the bank.

It was not necessary to bring an action for the purpose of having trustees appointed or their appointment confirmed, and then a separate action to have it decreed that they were invested with all the title and powers of the original trustees to whom they were successors, and to be afforded the other relief prayed for in the complaint. All these matters, which were of equitable cognizance, could be determined in one action, and it was proper to embrace them all in the action brought and to apply for full and equitable relief, as was done.

On the merits it is insisted by appellant that while this action, on the theory of the respondents, was brought to confirm the appointment of the trustees selected by the bank and to have it decreed that the legal title to the trust property was vested in them, and that they should proceed to execute the terms of the trust, the action, in effect, was one brought to foreclose the deed of trust as a mortgage, and that, as the debt to secure which the trust deed was given was barred when the action was brought, the right to enforce the trust deed as a mortgage was also barred. This claim of appellant is based on the fact that the complaint prayed, among other things, that the amount found due the bank be adjudged a lien on the land and for a sale of the premises described in the trust deed, and the application of the proceeds to the payment of the amount due the bank and costs.

In our judgment this is a forced and unwarranted construction of the pleading and the decree of the court. The action was plainly one to confirm or appoint trustees where there was a vacancy in the trusteeship, and to establish the legal title in those trustees and authorize them to proceed to enforce the trust under the terms of the trust deed. Undoubtedly, under a trust deed legal title to the property is vested in the trustees for the purposes of the execution of the trust, and it is therefore legally impossible for such trustees in their fiduciary capacity to have a lien on the property. *Weber v. McCleverty*, 149 Cal. 316, 86 Pac. 706. Under a deed of trust, the land is charged with the payment of the debt, but technically the debt

is not a lien upon the land. So that, when the plaintiff asked to have it decreed that the title to the trust property was vested in the substituted trustees and the court so decreed, it fully confirmed what the trust deed was intended to effect, and which it was one of the main purposes sought to have decreed in bringing the action, and while it was not technically correct for the plaintiff to ask or the court to decree, in addition, that the debt should constitute a lien on the land, yet, considering that the main and obvious purpose of the suit was to construe and enforce a trust deed, which was properly done, the additional matter of the lien may be disregarded. Certainly the fact that a lien was decreed in addition to construing the trust and providing for its enforcement according to its terms did not determine the nature of the action so as to make what is clearly an action relative to a trust deed one to foreclose such deed as a mortgage, under which the plea of the statute of limitations by the defendant may be successfully invoked. Neither does the complaint ask nor the decree direct the sale of the property, as in actions for foreclosure, but in the manner and in accordance with the terms of the deed of trust.

This claim of the defendant that the action was in foreclosure being baseless, there is no room for the plea that the debt secured by the deed of trust is barred by the statute of limitations. As the action was not to foreclose a trust deed as a mortgage, it is unimportant to determine whether the bank could toll the statute of limitations by extending payment of the note yearly, as it provided might be done, and as the court found, at the request of the administrator, the bank did; or the effect on the statute of the allowance and approval of the claim of the bank against the estate of Ellen M. Murphy, deceased.

The action having been brought to construe a trust deed and direct its enforcement according to its terms, the plea of the statute of limitations has no place. It is well settled that a trust deed conveys the title to the trustees for the purposes of the trust, and the title remains there until the debt is paid or the property sold under the trust deed for that purpose, and the power of sale to pay the debt given to the trustees may be enforced, when otherwise the statute might be interposed to defeat an action on the debt due under it. *Grant v. Burr*, 54 Cal. 298; *Savings & Loan Society v. Burnett*, 106 Cal. 528, 39 Pac. 922; *Weber v. McCleverty*, 149 Cal. 316, 86 Pac. 706; *Travelli v. Bowman*, 150 Cal. 587, 89 Pac. 347.

We have examined the other points made by appellant and deem them of no force.

The judgment and order are affirmed.

We concur: MELVIN, J.; HENSHAW, J.

(159 Cal. 664)

In re DWYER'S ESTATE. (L. A. 2,569.)

(Supreme Court of California. April 7, 1911.)

1. WILLS (§ 484*)—TRUSTS—PROPERTY PASSING TO TRUSTEE—PROCEEDS OF REAL ESTATE SOLD IN TESTATOR'S LIFETIME.

Testatrix bequeathed to her husband, who predeceased her, the residue of her personal estate, without a remainder, and then declared that all her real estate, with certain exceptions, should be sold by her executors, and, after the payment of certain legacies charged thereon, should be paid to trustees to maintain a home. *Held* that, since every testator is presumed to know that his will only operates from the date of his death, such provision did not include real estate concerning which testatrix had made an enforceable contract of sale prior to her death, of which specific performance was decreed against her executors, but only the proceeds of sales of real estate which testatrix owned at her death on which the executors' power of sale could operate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1015; Dec. Dig. § 484.*]

2. WILLS (§ 194*)—CONSTRUCTION—DEVISE—REVOCATION—STATUTES.

Civ. Code, § 1301, declares that an agreement made by testator for the sale of property disposed of by will previously made does not revoke such disposal, but the property passes by the will subject to the same remedies on the testator's agreement, for specific performance or otherwise, against the devisees or legatees as might be had against the testator's successors if the property had passed by succession. Section 1303 declares that a conveyance, settlement, or other act of a testator, by which his interest in a thing previously disposed of by his will is altered, but not wholly divested, is not a revocation; but the will passes the property which would otherwise devolve by succession. *Held*, that where a will created a naked power of sale in the executors to dispose of testatrix' real estate, with certain exceptions, and devote the proceeds to a particular charity, the trustees could not invoke such sections to sustain an alleged right to the proceeds of property concerning which testatrix had made an enforceable contract of sale prior to her death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 481-489; Dec. Dig. § 194.*]

3. VENDOR AND PURCHASER (§ 53*)—CONTRACT OF SALE—EXECUTORY OR EXECUTED CONTRACT.

Where testatrix executed an enforceable contract for the sale of certain real estate and agreed to convey the same on a specified date on payment of a certain sum and the tender of notes secured by a mortgage for the balance, the contract, after tender of the purchase price by the vendee, was executed, so far as the ownership of the land by the vendee and the right of testatrix to the purchase price was concerned.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 84; Dec. Dig. § 53.*]

4. CONVERSION (§ 12*)—EQUITABLE CONVERSION—SALE OF REAL ESTATE.

Where a contract for the sale of land binding on the parties is executed, there is an equitable conversion of realty into personalty, the purchaser being deemed the equitable owner of the land, and the seller the owner of the price; whether the conversion is absolute depending on whether the terms of the contract are subsequently complied with.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. § 17; Dec. Dig. § 12.*]

5. VENDOR AND PURCHASER (§ 54*)—CONTRACT PARTLY EXECUTED—EFFECT.

Where a purchaser under a contract for the sale of real estate has performed or offered to perform his covenants at the date provided for a conveyance, equity considers the property as belonging to him as of that date, and that the owner is a mere holder of the legal title in trust for him.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 85; Dec. Dig. § 54.*]

6. TRUSTS (§ 191*)—POWERS OF SALE—EXTENT.

A power of sale in a will, authorizing executors to sell testator's real estate, does not embrace lands sold by the testator under a contract, the purchase money remaining unpaid and the legal title in the testator, since testator's interest under such circumstances is personality and not real estate.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 191.*]

In Bank. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Judicial settlement of the estate of Lelia Bonner Dwyer, deceased. From so much of a decree of distribution as awarded to Emma J. Bonner and others, heirs of the decedent, the proceeds of a sale of a certain lot in the city of Los Angeles, the trustees of the J. M. Bonner Memorial Home appeal. Affirmed.

See, also, 115 Pac. 242.

Geo. J. Leovy and Hunsaker & Britt, for appellants. A. H. Van Cott, Benjamin E. Page, and E. W. Camp, for respondents. Denis & Loewenthal, H. W. O'Melveny, and O'Melveny, Stevens & Millikin, for administrator, etc.

LORIGAN, J. This is an appeal by the trustees of the J. M. Bonner Memorial Home from so much of the decree of distribution in the above estate as awarded to Emma J. Bonner and others, the heirs at law of deceased, the proceeds of the sale of a certain lot in the city and county of Los Angeles known as the "Broadway" property.

Testatrix was a resident of and domiciled in the city of New Orleans, La., where she died in June, 1905, leaving a last will and an estate consisting of real and personal property in the states of Louisiana and California and real property in other states. Her will dated July 16, 1901, was duly admitted to probate, and letters testamentary issued at New Orleans on September 5, 1906.

The will of the testatrix, in as far as its provisions are involved here, after declaring that she had no descendants or ascendants, provided for the payment of certain special pecuniary legacies, and then further provided: "Third. I desire all my real estate, except the residence and lots situated in the square bounded by First, Second, Coliseum and Chestnut streets in the city of New Orleans, to be sold by my executors to the best advantage and after the payment of the foregoing special pecuniary legacies, which are

expressly charged upon said real estate so to be sold, and are not to bear upon any other portion of my estate, I will and bequeath all the rest and residue of the proceeds of said real estate so to be sold (to certain persons named), as trustees in trust to found and maintain in New Orleans a home for aged and infirm men, to be called The John M. Bonner Memorial Home." By subsequent clause she named her husband, Alexander J. Dwyer, her universal residuary legatee, bequeathing him all property of whatever nature she might die possessed, other than that theretofore specially bequeathed, and expressly including therein the residence and lots owned by her in the square bounded by First, Second, Coliseum, and Chestnut streets in the city of New Orleans. The husband of testatrix predeceased her in April, 1904, but she made no change in her will respecting the residuary bequest to him. The administration of the estate of deceased had in Louisiana was completed, distribution made, and the estate closed there in 1906. All special legacies were paid, the J. M. Bonner Memorial Home was incorporated, and something over the sum of \$126,000 was received by the trustees thereof under the administration of the estate in Louisiana. In August, 1905, the will of testatrix was admitted to probate here as a foreign will, and the only administration now pending is in this state.

At the time of making her will the testatrix owned in California, in the county of Los Angeles, certain parcels of real estate consisting of what was called the Broadway property, property known as the "Farm" and other real property near the city of Pasadena and in the city of Los Angeles of large value. The only property, however, administered on in this state, were proceeds of the sale of the Broadway property, the Farm property, and some personal effects. The other property owned by testatrix in Los Angeles county at the date her will was made was sold by her in her lifetime; she receiving full payment of the Pasadena property herself. Part of the purchase price of the other real estate (not including the proceeds of the sale of the Broadway property) had been received by testatrix in her lifetime, the balance was collected by the testamentary dative executor of her will, under the administration of her estate in Louisiana, and such proceeds from the sale of the Pasadena property and the other Los Angeles lots were distributed to the heirs at law of the deceased, under the administration of the estate in Louisiana.

At the time her will was made, as we have said, the testatrix was the owner of the Broadway property. In March, 1905, three months prior to her death, Mrs. Dwyer contracted in writing to sell this property to one J. E. Carr for \$100,000, she to make a conveyance thereof to Carr on or before May 13, 1905, upon the latter making certain cash

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

payments and executing notes and a mortgage for the balance of the purchase price. Prior to April 27, 1905, Carr tendered her the money, notes, and mortgage and demanded a conveyance of the property which Mrs. Dwyer refused to make, whereupon Carr immediately brought an action against her for specific enforcement of the contract. On June 25, 1905, while this action was pending, Mrs. Dwyer died. Carr then dismissed the first action and brought a similar suit against the administrator with the will annexed of her estate in which, on August 20, 1906, a judgment was rendered in favor of Carr for specific performance of the contract; the court determining the respective rights of the parties as of May 13, 1905, the date provided in the contract for the delivery of the deed by Mrs. Dwyer to Carr. On appeal to this court by the administrator with the will annexed, the judgment was affirmed (*Carr v. Howell*, 154 Cal. 372, 97 Pac. 885), whereupon said administrator made a deed to Carr; the latter making the cash payment and delivering the notes and mortgage to the administrator as the contract provided and the decree of the court required.

In due course thereafter the administrator filed his final account, together with his petition for the distribution of the estate, asking in the latter that the court determine who were entitled thereto and to make a decree accordingly. Cross-petitions were filed by both the heirs at law of testatrix and the trustees of the J. M. Bonner Memorial Home, and as addressed to the proceeds of the sale of the Broadway property, consisting of cash and the notes and mortgage securing the deferred purchase price thereof, each asked for distribution thereof in their favor. The court distributed the entire proceeds to the heirs at law, and the trustees of the J. M. Bonner Memorial Home (hereafter to be referred to as the trustees of the Home) appeal.

The view of the superior court was that under the will of testatrix the only proceeds of her real property given to the trustees of the Home were proceeds of such real property as she owned at her death and which her executor was empowered to sell; that at her death she did not own the Broadway property, having sold it in her lifetime to Carr; that the proceeds of such sale to which she was entitled when she died were personal property which would have gone to her husband as universal residuary legatee had he lived; that, by his death prior to testatrix, such residuary legacy to him lapsed, and no disposition over on such event being provided for, and no change in her will having been subsequently made by testatrix, the heirs at law of testatrix (and respondents are conceded to be such) took all property which otherwise would have gone to the husband as residuary legatee, including the proceeds of the sale of the Broadway property.

This conclusion of the trial court appellants insist was erroneous when the intention of the testatrix as disclosed by her will and the circumstances surrounding its execution are taken into consideration; that further the court failed to correctly apply the general principles of law when a gift, such as is made to the trustees of the Home, is to be considered, and ignored certain provisions of the Civil Code of the state under which the trustees claim they were entitled to have these proceeds distributed to them.

Now as to these claims: Starting with the cardinal rule for guidance in the interpretation of wills—that the intention of the testator must be sought for and carried out—it is insisted by the trustees of the Home that the will under consideration and the circumstances surrounding its execution disclose an intention on the part of Mrs. Dwyer that the proceeds of all of the real property which she owned when her will was made (excepting of course the lots in New Orleans) should be applied to the establishment and endowment of the J. M. Bonner Memorial Home, and that the sale of the Broadway property made by her was made simply to facilitate in her lifetime the creation of the fund which she intended at her death should be devoted to the creation of the Home. It is insisted in this regard that courts look with favor on endowments for charitable or philanthropic purposes; that testatrix had a warm regard for her deceased uncle J. M. Bonner, from whom she had derived the California property, and in whose memory she desired to establish the Home; that it was only a natural and reasonable desire on her part that the proceeds of this property which she had derived from him should be devoted to that purpose; that her estate outside of California amounted to almost \$500,000 a large portion of which was left to her husband as residuary legatee; that by specific legacies she had provided for these respondents who as her heirs at law are here contesting the right of the trustees to these proceeds; and that it is evident from the will that she did not intend they should have anything more than she had specifically bequeathed to them, and certainly none of her real property. Under these considerations it is insisted that an intention of the testatrix is disclosed to devote the proceeds of all property owned by her when her will was made to the establishment and endowment of the Memorial Home, and the appellants cite *Littig v. Hance*, 81 Md. 46, 32 Atl. 343; *Kenady v. Sinnott*, 179 U. S. 606, 21 Sup. Ct. 233, 45 L. Ed. 339; *Conn. T. & T. Dep. Co. v. Chase*, 75 Conn. 683, 55 Atl. 171; *Miller v. Malone*, 109 Ky. 133, 58 S. W. 708, 95 Am. St. Rep. 338; and *Nooe v. Vannoy*, 59 N. C. 185—in support of their contention.

Without just now discussing the cases cited, but giving consideration to the other mat-

ters suggested, we do not perceive how in any particular they support the claim made by appellants.

[1] Every testator knows that his will only takes effect upon his death, and only operates upon such property as he then owns, and that in the meantime his freedom to deal with his property is not in any respect curtailed, and there is nothing in the will of the testatrix here to indicate that she intended to limit her right to deal, in her lifetime, with any of her property just as she pleased, to transfer her real property into personalty or vice versa, and to have the provisions of her will as to the disposition of her estate apply at her death to the character of the property as she then owned it. In fact, the provisions of this will could bear no other construction. There is no force in the assertion that the paramount intention of the testatrix as to her real estate was that the proceeds of all that she owned at the execution of her will, particularly the California property which she derived from her uncle, should be devoted to the establishment of the Memorial Home. Certainly the will expressly declares no such intent. It says nothing about California real property, or about any specific real property or its proceeds. Besides, as to all her property the paramount intention of the testatrix was that her husband should be abundantly provided for; she was particularly solicitous that his comfort should be assured by having in her estate at her death ample property of such a character—personal property—as would fall into her residuary estate and go to him as her residuary legatee. So solicitous was she in this respect that in the clause bequeathing the proceeds of her real estate to the trustees she expressly charges the real estate to be sold for that purpose, with the payment of the special pecuniary legacies, and declares that they are not to bear upon the residuary bequest to her husband. If the claim of counsel for the trustees could prevail, testatrix on making her will, no matter what the changed condition of her estate might be thereafter, could not sell any real estate, the proceeds of which could go into the residuary fund for the benefit of her husband; no matter to what extent the vicissitudes of fortune might deplete her personal estate, all of which was to go to him, she could not replenish or increase the residuary fund by selling any of her real property unless by making a change in her will. But it is unnecessary to proceed further with any general discussion of the intention of testatrix as to these trustees of the Home because her intention as to what portion of her estate they shall take is plainly and clearly stated in the only clause of her will which gives them anything. There is nothing inartificial about the will of testatrix in any respect. It expresses with accuracy just what disposition of her estate is to be made among her

beneficiaries thereunder, and when the clause in favor of the trustees of the Home is examined, and the language used there is given its natural and ordinary import, the testatrix clearly declares what proceeds of her real estate the trustees shall take and from the sale of what real estate itself the proceeds for the benefit of the Memorial Home shall be derived. The only gift to the trustees is in clause 3 of the will, and the language used there leaves no room for any question as to what proceeds and the proceeds of what property owned by the testatrix should be devoted to establish the Memorial Home. Her declared intention is that all her real estate (except the lots in New Orleans) is "to be sold by my executor to the best advantage" and after payment of the specific pecuniary legacies which are expressly charged upon the real estate "so to be sold" she gives the residue of the proceeds of said real estate "so to be sold" to the trustees in trust to found the Memorial Home. Under this clause, and for the purposes declared in it, a general power of sale is given by the testatrix to her executor to sell her real estate, pay the special pecuniary legacies, and turn the remainder over to the trustees of the Home. By the very terms of the clause this power of sale, under the execution of which alone her executor was to derive the funds for the Memorial Home, could only be exercised after her death, and could only apply to real property which she owned at the time of her death. Certainly this language cannot by any process of construction be held to mean anything other than that the proceeds of the sale of real estate which were to go to the trustees of the Home were the proceeds of such real estate as the testatrix owned at her death, and upon which the power of sale given him could operate, and clearly and expressly negatives the claim of the trustees that it was the intention of the testatrix that the proceeds of all real property which she owned at the time her will was made was intended by her to go to the trustees of the Home, and that any sale made by her thereafter was to facilitate that purpose. She undoubtedly intended to leave real estate at her death which, in her judgment, would be sufficient to establish the Home. This she did, and it is evident from the clause of her will referred to that it was all she intended to do.

It will be observed, too, that after making her will testatrix sold her Pasadena and other real property in Los Angeles county, receiving for the former at least \$60,000, and after her death her dative testamentary executor collected some \$4,000 as a balance due her from the sale of the other real property here. No claim was made by the trustees of the Home on distribution in the Louisiana court that they were entitled to these funds as proceeds of real estate which testatrix had intended, when she made her will, should be devoted to the establishment of the Home,

and which real estate she sold to facilitate in her lifetime the creation of a fund for that purpose. On the contrary, these proceeds were distributed to the heirs at law. Obviously, all the interested parties, and the Louisiana court, were of the opinion that the bequest to the Memorial Home was only of the proceeds of real estate owned by testatrix at her death, and which property the executor was expressly empowered to sell, which were to go to found the Memorial Home—a view, the correctness of which we are satisfied there can be no doubt.

As to the authorities relied on by counsel for appellants and referred to above, they have no application under the bequest in question. Those cases hold that where a testator by his will directs the sale of specific property after his death and payment of the proceeds to designated legatees, if the testator makes a sale of the specific property in his lifetime, and the proceeds are held intact, they pass to the legatees; that a sale by the testator will be held to have been made simply to facilitate the creation of the fund designed for the legatees. In all these cases it will be noted, however, that the property directed to be sold or disposed of was specifically designated—either particular lots or tracts of land or personal property consisting of mortgages, bonds, or other described securities—the proceeds of which the legatees were given. There the clear intention of the testator was to make the legatees—either the wife, children, or near relatives of the testator—the recipients of the proceeds of specific property after his death. It was held that the sale by the testator in his lifetime of the specific property devised or bequeathed and retention by him intact of the proceeds was for the purpose of facilitating his intention that the legatees should have the avails of the specific property; that an intention to benefit the legatees is presumed to continue even after the changes in the form of the property made by the testator in his lifetime, and where, particularly, as in the cases cited, any other construction would have defeated the intention of the testator to provide for the legatees.

Here, however, there was no devise of the proceeds of the Broadway street property as such, or a devise of any specific real property, or the proceeds, to the trustees of the Home. The power of sale to the executor applied only to such property as the testatrix owned at her death.

The bequest of the proceeds of her real estate to the trustees, it is true, was a specific bequest; but it was in no particular a bequest of the proceeds of the Broadway or any other specific property. On the contrary, there was a declared intention that the trustees should take only the proceeds of the real property she owned at her death and upon which the power of sale given her executor could alone operate. Hence, as there was no specific bequest to them of the pro-

ceeds of the Broadway property which she had sold in her lifetime, the cases relied on can have no application.

[2] Appellants, however, insist that if their position, just discussed, is untenable, still they are entitled to the proceeds of the Broadway property by virtue of sections 1301 and 1303 of the Civil Code, applied to the provisions of the will and to the contract for the sale of the property to Carr by the testatrix before her death.

The first section relied on (1301) provides: "An agreement made by a testator for the sale or transfer of property disposed of by will previously made, does not revoke such disposal; but the property passes by the will, subject to the same remedies on the testator's agreement, for a specific performance or otherwise against the devisees or legatees, as might be had against the testator's successors, if the same had passed by succession." The other (1303) declares that: "A conveyance, settlement or other act of a testator, by which his interest in a thing previously disposed of by his will is altered, but not wholly divested, is not a revocation; but the will passes the property which would otherwise devolve by succession."

But appellants are in no position to invoke these provisions of the Code. While at common law the general rule is that a sale, or an executory contract of sale of property devised, is a revocation of the devise, and our Code provisions have modified the common-law rule as to an executory contract of sale, still there is no disposition of property to appellants which could bring them within the benefit of the modification of the common-law doctrine. While the sections apply to either real or personal property which a testator has disposed of by his will and subsequently contracts to sell, we are only concerned with them here as far as appellants claim they apply to the Broadway property. But here there was no devise, specific or general, of the Broadway property, or of any real property whatever, either to the trustees of the Home or to the executor for their benefit. The latter was given simply a naked power of sale, not directed to any specific real property, but in terms operating solely upon such real property as the testatrix owned at her death, and the bequest to the trustees was only of the proceeds of such real estate as the power of sale could operate upon. On no possible theory can it be said that either the power of sale or the bequest to the trustees of the proceeds of real property was a devise of any real property or could have any application to real property which the testatrix contracted to sell in her lifetime, as the power to be exercised by the executor and the benefits accruing to the trustees relate by the precise terms of the will to real estate which is owned by the testatrix at her death. And, as neither the power of sale nor the bequest could apply to any real estate except that which the testa-

trix owned at her death, there is no room for the claim that there was in the will any disposition in favor of the trustees of any specific real property relative to which, as the testatrix had entered into an executory contract of sale of it during her lifetime, brought the appellants—trustees—within the benefit of the sections of the Code which they rely on as entitling them to the proceeds of such sale.

[3] Nor can these sections be invoked by appellants on the theory that the contract between the testatrix and Carr with respect to the sale and purchase of the Broadway property was simply executory at the time of her death; that the ownership of the property was in testatrix when she died, and hence, as a portion of her real property owned by her at her death, the trustees of the Home were entitled to its proceeds.

The contract of sale between Carr and testatrix was not executory merely at her death; but in equitable contemplation, as far as ownership of the land in Carr and the right of Mrs. Dwyer to the purchase price only are concerned, the contract had become an executed one some time before her death.

[4] When a contract for sale of real property binding on the parties is executed, an equitable conversion is worked; the purchaser of the land is deemed the equitable owner thereof, and the seller is considered the owner of the purchase price. The equitable conversion thus deemed to exist from the time a valid contract of sale is entered into may or may not be absolute. Whether it is, or not, will depend upon whether the terms of the contract of sale are subsequently complied with. If there is no default in that respect, but, on the contrary (and dealing now with the contract involved here), the purchaser performs all the conditions precedent which under the contract entitle him to a conveyance on a given day, he will be deemed on that day to be the owner of the land and the seller to be the owner of the purchase money. The fact that the contracting owner of the land refuses to perform his part of the agreement and make the conveyance to which the purchaser is entitled, on compliance with the contract, cannot affect the status or rights of the parties as to the property.

[5] The purchaser having performed or offered to perform his covenants at the date when the contract called for a conveyance to him, equity considers the property as belonging to him as of that date, and the owner as simply holding the legal title in trust for him. To make a concrete application of the principle: Mrs. Dwyer contracted to sell the Broadway property and make a deed to Carr, if by May 13, 1905, the latter should pay a certain sum in cash and execute notes and a mortgage for the balance of the purchase price. On the deed day—May 13, 1905—Carr tendered payment as the contract required, and Mrs. Dwyer refused

to accept it and make the deed, and, as the record shows, not because she did not want to sell the property, but because she wanted to get more money for it. On her refusal, Carr brought an action for specific performance. The superior court decided he was entitled to such performance as of May 13, 1905, and to a deed as of that date, and, as that carried with it the right to possession as of that date, awarded him the rents and profits of the property therefrom, and charged against him the taxes imposed on the property from that date. This decision was on appeal affirmed in all respects by this court (*Carr v. Howell*, 154 Cal. 372, 97 Pac. 885), and the only theory on which the reciprocal rights of the parties as fixed by the trial court could be sustained was: That those rights were to be measured as of the date when Carr was entitled to the deed. The contract was to be deemed performed on the deed day; the purchaser being entitled to the property as owner at that time, acquiring all rights as such, and subject to all obligations proceeding from such ownership. That, although the refusal on the part of Mrs. Dwyer to transfer the title by actual conveyance necessitated an action for specific performance to accomplish it, still, when the decree was entered, as far as the title was concerned, the transfer thereof was by relation as to the 13th of May, 1905. That what Mrs. Dwyer should have done on that day, in legal contemplation, was done, and the legal title passed as of that date. This being true, it necessarily follows that Mrs. Dwyer had sold all her interest in the Broadway property on the 13th of May, 1905, and her only right was to the balance of the purchase price in cash and the notes and mortgages. She had no interest in the Broadway property after that date. That interest had, by the performance of the contract on his part and under the doctrine of relation, completely vested in Carr. The only right which Mrs. Dwyer had under the sale was a right to the proceeds thereof which were at her death a portion of her personal estate and fell into the residuary clause of her will, and to which the respondents as her heirs at law were entitled.

These sections of our Civil Code upon which appellants rely were adopted from the New York Code and Revised Statutes. Our section 1301 corresponds with section 569 of the New York Code and section 45 of the New York Revised Statutes (2 Rev. St. [1st Ed.] p. 64), and our section 1303 to section 571 and section 47 of the New York Code and Revised Statutes, respectively, and, under the general rule, are assumed to have been adopted here with the construction placed on them by the courts of New York.

In *Roome, Adm'r, etc., v. Phillips*, 27 N. Y. 357, the original plaintiff in the action there contracted with defendant for the sale of certain real property in the city of New York; payment by defendant of the purchase price

to be made on a date specified and delivery of a deed to him by plaintiff vendor on that date. The vendor, at the date fixed for consummation of the contract, attended at the place agreed on to receive the purchase price and deliver the deed, but defendant did not appear. The vendor commenced an action for specific performance of the contract and shortly afterwards died, leaving a will, made before the contract for the sale of the property was entered into, whereby he directed his executor to sell off all his real property and pay over the proceeds to his mother and aunt in certain proportions. The administrator with the will annexed proceeded with the suit. One of the questions arising in the case was whether a naked power of sale given to an executor to sell real estate was applicable to land, for the sale of which testator had made a contract and tendered performance in his lifetime. It was held that it was not; the court saying: "But there is a further difficulty in this case. The power of sale conferred upon the executor by the will had become inapplicable to this land by the sale of it which the testator had made in his lifetime. The will directs the executor to sell and convey all the testator's real estate, either at public or private sale, upon such terms as he may think proper and most beneficial to his estate. But the manner of sale and the terms had all been conclusively determined by the testator before the will took effect by his death, and a sale had actually been made; and the power does not look to the conveyance of the naked title to lands, of the beneficial interest in which the testator has divested himself in his lifetime. The sale was not a revocation of that part of the will, express or implied, so as to require an attested instrument to satisfy the statute, nor was the case within the provision which declares that a contract by the testator for the sale of land devised shall not revoke the devise incidentally made (2 R. S. p. 64, § 45); for the land in this case was not devised, though the proceeds of the sale were. Simply, the duty which the executor was appointed to perform respecting this land could not be performed by him, because, at the death of the testator, there was no such land to be sold."

[6] In *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706, an action was brought by the widow of testator to recover dower in a tract of land which testator had contracted to sell in his lifetime. The power of sale contained in the will authorized the executor to sell all the testator's "fast estate." This excerpt from the syllabi embraces the gist of the opinion of the court: "A power of sale contained in a will authorizing executors to sell all the testator's 'fast estate' does not embrace lands which have been sold by contract by the testator; the purchase money being unpaid, and the title still remaining in him. The interest remaining in the vendor in such case is a right to the money due on the con-

tract, which is not real, but personal, estate." See, also, *McNaughton v. McNaughton*, 34 N. Y. 201, and *Williams v. Haddock*, 145 N. Y. 144, 39 N. E. 825.

While additional authorities from other states might be cited, we refer to the New York cases only, on account of the similarity of our Code provisions and the construction placed on them prior to their adoption here by the New York courts; particularly in the earlier decisions quoted from.

There is nothing in *Mott v. Ackerman*, 92 N. Y. 539, cited by appellants, which in any respect disturbs the rule announced in *Roome v. Phillips* and in *Lewis v. Smith*.

Nor do the several New York cases relied on by appellant support their position. These New York cases are *Knight v. Weatherwax*, 7 Paige (N. Y.) 182; *McCarthy v. Meyers*, 5 Hun (N. Y.) 83; *Hopkins v. Gourand*, 23 N. Y. Supp. 189; *Wagstaff v. Marcy*, 25 Misc. Rep. 121, 54 N. Y. Supp. 1021; *Nutzhorn v. Sittig*, 34 Misc. Rep. 486, 70 N. Y. Supp. 287; *Van Tassel v. Burger*, 119 App. Div. 509, 104 N. Y. Supp. 273.

These cases all involve the application of these similar New York sections to devises made by testators and the effect thereon of contracts for the sale of the devised property subsisting at their death. In two essential and vital particulars, however, these cases differ from the case at bar. In each of them—save one where the testamentary disposition applied to the proceeds of a specified mortgage—there was a devise of specific real property, or the testamentary disposition related to specific real property, and in each case the contract for the sale of the property specifically devised was clearly executory at the time of the death of the testator, because either the time fixed by the contract for performance—the deed day—was subsequent to the death of testator or had been postponed by mutual consent to a date which was subsequent thereto. Clearly, under such conditions and by virtue of the Code provisions, the property specifically devised passed to the specific beneficiaries, subject to the rights of the vendee under the contract. But neither of the conditions which in the cases cited made the rule applicable exist in the case at bar. Here there is no devise of any real property; only a naked power of sale is given to the executor to sell such real property as the testatrix owned at her death.

The Broadway property could not fall under this general power of sale because testatrix had become completely divested of her ownership therein under a contract of sale which, in equitable contemplation, was fully executed a month prior to her death. The only right which Mrs. Dwyer then had relative to that property was solely a right to the purchase price thereof which, as per-

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 3 Misc. Rep. 619.

sonal property, fell into the residuum of her estate, and was properly distributed by the superior court to the respondents, her heirs at law.

We have examined other points made by appellants against the correctness of the decree of distribution, but deem them neither tenable nor requiring discussion.

The portion of the decree of distribution appealed from is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

159 Cal. 680

In re DWYER'S ESTATE. (L. A. 2,562.)
(Supreme Court of California. April 7, 1911.)

1. EXECUTORS AND ADMINISTRATORS (§ 2*)—
FOREIGN ASSETS—DISTRIBUTION—WHAT
LAW GOVERNS.

Where testatrix, a resident of Louisiana, had contracted to sell certain real estate in California, and the proceeds were not collected until after the close of the domiciliary administration, the proceeds, when collected, being personal property, were distributable according to the law of Louisiana, and, except for the fact that the administration there had been closed, would have been transmitted to the Louisiana administration for distribution.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 2.*]

2. WILLS (§ 15*)—BEQUEST TO CHARITY—STAT-
UTORY LIMITATION—"ESTATE OF TESTATOR."

Civ. Code, § 1313, declares that no devise or bequest of any estate, real or personal, to any charitable or benevolent society or corporation, or to any person or persons, in trust for charitable uses, shall collectively exceed one-third of the estate of the testator, leaving legal heirs. *Held*, that such section was intended not to fix a state polity, but for the protection of heirs at law, and that, in determining whether a bequest to charity exceeds one-third of the testator's estate, the court is not limited to the property bequeathed to charity within its jurisdiction, but should consider all the property bequeathed by testator to charity wherever situated.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 36; Dec. Dig. § 15.*]

3. WILLS (§ 13*)—CHARITABLE BEQUEST—LIMITATION OF RIGHT.

Aside from Civ. Code, § 1313, prohibiting a testator, leaving heirs, from leaving more than one-third of his estate to charity, there is no limitation on the right of a person to dispose of his property in favor of charitable purposes.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 32-39; Dec. Dig. § 13.*]

4. WILLS (§ 15*)—BEQUEST—PROCEEDS OF
SALE OF LAND—AMOUNT—DEDUCTION OF EXPENSES.

Where trustees were entitled to the proceeds of a sale of certain real estate in California belonging to testatrix for the benefit of a charity, the trustees, under Civ. Code, § 1313, providing that a testator leaving heirs may only devise one-third of his estate to charity, being entitled only to one-third of the distributable assets after payment of debts and charges of administration, were only entitled to the proceeds of such property after deducting therefrom the costs and expenses of the sale.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 36; Dec. Dig. § 15.*]

In Bank. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Judicial settlement of the estate of Lelia Bonner Dwyer, deceased. From a portion of the decree of distribution distributing to the trustees of the J. M. Bonner Memorial Home the gross proceeds of the sale of a tract of land in Los Angeles county, testatrix' heirs appeal. Reversed, with directions.

A. H. Van Cott, Benjamin E. Page, and E. W. Camp, for appellants. Geo. J. Leovy and Hunsaker & Britt, for respondents. Henry W. O'Melveny, O'Melveny, Stevens & Millikin, and Denis & Loewenthal, for administrator, etc.

LORIGAN, J. This appeal is taken by the heirs at law of the deceased from a portion of the decree of distribution in her estate which distributes to the trustees of the "J. M. Bonner Memorial Home" the gross proceeds of the sale of a certain tract of land in Los Angeles county.

The principal provisions of the will of testatrix, and the various matters pertaining to the administration of her estate, are set forth in the opinion this day filed on the appeal of the trustees of the Memorial Home from another portion of this same decree (Estate of Dwyer [L. A. No. 2,569] 115 Pac. 235); but for the purpose of considering the points made on this present appeal some of them will be briefly recited.

The testatrix died in New Orleans in June, 1905, a citizen of and domiciled in Louisiana, and leaving a will which was duly admitted to probate in New Orleans in the year mentioned and letters thereon issued. She left real and personal estate in Louisiana and in Los Angeles in this state, and real property in Alabama and Texas. Her will, after providing for the payment of certain specific legacies, directed that all her real estate (except some lots in New Orleans) should be sold by her executor, the special legacies, which were expressly charged upon said real estate, paid therefrom, and bequeathed "the rest and residue of the proceeds of said real estate so to be sold to certain persons (named as trustees and hereafter to be referred to as the trustees of the home) in trust to found and maintain in New Orleans a home for aged and infirm men to be called the "J. M. Bonner Memorial Home." Her husband, Alexander J. Dwyer, was made her "universal residuary legatee." He predeceased her about a year; but she made no change in her will as to the residuary bequest, so that appellants here, who are conceded to be her heirs at law, were entitled to have distributed to them any property which should fall into the residuum of her estate.

In August, 1905, the will of the testatrix, theretofore admitted to probate in New Orleans, was admitted to probate in the superior court of Los Angeles county, Cal., as a

foreign will, and letters of administration with the will annexed were issued. Administration of the estate in Louisiana was closed and the administrator discharged in 1906, since which time there has been no administration of the estate pending anywhere except in this state.

The only real property in this state of which the testatrix died possessed was a ranch in Los Angeles county consisting of 170 acres of land. By an order of court this land was sold by the administrator for \$20,250 and the sale confirmed in 1907; there being allowed and paid as a part of the expenses of the administration of the estate, and not charged against the purchase price of the ranch, a commission of \$1,012.50 for effecting the sale and \$100 for a certificate of title.

In 1909 the administrator with the will annexed filed his petition for distribution asking that the estate be distributed to such persons as the court should deem entitled thereto.

[1] While the estate to be distributed amounted, including the \$20,250 gross proceeds of the sale of the ranch, to \$135,296.64, practically all in money and securities, the only portion thereof subject to distribution under the laws of this state was the proceeds of the real estate which had been sold by order of the probate court. The rest of the estate consisted of the purchase price of land in this state which testatrix had contracted to sell in her lifetime, but which, on account of protracted litigation involving the validity of the contract of sale (see *Estate of Dwyer* [L. A. No. 2,569] *supra*), was not collected until after the close of the domiciliary administration of her estate in Louisiana. It was collected by the administrator here; but, being personal property, the distribution of which was governed by the law of the domicile of the testator, and which would have been transmitted to the administrator in Louisiana to be distributed there had that administration not been closed, the court here in the ancillary administration properly distributed it to the heirs at law of the testatrix in accordance with the law of Louisiana. *Estate of Apple*, 66 Cal. 433, 6 Pac. 7; *Collins v. Maude*, 144 Cal. 289, 77 Pac. 945.

[2] As to the proceeds of the sale of the ranch which, as we have said, was the only portion of the estate of the testatrix subject to administration under the laws of this state, cross-petitions for the distribution thereof were presented to the superior court by the heirs at law and the trustees of the Home. The heirs at law claimed that they were entitled to distribution to them of two-thirds of the proceeds under section 1313 of the Civil Code limiting the disposition which a testator may make of his estate in favor of charity to one-third thereof. The trustees claimed to be entitled to the entire gross proceeds of the sale, which claim the court

sustained and ordered distributed to them that entire amount. This appeal involves the correctness of that order of distribution.

Upon the hearing of the petition for distribution in the superior court it was shown that there is no limitation in Louisiana upon the amount of property which a testator may leave to charity, except where he leaves a father, mother, or children. The testatrix here left none, and under her situation, in that respect, by the law of Louisiana she might have left her entire estate to charity. It was further in evidence that, under the administration of the estate of testatrix in Louisiana and the other states, there was distributed to the heirs at law \$234,778.43 aside from the amount distributed to them here, to the legatees \$40,000, and to the trustees of the Memorial Home \$126,165.92, and it was conceded that the sum distributed as aforesaid to the trustees of the Memorial Home, together with the \$20,250, the proceeds of the ranch distributed by the superior court of Los Angeles, and which is in question here, amounted to less than one-third of the whole distributable estate of the testatrix considered as an entirety.

Proceeding now to the merits of the appeal: The principal question involved therein is as to the construction which is to be given to section 1313 of our Civil Code, which declares that no devise or bequest of any estate, real or personal, to any charitable or benevolent society or corporation or to any person or persons, in trust for charitable uses, shall collectively exceed "one-third of the estate of the testator leaving legal heirs," and further declaring that all disposition of property contrary thereto shall be void and go to the residuary legatees, devisees, next of kin, or heirs according to law.

In distributing to the trustees the entire proceeds of the sale of the ranch, the superior court construed the term "one-third of the estate of the testator," as used in section 1313 with reference to the proportion thereof which was disposable to charity, as meaning one-third of the entire distributable estate of the testator wherever located; that although the testatrix died domiciled without the state, and the larger proportion of her estate was distributed in foreign jurisdictions, still, if the estate distributed elsewhere to charity, and the estate here—the proceeds of the ranch alone—coming within the terms of the charitable bequest distributable here, did not exceed one-third of the entire distributable estate of the testatrix wherever located, the trustees were entitled to the whole proceeds of the sale of the ranch; and as it was not only conceded, but proven, that with distribution here of the proceeds of the sale of the ranch to the trustees of the Home added to the amount elsewhere distributed to them the charitable bequest would receive less than one-third of the entire estate of the testatrix, a proper construction of section 1313 required the en-

the proceeds of the ranch to be distributed to the charity.

Appellants insist, on the other hand, that the "estate of the testator" mentioned in section 1313 means the estate located in this state over which the superior court has power and jurisdiction, and none other; that in determining the amount of the estate distributable here under the charitable devise, as the only estate over the testamentary disposition of which the law of this state had control and jurisdiction was the real estate of testatrix situated here or its proceeds and nothing else, the superior court could under section 1313 only distribute one-third of that property considered alone to the charity and should have distributed the remaining two-thirds thereof to appellants as heirs at law of testatrix.

This is the first time this precise question has been presented for consideration to this court, and the correctness of the decree of distribution involved depends upon the meaning which is to be given to the term "estate of the testator" as used in section 1313. Is it the estate here which alone can be taken into consideration in determining the amount which a nonresident testator may devise to charity, or is it the entire estate—that distributed elsewhere together with that distributed here—which shall be made the basis of calculation?

The solution of this question in our judgment is to be determined by a consideration of the legislative intent as disclosed by the entire section; the purpose which the Legislature intended to accomplish by its enactment.

As a general proposition the right of a nonresident testator to dispose of property in this state is recognized and may be exercised under no greater testamentary restrictions than apply to a disposition of it by a domiciliary testator. Our law recognizes the validity in this state of wills made by nonresidents, provides for their probate here and for administration and distribution of property owned in this state by the testator. In the administration of such estates here, as in those of domiciliary testators, we endeavor to carry out the intention of the testator expressed in his will concerning the disposition of his estate and sustain trust provisions of the will, particularly where such provisions are valid both under the law of the domicile of the testator and under the law of this state.

There is, of course, no question as to the validity of the bequest by the testatrix to the trustees of the Home. It is valid, both under the laws of Louisiana and this state. The only question is whether in measuring the one-third of the estate distributable in favor of that charity the court here under section 1313 shall take into consideration the estate of the testator in this state only, or the entire estate wherever distributed.

The general rule undoubtedly is, and is so

declared by section 1376 of our Civil Code, that the testamentary disposition of property in this state is governed by the law of this state. Taking this rule into consideration, appellants insist that, when section 1313 speaks of "the estate of the testator" in connection with the inhibition of disposition of more than one-third of it to charity, the estate mentioned must be construed to be the estate of the testator in California only and over which the law of this state has alone control. But this conclusion does not necessarily follow from a consideration of the rule. Giving the rule its full force, it does not answer the inquiry as to what is meant by the "estate of the testator" as used in the section, a proportional part of which alone can be disposed of in favor of charity. The disposition of the estate must, it is true, be governed by the law of this state; but the inquiry is: What is the law in that respect? If the Legislature in the enactment of section 1313 intended to limit the proportion of the estate of a testator which could be disposed of in favor of charity here to the estate alone under distribution in this state, then the trustees of the Home were only entitled to a distribution of one-third of the proceeds of the sale of the real property. If, on the other hand, the words "estate of the testator" used in the section referred to the estate generally, then the distribution of the entire proceeds of the sale of the ranch to the trustees of the Home, as it would not exceed one-third of the entire distributed estate of the testator wherever situated, was properly made. So, as the term "estate of the testator" may have a limited or enlarged significance, it is necessary, in order to determine in what sense the term is used in the section, to examine into the intent and purpose of the Legislature in the enactment of the section so as to apply the law of this state to dispositions in favor of charity as the Legislature intended.

[3] Now, as to such legislative intent: There is no limitation under the laws of this state, except as prescribed by section 1313, upon the right of a person to dispose of his property in favor of charitable purposes. He may by gift in his lifetime devote all his property thereto. He has a legal right to do so. He may with equal legal right dispose by will of all his property in favor of charities provided he leaves no heirs at law. It is only when he leaves such heirs that his power of disposition by will is restricted. But this is not by reason of any public policy of this state against dispositions in favor of charity. In fact, the state has no such public policy. It is well settled here that dispositions to charity are looked upon with favor, and the courts will uphold all such gifts whether made by a donor in his lifetime or by a testator, when it can be done consistently with the rules of law. The theory of section 1313 is not to prevent char-

ities from receiving testamentary gifts of property. It is not a mortmain statute; not an expression of a policy of the state against the accumulation of vast properties or the centralization of wealth in mortu manu. It was not designed to operate upon the capacity of corporations or institutions or individuals to take charitable testamentary gifts, but solely as a limitation on the power of a testator to make them when he had legal heirs. The purpose of the section was remedial; to prevent what was deemed a wrong and injustice to those who should naturally be the recipients of the bounty of a testator—his heirs at law. It was not enacted for the public good or as a matter of state polity, but for the benefit exclusively of those named in it—the heirs at law—and as a protection against hasty and improvident gifts to charity by a testator of his entire estate to the exclusion of those who in the judgment of the Legislature had a better claim to his bounty. As then the section in question was not enacted as declaratory of any public policy of this state relative to charitable dispositions by will, but was enacted exclusively for the protection of the heirs at law of a testator, there is no reason why it should be held that the estate of the testator mentioned therein of which a limited disposition to charity may be made means the estate of the testator distributable alone in this state. On the contrary, as the legislative intent was only to prevent a disposition in excess of one-third of the estate of the testator where he left heirs at law, and was solely to secure their rights in any excess disposed of over that proportion, it was entirely immaterial in the legislative mind where or how the heirs received the proportion of the estate to which they were deemed entitled as long as they obtained it. In requiring ancillary administration in this state, we do so for the benefit of creditors of the decedent and claimants here. When their claims have been satisfied as far as the distribution of the property of the estate located here is concerned, distribution thereof is made in conformity to the terms of the will and the intention of the testator, unless contrary to some provision of the law of this state. In making such distribution, where bequests to charity are involved, there is no principle of construction, or any rule of public policy in this state, or any rule of law, which requires us to hold, in determining the amount of the estate of a nonresident testator distributable to charity under the Code section in question, that the estate of the testator here can alone be taken into consideration. Such a construction would be arbitrary and not in harmony with the legislative intent and purpose. Its effect, too, would be, in many instances at least, to permit the heirs at law, under distribution in foreign jurisdictions and here, to receive an amount

largely in excess of two-thirds of the aggregate of the estate of the testator and contrary to his intention.

From these considerations we are of the opinion, therefore, that the term "estate of the testator" employed in the section means, for the purpose of determining the amount of the estate here distributable to charity, not the estate alone over which the court here has control, but has relation to the aggregate estate wherever situated or distributed, and that where it can be shown, as it is shown here, that in the administration of the estate in other jurisdictions the heirs at law have already received two-thirds of the estate of the testator, or that of the estate in this jurisdiction, an amount less than two-thirds of the distributable estate here, added to what has already been received by them in other jurisdictions, will give them two-thirds of the estate of the testator, they will not be allowed to take in this jurisdiction an amount in excess of what is necessary to make up the two-thirds of the estate to which in the legislative judgment and the intention of the testator they are entitled, and which, if it were permitted to do, would give them more than two-thirds of the aggregate estate of the testator.

The only authority to which our attention is directed on either side of this controversy which squarely applies to the question here involved is the case of *Paschal v. Acklin*, 27 Tex. 173. In that case, Isaac Franklin, a testator domiciled in the state of Tennessee, died leaving a widow and children. By his will, after making bequests to his wife and children, he devised all his "property, real and personal, of whatever kind or nature, that is situated in the states of Tennessee and Mississippi, or any other common-law state, where trust estates can be created, * * * and the rest and residue of my estate wherever situated," to his two brothers in trust to erect, endow, and maintain an academy or seminary of learning on the plantation of the testator in Tennessee. At the time of his death testator left real property in Texas. The law of Texas provided that a testator leaving children him surviving could not dispose of more than one-fourth of his estate to other than the children. The Texas Supreme Court, after deciding that Texas was a "common-law state where trust estates could be created" within the terms of the devise in trust under the will, proceeded to consider, among other questions, whether, in ascertaining the portion of his estate which the testator could leave to charity under the testamentary restrictions of the law of Texas, regard should be had only to such estate as might be in Texas, or did it apply to the whole estate of the testator wherever situated? It was held that the whole estate wherever situated must be considered. The court said: "It is also insisted by the appellees, and was so

ruled in the district court, that Isaac Franklin's will is inoperative and void in this state, to the extent of three-fourths of his estate, because, as they allege, it contravenes the provisions of our former statute of wills, which forbid a parent depriving his children by will of more than one-fourth of his estate. * * * On the other hand, the position assumed by appellants, that the court, in applying this statute to the will, can only take into view the property of the testator situated in this state, is equally fallacious. The only limitation upon the right of the owner to dispose of his property by will has reference to the proportional part of the value of his estate. In other respects his discretion is unshackled. The authority to dispose of his property by will is general; the limitation or qualification of this right is special and particular. In the nature of things, it is impossible that a part of each specific article of property should be allotted to the children. To deprive the testator of the privilege of selecting the item of property for bequest would often, if not generally, take from him the incentive for making it. The object of the law was to secure to children a just and reasonable portion of their parents' estate. If they received the portion to which the law declared they were entitled, it was immaterial where or in what they received it. It is not to be understood from this that there may not be cases in which our courts would refuse to send our citizens abroad, to encounter difficulties and uncertainties in obtaining their portion of their parents' estate in a foreign tribunal, to enable the devisees or legatees to secure the full amount of their bequests here. The question presented in this case is: Can the children, or those claiming under them, if they have already received their legitimate portion of the entire estate, claim a like proportional part of the property in this state, simply because the portion which they have received was not within its limits, or within the jurisdiction, or under the control of our courts? To answer in the affirmative would be to give the statute in question a construction altogether foreign to its spirit and purpose, as well as to violate a fundamental principle in this department of jurisprudence."

We make no doubt upon the correctness of the rule as laid down in the above case and that it is applicable to our statute. It seems to be the only construction which will permit the intention of a testator to be carried out as to the portion of his estate which he may devote to charity at the same time that it gives to the heirs at law all that in the judgment of our Legislature they should have and prevents them from taking a proportion in excess of what they are entitled to.

There is nothing in the Estate of Peabody, 154 Cal. 173, 97 Pac. 184, cited by appellants,

which decides anything contrary to the conclusion we have reached. There the devise was to charity, and the only two questions involved were as to the validity of the trust clause, tested by the rule of the Estate of Fair, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70, and subsequent cases, as to trusts to convey, and the application of the doctrine of cy pres to the charitable devise there under consideration. Denying the application of the rule in the Fair Case to the trust in question, this court then proceeded to consider the application of the cy pres doctrine under the claim of appellant that the estate in California devised to charity was so small that it would be inadequate to accomplish the purpose designed by the testatrix, and should be held void on that account. In disposing of this point, the court, among other things, said: "We do not know the value of the house and lot in St. Louis, nor whether, under the law of Missouri, the whole devise is effectual as to that property. The mere fact that one-third, only, of the California property can be devoted to the establishment of 'The House of Rest,' and that hence the establishment may be much smaller than the testatrix intended, does not make the devise invalid." It is on this language used in the quoted portion of the opinion upon which appellants here base their claim that it is a decision of this court to the effect that, in determining the one-third of the property which can be distributed to charity here, the property in this state alone can be taken into consideration. But in this Peabody Estate appeal there was no question presented to this court for consideration as to whether in determining the one-third of the estate of a testator which should be distributed to charity one-third of California property only should be taken into consideration, or one-third of the entire estate wherever situated. The attorney for the appellant in that case conceded that one-third of the California property only could go to charity, so that the question involved here could not arise in that case, nor did the court undertake to determine it. The language there used is referable only to the matter which was under consideration. The court had no data under which it could know anything about the estate of the testator elsewhere than in this state; it did not know the value of the property devoted to charity in Missouri, or whether the devise there was valid, or whether any distribution of the estate had been made there, and, under the concession of counsel for appellant, that only one-third of the property in this state could be devoted to charity, was dealing only with the question presented, namely, whether as the one-third of the estate here was insufficient to carry out the general scheme of the testatrix to establish a "Home of Rest" as she designed it, should the devise for that reason be declared invalid? The court, applying the cy pres doctrine, held that it was

not. That was all that was decided, and, as the language of the court was addressed to this sole proposition, it cannot be construed into a declaration that, in determining the amount which shall be available for charitable purposes of property situated in this state, the court shall take into consideration the property here alone, and not the entire estate wherever situated. No such question was involved in the Peabody Case, and nothing respecting it was there decided.

In reaching our conclusion in this matter, we give due consideration to the suggestion of counsel for the appellants as to the difficulties and embarrassments which may attend the distribution of property of the estate here under our construction of the Code provision. These are, to state the principal ones urged, that, where a testator leaves property here and in other states, administration may be pending elsewhere at the same time that it is pending here; that, when the ancillary administration here is ready to be closed, administration elsewhere may still be pending, and the court here cannot know how the estate there will be distributed; that administration here should not be delayed for the sole purpose of ascertaining how and to whom distribution of the estate in other jurisdictions may be made; and that, unless the administration is delayed here until other administrations are closed, the court here will not be able to take into consideration the value of the estate distributed elsewhere and the manner of its distribution, for the purpose of determining what amount of the estate here shall be distributed to charity and what to the heirs at law. But, conceding that such conditions may exist elsewhere when estates are ready for distribution here, this would not affect the correctness of the rule itself as a rule of distribution. They would only render the rule difficult of application. The natural and proper desire and disposition of all beneficiaries under a will, or the heirs at law of a testator, to obtain their share of the estate at the earliest moment they are entitled to it, can be safely relied on to prevent any delays in the speedy distribution of the estate of a testator, in whatever jurisdiction it may be situated. But, if such difficulties may sometimes exist, none of them are presented here. In this particular estate the domiciliary administration in Louisiana and the ancillary administrations in other states were closed, and the only administration pending anywhere was in this state. Here the value of the property distributed elsewhere and how and to whom it was distributed was shown. The rule announced under these circumstances was of ready application. It was a matter of mere mathematical calculation for the court to ascertain the amount of property under its control here, which, together with the amount distributed elsewhere, would give to the heirs at law the

two-thirds of the estate of the testatrix to which they were entitled, and allow distribution to charity of the rest, which, in itself, would not bring the bequest to charity up to one-third of the aggregate distributable estate of the testatrix to which it was entitled.

Should, however, the conditions of uncertainty suggested by appellants exist when an estate here is ready for distribution, that at that time the value of the estate elsewhere and the manner in which it has been distributed cannot be ascertained, the court necessarily could only take into consideration in determining the respective amounts of the estate which should be distributed under section 1313 to charity and to the heirs at law the estate under its control here. But this, as we have said, is not because a proper construction of section 1313 does not require the court to take into consideration if it can the amount of the estate of the testatrix wherever distributed in determining the amount distributable to charity of the estate here, but because, in the absence of knowledge as to the value of the estate distributed elsewhere, or how distributed, it is impossible to take the entire estate into consideration in making distribution of the estate here.

[4] Under the construction which, in our opinion, must be given to the term "estate of the testator" as employed in section 1313 with reference to the amount of property which may here be distributed to charity thereunder, the superior court properly distributed to the trustees of the Memorial Home the proceeds of the ranch, and there only remains for consideration the further point made by appellants that, if the trustees were entitled to the proceeds as a whole, the court should not have distributed to them the gross proceeds, but only the net proceeds thereof. This point is based on the fact that the court allowed, for effecting a sale of the property, under its order, a commission of \$1,012.50, and \$100 for a certificate of title. These expenses attending the sale were not deducted from its proceeds, but were allowed and paid as part of the general expense of administration of the estate, and the gross proceeds of the sale distributed to the trustees of the Home. We think the proceeds of the sale should have been charged with the expense attending the sale and only the net proceeds distributed to the trustees. Several reasons might be assigned in support of this conclusion, but one will suffice. It is the settled law in this state that it is only one-third of the distributable assets of the estate of a testator, after payment of debts and charges of administration, which can be distributed to charity. *Estate of Hinckley*, 58 Cal. 457; *Pearson's Estate*, 98 Cal. 603, 33 Pac. 451. This being true, it necessarily follows that it is only the proceeds of the sale of the

ranch, after deducting the expenses of effecting its sale—the net proceeds thereof—which can be distributed to charity.

For this error in distributing to the trustees of the Home the gross instead of the net proceeds of the sale of the ranch, that portion of the order appealed from is reversed, with directions to the superior court to modify that portion of the decree appealed from, by distributing to the trustees of the Home the net proceeds of the sale, amounting to \$19,137.50, and as it appears that the heirs at law would be entitled to have distributed to them the \$1,112.50, representing the amount in excess of what should have properly been distributed to the trustees of the Home, the court shall further modify the decree of distribution so as to distribute to them that amount, and, as so modified in the particulars stated, the decree, as far as it is affected by this appeal, will stand affirmed. Appellants are entitled to their costs on appeal.

We concur: HENSHAW, J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.

15 Cal. App. 515

**TIMES-MIRROR CO. v. SUPERIOR
COURT OF LOS ANGELES
COUNTY et al. (Civ. 956.)**

(District Court of Appeal, Second District, California. March 1, 1911.)

CERTIORARI (§ 28*)—QUESTIONS REVIEWABLE—JURISDICTION.

Where the issue whether there was pending another action between the same parties for the same cause was a question within the jurisdiction of the trial court, its judgment was not reviewable on certiorari, which, under Code Civ. Proc. §§ 1068, 1074, can be called into use only to review judgments made without or in excess of jurisdiction.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 41; Dec. Dig. § 28.*]

Petition for writ of review by the Times-Mirror Company against the Superior Court of Los Angeles County and W. R. Hervey, a judge thereof. Writ discharged.

John Beardsley, for petitioner. A. W. Sorenson, for respondents.

JAMES, J. Petitioner herein seeks to have reviewed a judgment of the superior court rendered in an action on appeal from a judgment of the justice's court of Los Angeles township. It appears that W. S. Booher and Ella B. Booher brought an action against the petitioner in said justice's court to recover damages in the sum of \$299.99, alleged to have been suffered by reason of a wrongful levy, under process of attachment, upon personal property belonging to them. In its answer to the complaint of the plaintiffs therein, petitioner interposed the defense that there was then pending another action for the same cause between the

same parties. In the justice's court judgment was awarded the plaintiffs, and petitioner, being the defendant in that action, appealed to the superior court. The superior court in due time proceeded to retry the action on appeal, and again judgment was rendered against petitioner. At the commencement of the trial in the superior court, petitioner first offered evidence in support of its plea in abatement, or, as phrased in the language of its answer, "that there was another action pending between the same parties for the same cause," and then made a motion that the action be dismissed, which motion was denied by the court and the trial proceeded with.

It does not appear that the superior court exceeded its jurisdiction in making the order denying the motion of petitioner, and proceeding with the trial of the action, and rendering judgment therein. The matter as to whether or not there was pending another action between the same parties for the same cause was a matter presented as an issue to be tried by the court, and one which the court had jurisdiction to determine either in favor of the plaintiffs or defendant in that action; and its judgment, when rendered, became final and conclusive between the parties. The writ of certiorari can be called into use only for the purpose of reviewing judgments or orders made without or in excess of jurisdiction, and cannot be made to serve the office of an appeal. Muir v. Superior Court, 58 Cal. 361; White v. Superior Court, 110 Cal. 60, 42 Pac. 471; Code Civ. Proc. §§ 1068, 1074.

The writ is discharged.

We concur: ALLEN, P. J.; SHAW, J.

15 Cal. App. 512

SPENCER et al. v. CLARKE et al. (Civ. 904.)

(District Court of Appeal, Second District, California. Feb. 28, 1911.)

1. BOUNDARIES (§ 35*)—HEARSAY—DISPUTE AS TO BOUNDARIES.

Hearsay evidence is inadmissible in a case between private parties involving boundaries, where the controlling monuments exist and the lines described in the field notes of an original government survey are susceptible of exact determination by independent surveys.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 154-156; Dec. Dig. § 35.*]

2. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS.

A finding on conflicting evidence will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

3. APPEAL AND ERROR (§ 981*)—REVIEW—DISCRETION OF COURT—REFUSAL OF NEW TRIAL.

The trial court, in refusing a motion for a new trial for newly discovered evidence, has discretion as to whether the evidence is cumulative or such as would have changed the find-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ing, and, where no abuse of such discretion is shown, its action will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3876; Dec. Dig. § 981.*]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by Ernest Spencer and others against Charles N. Clarke and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

O. N. Andrews, for appellants. Ward, Wells & Ward, for respondents.

ALLEN, P. J. The action was one to quiet title; the only matter in controversy being as to the exact location upon the ground of a division line between the lands of the respective parties to the action. The court found in favor of defendants, and judgment went accordingly, from which, and an order denying a motion for a new trial, plaintiffs appeal.

[1] The only serious question presented relates to the ruling of the trial court in sustaining an objection to certain testimony. One of the plaintiffs offered himself as a witness, and, after stating that he had no information as to the controlling monuments or true location of the line in question, other than that which was derived from statements made to him by a surveyor named Wheaton, now deceased, who was a few years before the commencement of the action employed by him to run the exterior lines of his premises, was asked to give the location of said lines and monuments. An objection to this testimony was made upon the ground that the witness was not shown to be competent or to have any knowledge as to the accuracy of said survey, and that the same was hearsay. This objection was sustained. It is appellants' contention that the statements of such deceased surveyor were admissible as one of the exceptions to the rule governing the admissibility of hearsay evidence, under the authority of *Morton v. Folger*, 15 Cal. 275, and *Cornwall v. Culver*, 16 Cal. 428. The rule recognized in those cases is "that the declarations on a question of boundary of a deceased person who was in a situation to be acquainted with the matter, and who was at the time free from any interest therein, were admissible, even when the controversy was between estates of private persons." It appears from the record that the controlling monuments and lines, including the contested line, were those of an original government survey, the field notes of which were in evidence; that, while Wheaton made a survey upon which his statements were based, neither he nor any other surveyor ever retraced the government lines or re-established the government corners, or the location of said lines as determined by a survey thereof. The trial court by its rejection of Wheaton's

statements determined that from the evidence Wheaton was not in a position to be acquainted with the matter involving the true line between the premises of the parties to this action, as fixed by the government survey, and when we consider that by his survey he had not sought to nor attempted to verify the government lines, which control the line in question, it was obvious that he was not so acquainted with the true location thereof as to bring his statements within the rule declared in the cases cited. The reason for the exception in cases of this character is based upon necessity for the protection of the rights of private parties. But in the case under consideration, where the controlling monuments exist, and the lines described in the field notes are susceptible of exact determination by independent surveys, it cannot be said that a condition exists through which an opinion of a previous surveyor should be received as of necessity. We think the court committed no error in sustaining the objection to the witness recounting Wheaton's statements.

[2] The bill of exceptions shows that a material conflict in the evidence existed as to the true location of the disputed line. This being true, the finding of the trial court should not be disturbed.

[3] It is finally claimed that the court abused its discretion in overruling the motion for a new trial based upon newly discovered evidence. From aught that appears in the record, this evidence may have been cumulative merely, or was not of such character as, taken in connection with the other evidence, would have had the effect to change the findings. These matters were for the trial court, and, no abuse of discretion being shown, appellants' contention in this regard cannot be sustained.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

15 Cal. App. 518

O'BRIEN v. GARIBALDI et al. (Civ. 725.)

(District Court of Appeal, First District,
California. March 2, 1911.)

1. BILLS AND NOTES (§ 134*)—ACCEPTED ORDER.

An order of a building contractor, directing the owner to pay a specified sum to a subcontractor "on completion when house accepted * * * and deduct same from my payment," and accepted by the owner, must be construed in connection with the building contract, which is completed when the work is finished in accordance with the original plans, and where the contractor failed to complete the building, and no payment subsequent to the date of the order became due to the contractor, the subcontractor having knowledge of the contract could not recover on the order.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 134.*]

2. CONTRACTS (§ 319*)—BUILDING CONTRACTS—RIGHTS OF PARTIES.

Where work on a building is abandoned by the contractor and the owner completes the building pursuant to a right reserved in the contract, the work of completion is, as a general rule, deemed to be done under the contract, but the contractor may receive only the balance of the contract price remaining after the cost of completion.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1493-1507; Dec. Dig. § 319.*]

3. EVIDENCE (§ 419*)—PAROL EVIDENCE—MODIFICATION OF WRITTEN INSTRUMENTS.

An order by a contractor, directing the owner to pay a subcontractor "on completion when house accepted," a specified sum, and accepted by the owner signing his name thereon below the signature of the contractor, cannot be modified by proof that the consideration of the order and acceptance was the resumption of work by the subcontractor.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Arthur J. O'Brien against A. J. Garibaldi and another. From a judgment for plaintiff, defendant named appeals. Reversed.

Sullivan & Sullivan and Theo. J. Roche, for appellant. Costello & Costello, for respondent.

LENNON, P. J. In this action the defendant, A. J. Garibaldi, appeals from the judgment rendered against him and from the order denying his motion for a new trial.

The judgment is based upon the making and acceptance of the following written order, viz.: "San Francisco, Cal., Jany. 19, 1907. Mr. A. J. Garibaldi, San Francisco, Cal.—Dear Sir: Please pay to Mr. A. J. O'Brien on *completion when house accepted* the sum of \$900, and deduct same from my payment, and oblige. Yours respectfully, J. M. Jackson."

As an evidence of his acceptance of this order, the defendant signed his name thereon below the signature of Jackson. The record further discloses that at the time of the presentation and acceptance of the order Jackson, a contractor and builder, was engaged in the erection of a building on certain real property owned by the defendant, in the city and county of San Francisco, pursuant to the covenants of a building contract, in the usual and ordinary form, executed by Jackson and defendant on the 12th day of October, 1906.

The contract price of the building was \$7,600, payable as the construction of the building progressed, in four equal installments. Prior to the 19th day of January, 1907, the date of the order in question, Jackson, the contractor, had so far progressed with his work, in accordance with the terms of his contract, as to be entitled to and he was paid the first two installments, amounting to the sum of \$3,800. On the 2d day of March,

1907, Jackson ceased work on the building and abandoned his contract, leaving due and unpaid to various persons for labor performed upon and materials used in the construction of the building the sum of \$5,927.73. Thereupon the defendant, having fully complied with the requirements of the contract in such a contingency, personally assumed the further construction of the building, and under his immediate control and supervision the building was completed prior to the commencement of this action.

The last two payments which, under the terms of the contract, would have been due and payable to Jackson, had he continued under his contract and completed the building, amounted to the sum of \$3,800. The sum of \$410.43 was expended by the defendant, Garibaldi, in completing the building. This sum, deducted from the amount of the last two payments, which would have been due to Jackson upon a compliance with the contract, left a balance of \$3,389.57 in Garibaldi's hands to be applied in satisfaction of the several liens for labor and materials which, within the time allowed by law, had been filed against the building, and subsequently sued upon. The balance was distributed pro rata among the various lien claimants. O'Brien, the plaintiff, as a subcontractor under Jackson to do the plastering upon the building, was one of the lien claimants. He was paid as his pro rata the sum of \$514.63, and, after deducting this amount from the \$900 specified in the order referred to, commenced this action and obtained judgment against the defendant in the sum of \$385.36.

It is conceded that the plaintiff was fully aware of the contractual relations existing, at the date of the order, between Garibaldi and Jackson; that in satisfying and discharging the liens of the several claimants the defendant, Garibaldi, expended all moneys due or which would have become due to Jackson upon his compliance with the terms of the building contract, and, finally, that no part of the moneys due to the several lien claimants was ever paid by Jackson.

The trial court found as a fact "that on the said 19th day of January, 1907, the said A. J. Garibaldi duly accepted the said order, and promised and agreed to pay this plaintiff said sum of \$900 *when the said house was accepted.*" This is a material finding. It is the basis of the judgment in this case. This finding, however, is not wholly supported by the evidence, and it is clearly contrary to the evidence, in so far as it finds that appellant's obligation, under the order, was to pay "the said \$900 when the said house was accepted."

[1] The order in question and its acceptance constitute a contract in writing, and, upon its face, is not susceptible of any such narrow and limited construction. Some evi-

dence was offered and received at the trial for the single purpose of showing the circumstances under which the order was made and accepted, but the record does not disclose that the appellant accepted the order in any other way than by writing his name thereon, or that the parties thereto in any way altered, varied, or limited its terms and conditions. This being so, the order, in conjunction with the subsisting contract for the erection of the building, contains and expresses all the promises and agreements of the parties, and therefore, for the purpose of ascertaining what the parties promised and agreed to do, resort must be had solely to the language of the order and the circumstances attending its inception and acceptance.

In the original contract it was in substance provided that Jackson was to "erect and finish" the building, and to furnish all labor and material required in the "construction and completion" thereof; the contract was to be deemed "completed" when the work was "finished in accordance with the original plans"; the third installment of the contract price was to become due and payable when the building was "finished" by Jackson and "accepted" by Garibaldi, and the final payment was due at the expiration of the "usual 35 days" after the completion and acceptance of the building. Manifestly the "completion," "acceptance," and "payment" referred to in the order of January 19, 1907, related to the completion, acceptance, and payment provided for in the original contract.

It is clear, therefore, that in basing its finding as to the promise and agreement of Garibaldi to pay upon the single condition of the acceptance of the building the trial court ignored the remaining and equally controlling conditions of the order with reference to the completion of the building by Jackson, and the existence of a fund from which the amount specified was to be deducted and paid.

Construed in connection with the original contract to which it was related, the order is free from any uncertainty as to its scope and effect. So construed it is clearly conditional, and the manner and form of its acceptance imposed upon the defendant, Garibaldi, no other or greater obligation than to pay to plaintiff whatever money might be due to Jackson upon the happening of *all* of the conditions of the order.

The order was in effect an assignment to the plaintiff of the sum of \$900 out of any moneys due or to become due to Jackson under the terms of the building contract; and the defendant's acceptance of the order was but a promise to pay upon the happening of the contingencies expressed therein. Nothing was due, however, under the contract from defendant, Garibaldi, to Jackson at the time of the execution and acceptance of the order, and no rights as to future payments

under that contract, different from or superior to those of Jackson, as the contractor, were by the terms and acceptance of the order conferred upon the plaintiff as assignee.

Jackson having failed to complete the building as required by his contract, and as was clearly contemplated by the very terms of the order, no payment subsequent to the date of the order became due to Jackson from which the sum specified in the order could be deducted. *Clark v. Collier*, 100 Cal. 256, 34 Pac. 677; *Hogan v. Globe Mutual, etc., Ass'n*, 140 Cal. 614, 74 Pac. 153. There being nothing due or to become due to Jackson under the building contract, nothing was due or could become due to the plaintiff, O'Brien, under the order. *Hogan v. Globe Mutual, etc., Ass'n*, *supra*; *Pohman v. Wilcox*, 146 Cal. 441, 80 Pac. 625.

It is contended upon behalf of the respondent that the completion of a building by the owner after abandonment by the contractor confers upon the contractor, and all others claiming under him, all the benefits which ordinarily would have accrued to the contractor or his assigns upon a full performance of the contract by the contractor. This position is untenable, and it is not supported by the authorities cited by counsel for respondent.

[2] It is true, generally, that when work upon a building is abandoned by the contractor, and the building is completed by the owner pursuant to a right reserved in the contract, as was done in this case, the work of completion is deemed to be done under the contract. *Boisot on Mechanics' Liens*, § 85. The contractor, however, in that event is entitled to receive only the balance of the contract price that may remain over and above the cost of completion. *Wiggins v. Bridge*, 70 Cal. 437, 11 Pac. 754; *Denison v. Burrell*, 119 Cal. 182, 51 Pac. 1; *White v. Livingston*, 69 App. Div. 361, 75 N. Y. Supp. 466. Obviously, in such a contingency, nothing is due the contractor, or those claiming under him, where, as happened in this case, the cost of completion and prior payments, added to the amounts due to bona fide lien claimants, exceeded the contract price.

The plaintiff O'Brien had agreed with Jackson to do the plastering work on the building for \$900, and the record shows that at the date of the order in controversy O'Brien's contract was about two-thirds completed. Not having received, up to this time, any payment from Jackson on account of his contract, O'Brien refused to proceed further with his work until he was given the order on Garibaldi for the said sum of \$900. In this connection O'Brien's foreman testified that when he presented the order for acceptance he informed Garibaldi that "there was only one way to continue work on his building, and that was by getting some assurance that Mr. O'Brien would get his money." Thereupon Garibaldi signified his acceptance

of the order by writing his name thereon below the signature of Jackson, saying at the time, "Yes, I can sign that; I would like to have you go right ahead and finish it."

[3] It is now claimed by counsel for respondent that the consideration for the order and its acceptance was the resumption of work by O'Brien, and not the completion of the building by Jackson, and that therefore, when the house was completed and ready for occupancy by any agency whatsoever, the sum specified in the order became due and payable to O'Brien.

The question as to whether or not there was any consideration for the acceptance of the order was distinctly raised by the pleadings, but the findings of the court are silent upon the subject, and the evidence of plaintiff's foreman was received by the court for the limited purpose of showing the circumstances under which the order was made and accepted. However, even if this evidence had been received for the purpose of showing the consideration for the acceptance of the order, it did not and could not modify or vary the terms and conditions upon which the order was accepted. *Guidery v. Green*, 95 Cal. 630, 30 Pac. 786; *Sivers v. Sivers*, 97 Cal. 520, 32 Pac. 571.

Cook v. Wolfendale, 105 Mass. 401, so strongly relied upon by the plaintiff here, is not in point. The order there sued upon is readily distinguishable from the order sued on in the case at bar. "In *Cook v. Wolfendale*, supra, which is relied upon by plaintiff, the acceptance was given in consideration of lumber furnished to the contractor to be used in building the house for the acceptor. *And the terms of the order contained no reference to the building contract, but merely fixed the time of payment as the time when the building should be ready for occupancy.*" *Somers v. Thayer*, 115 Mass. 163.

As already shown, the order in the case at bar refers to and is dependent upon the completion and "payment" provided in the original building contract.

The judgment and order appealed from are reversed.

We concur: KERRIGAN, J.; HALL, J.

15 Cal. App. 525

O'BRIEN v. JACKSON et al. (Civ. 736.)
(District Court of Appeal, First District,
California. March 2, 1911.)

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by Arthur J. O'Brien against J. M. Jackson and another. From a judgment for defendant Molinari, plaintiff appeals. Affirmed.

Costello & Costello, for appellant. Sullivan & Sullivan and Theo. J. Roche, for respondent.

LENNON, P. J. This is an appeal by the plaintiff from a judgment entered in favor of the defendant Molinari, and from an order denying plaintiff's motion for a new trial.

The action was brought to recover the amount specified in an order drawn by J. M. Jackson, in favor of the plaintiff, upon and accepted by the defendant P. G. Molinari.

The order and acceptance are as follows:

"San Francisco, Cal. Feby. 1, 1907. Dear Sir: Please pay the bearer, Mr. A. J. O'Brien, the sum of six hundred and ninety-six dollars, the same being for the plastering of your property located on Broadway street, between Kearny and Dupont streets. J. M. Jackson.

"I will accept this order, and deduct the amount from next payment due on my building. P. G. Molinari."

The answer of the defendant Molinari was, substantially, that the order and its acceptance related to and were dependent upon the performance of a building contract existing at the time between Jackson and the defendant Molinari; that Jackson abandoned the building and failed to comply with the terms of the contract; that in consequence of this breach on the part of Jackson no money ever became due to Jackson out of which a payment of the money called for in the order could be made to O'Brien.

The findings of the court upon all of the material issues were in favor of the defendant Molinari; and they are fully sustained by the evidence offered and received upon the trial. This case and the case of *O'Brien v. Garibaldi*, 115 Pac. 249, numbered 725 in this court, and this day decided, wherein the judgment of the trial court is reversed, were tried and determined together. The parties in both cases, with the exception of the owners, are identical, and the facts of each case, with but slight and immaterial variations, are the same.

The question of law upon this appeal having been disposed of in the case of *O'Brien v. Garibaldi*, above mentioned, adversely to the contention of the plaintiff, it follows that the judgment and order here appealed from must be affirmed. It is so ordered.

We concur: KERRIGAN, J.; HALL, J.

15 Cal. App. 509

PARK et al. v. GRUWELL. (Civ. 861.)
(District Court of Appeal, First District,
California. Feb. 27, 1911.)

1. APPEAL AND ERROR (§ 965*) — VENUE (§ 52*) — RULINGS ON APPLICATION FOR CHANGE OF VENUE—DISCRETION OF COURT.

The granting or refusing of a change of venue for the convenience of witnesses rests in the discretion of the trial court, and its rulings will be disturbed only where there has been an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3836; Dec. Dig. § 965; Venue, Cent. Dig. §§ 76, 77; Dec. Dig. § 52.*]

2. VENUE (§ 52*)—CHANGE OF PLACE OF TRIAL FOR CONVENIENCE OF WITNESSES.

Refusal to grant a change of the place of trial of an action for negligent death to the county in which the accident occurred, based on the convenience of witnesses, was an abuse of discretion, where plaintiff and all the witnesses, excepting defendant and his guardian ad litem and a witness, resided in such county, and where its county seat was more accessible to such excepted persons than the county seat in the county in which the action was pending.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 76, 77; Dec. Dig. § 52.*]

Appeal from Superior Court, Lake County; V. S. Sayre, Judge.

Action by Alice L. Park and others against Lewis E. Gruwell. From an order refusing to change the place of trial, plaintiffs appeal. Reversed.

Albert H. Elliott and Herbert V. Keeling, for appellants. C. M. Crawford, for respondent.

HALL, J. Plaintiffs, as the widow and children of Dean W. Park, brought this action in Santa Clara county to recover damages for the death of said Dean W. Park, alleged to have been caused through the negligence of defendant. Defendant is a minor and appeared by his guardian ad litem, Fannie H. Gruwell.

Upon demand of the defendant, before answer filed, the place of trial of said action was changed to Lake county, where defendant resides. After answer had been filed, plaintiffs moved that the place of trial be changed to Santa Clara county, upon the ground that the convenience of witnesses and the ends of justice would be promoted by the change. This motion was denied, and plaintiffs in due time appealed.

It is alleged in substance in the complaint that, while Dean W. Park was riding a bicycle in an easterly direction along a driveway in the grounds of the Leland Stanford, Jr., University, defendant, at the same time and place, was riding a bicycle in a westerly direction at a reckless and dangerous rate of speed, and so carelessly and negligently rode and ran the same that, without fault of said Dean W. Park, defendant ran into and collided with said Park and injured him, so that he died from such injuries about four hours later.

Defendant in his answer denied the allegations of the complaint constituting the gravamen of the action, including the allegation as to the death of said Park. Defendant also affirmatively pleaded that the collision and injury to said Park, if any was received, were caused by the negligence of said Park.

The motion was heard upon the complaint and answer, affidavit of plaintiff Alice L. Park, affidavit of Fannie H. Gruwell, guardian ad litem of defendant, and a certified

copy of the testimony taken at the coroner's inquest on the body of Dean W. Park.

[1] Appellants, at the outset, very properly concede that the granting or refusing a change of venue upon the grounds upon which the motion was based rests largely in the discretion of the trial court, and that this court can only interfere when there is plainly an abuse of discretion on the part of the trial court disclosed by the record. Appellants, however, contend that the record does show such an abuse of discretion, and, after a careful examination of the record, in the correctness of this position we are constrained to agree.

[2] The accident occurred at Palo Alto, in Santa Clara county, where all the plaintiffs and all the witnesses to the accident reside. Indeed it appears that all the witnesses, whether they saw the accident or not, reside at Palo Alto, except the defendant, his guardian ad litem, and one Borland, who it is shown resides in the city and county of San Francisco. No showing, however, was made as to what either the guardian ad litem or said Borland could or would testify to. It is apparent that a resident of San Francisco could more easily appear as a witness at San Jose, the county seat of Santa Clara county, than at Lakeport, the county seat of Lake county, which, as the record shows, cannot be reached by way of any railroad at all, and which is at a much greater distance from San Francisco than is San Jose.

It is true, likewise, that the affidavit of plaintiff Alice L. Park does not disclose what testimony can or will be given by the witnesses named by her, but she does name as the witnesses that will be produced by plaintiffs at the trial Ledley L. Ware, a teacher at said university, Franklin F. Wolff, Josiah H. Kirk, a practicing physician at Palo Alto, Josiah W. Roller, Alva L. Jewett, and James Stevenson. The certified copy of the testimony taken at the coroner's inquest, however, shows that each of these witnesses gave testimony at such inquest; that Ware and Wolff were present at the scene of the accident when it occurred, and that Jewett and Stevenson, both hackmen, appeared immediately afterward, and each conveyed away one of the participants in the collision. Dr. Kirk was called immediately, and ministered unto the deceased until he died, four hours later.

Ware gave testimony that was not only material and pertinent to the case, but tended to support the essential and controverted allegations of the complaint. While it is not at all clear that the testimony of either Wolff, Jewett or Stevenson will tend to disclose who was at fault in the matter of the collision, each, because of his presence, either at the time of the accident or immediately thereafter, will be a proper and mate-

rial witness to be examined as to the immediate surroundings of the accident. The testimony of these witnesses fully supplied the deficiencies of plaintiff's affidavit.

It was shown that plaintiffs are possessed of very limited means. The case is of such a character that it manifestly cannot be very satisfactorily tried upon deposition, even if plaintiffs were able to bear the additional expense of so doing. None of the witnesses could be compelled to appear at Lakeport. If they or any of them voluntarily appeared, it would be at considerable expense and loss of time. On the other hand, San Jose is accessible by rail from San Francisco, where Borland resides, at little expense and in less than two hours time, and can be reached from Palo Alto at much less expense, either in time or money.

The case is in its essential features very similar to *Thompson v. Brandt*, 98 Cal. 155, 32 Pac. 890, in which an order denying a change of venue was reversed, and the court ordered to grant the motion.

We think it clearly appears without substantial conflict that both the convenience of witnesses and the ends of justice would be promoted by a change of the place of trial to Santa Clara county, where the cause of action arose.

The order is reversed, and the court is directed to grant the motion.

We concur: LENNON, P. J.; KERRIGAN, J.

15 Cal. App. 469

BOND v. KARMA-AJAX CONSOL. MINING CO. (Civ. 909.)

(District Court of Appeal, Second District, California. Feb. 24, 1911.)

1. JUDGMENT (§ 145*)—DEFAULT—RIGHT TO RELIEF—GROUNDS—MERITS ALONE.

If a party applying to be relieved from a default, under Code Civ. Proc. § 473, satisfactorily shows inadvertence or excusable neglect, and files a sufficient affidavit of merits, he cannot be denied relief, because his adversary produces proof by affidavits which overcomes the prima facie showing of merits made by such defendant; but, until the primary question as to excusable inadvertence or neglect has been determined in favor of the moving party, he is not entitled to relief, be his merits ever so strong or satisfactory.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 292-295; Dec. Dig. § 145.*]

2. APPEAL AND ERROR (§ 1074*)—HARMLESS ERROR—EVIDENCE.

Where it is rightly decided on motion to vacate a default judgment that excusable negligence or inadvertence by defendant is not shown, any error in admitting or excluding evidence touching the merits is not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4248, 4249; Dec. Dig. § 1074.*]

3. APPEAL AND ERROR (§ 957*)—REVIEW—MOTIONS TO VACATE DEFAULT.

Before an appellate court can disturb an order made on a motion to set aside a default

judgment, under Code Civ. Proc. § 473, abuse of discretion must clearly appear.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. § 957.*]

4. JUDGMENT (§ 143*)—DEFAULT JUDGMENT—VACATION.

It was not an abuse of discretion to refuse to set aside a default judgment, where defendant relied on a showing that its president, believing that the claims sued on were justly due, concealed from the directors information of the pendency of the suit; that when the suit was brought defendant was not actively engaged in the business, and no regular directors' meetings were being held, and that a considerable part of the claim sued on was not owing.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269-291; Dec. Dig. § 143.*]

5. CORPORATIONS (§ 503*)—VENUE.

Const. art. 12, § 16, providing that a corporation may be sued in the county where a contract is made or to be performed, or where the liability occurs, or in the county of the principal place of business of the corporation, subject to change of venue as in other cases, is permissive and entitles plaintiff to choose which of the counties he desires to sue in, and, if the county chosen is not of the principal place of business, the corporation cannot secure a change of venue on that ground.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1943; Dec. Dig. § 503.*]

6. JUDGMENT (§ 99*)—VALIDITY—JURISDICTION.

A default judgment against a corporation is valid, where the court had jurisdiction of the subject-matter and obtained jurisdiction of the corporation by proper service on its president, though, had it appeared, it might have made a showing entitling it to a change of venue under Code Civ. Proc. § 396.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 161; Dec. Dig. § 99.*]

7. VENUE (§ 3*)—LEGISLATIVE POWER.

Provisions of the Code of Civil Procedure, prescribing in what counties actions must be tried, is a proper exercise of legislative power.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 2; Dec. Dig. § 3.*]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by A. D. Bond against Karma-Ajax Consolidated Mining Company. From an order refusing to set aside a default judgment, defendant appeals. Affirmed.

F. C. Austin (Byron Waters, of counsel), for appellant. Walter R. Leeds, for respondent.

JAMES, J. This action was brought to recover the sum of \$9,190.30, alleged to be owing by defendant corporation upon various claims, for merchandise furnished, money advanced, and services rendered, all of which were assigned to plaintiff prior to the bringing of suit. No answer having been filed on the part of defendant, judgment was entered against it by default. Service of summons in the action was made upon John A. Gerner, president of defendant, in the city of Los Angeles, on November 30, 1908. On May 19, 1909, judgment was rendered. A motion was presented on September 13, 1909, by defendant, whereby it asked

to be relieved from its default and allowed to answer on the ground of inadvertence and excusable neglect, and that the judgment was entered without jurisdiction. An appeal is taken from the order denying that motion.

From the affidavits used on the hearing of the motion, it appeared that at the time of the service of summons Gerner was the president and a large stockholder of defendant corporation; that his holdings of stock, together with those of relatives and friends, made up a large majority of the shares issued; that, when served with summons as president of the corporation, Gerner believed that the claims sued on were all justly due, and for that reason did not formally call the matter to the attention of the board of directors, and caused no defense to be made in the action. It further appeared that at the time the suit was commenced the corporation was not actively engaged in business, and that no regular directors' meetings were being held.

On the part of defendant, affidavits were submitted in which a considerable portion of the alleged indebtedness was denied to be owing, and it was further set out that Gerner had not only failed to inform the board of directors of the fact of the bringing of the action, but that he had concealed information of the pendency of the same from the board of directors, and that a defense would have been interposed, had the directors been apprised of the fact that the corporation had been sued. An affidavit of merits sufficient in form and substance was filed by defendant and, over its objection, counter affidavits were allowed to be filed thereto. In its order denying the motion to vacate the judgment, the court recited that the motion was denied "on the ground that there appears to the court to be no surprise, excusable negligence, or inadvertence on the part of defendant." The decisions, cited in support of appellant's contention that such error was committed by the court in allowing the counter affidavits on the question of merits to be filed as to require that its order be reversed, are not applicable to this case.

[1] It is unquestionably established that, if a party applying to the court to be relieved from the results of his default, under section 473 of the Code of Civil Procedure, makes out a satisfactory showing of inadvertence or excusable neglect, and files a sufficient affidavit of merits, he cannot be denied relief, because the opposite party produces proof by affidavits which, in the opinion of the court, overcomes the prima facie showing of merits made by such defendant. But, until the primary question as to whether or not there has been excusable inadvertence or neglect has been determined in favor of a moving party, he is not entitled to relief, be his showing of merits ever so strong or satisfactory.

[2] Where it is rightly decided, therefore, that no case is presented of excusable neglect or inadvertence, then any error committed by the court in admitting or refusing to admit proof touching the merits of the controversy cannot be prejudicial. In the decisions to which reference is made by appellant, notably, *Douglass v. Todd*, 96 Cal. 657, 31 Pac. 623, 31 Am. St. Rep. 247, and *Rauer's Law, etc., Co. v. Gilleran*, 138 Cal. 354, 71 Pac. 445, where orders of the kind under review here were considered and reversed, it appears in each of the cases that the evidence which was received, contradicting the showing of merits, controlled the court in making the orders appealed from. In this case the court specified in its order that it found that there had been no excusable neglect or inadvertence. Hence the admission of the affidavits in rebuttal of the showing made by appellant that it had a meritorious defense to the action, if error, was not prejudicial.

[3] It is next contended that under the showing of excusable neglect, as made, defendant was entitled to have the judgment vacated and leave granted it to answer. Before an appellate court is authorized to disturb an order, made upon a motion to set aside a judgment under the provisions of section 473, it must clearly appear that the court making the order has abused the discretion committed to it; otherwise stated, that the order is without any evidence whatsoever to sustain it. *Moore v. Thompson*, 138 Cal. 23, 70 Pac. 930; *Nicoll v. Weldon*, 130 Cal. 666, 63 Pac. 63.

[4] Only a brief abstract of the substance of a portion of the affidavits as they were presented to the court at the time of the hearing of the motion has been set out herein, but enough is shown to make it clear that the judgment of the court was exercised within the limits of a reasonable discretion, and was supported by competent evidence.

We now reach the third point urged as a reason why the motion to vacate the judgment should have been granted. It is insisted that the superior court of Kern county had no jurisdiction over the subject-matter of the action, nor of the defendant corporation. Section 16, art. 12, of the Constitution of California, is cited in support of this claim. That section provides as follows: "A corporation may be sued in the county where the contract is made or is to be performed, or where the obligation or liability occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial, as in other cases." At the time this action was commenced, defendant had its principal place of business within the city of Los Angeles, and it may further be said, or at least assumed, that the record sufficiently shows that defendant

did not agree to satisfy any of the obligations sued upon in the county of Kern, and that it did not there contract for the performance or furnishing of any of the things which were furnished or performed by plaintiff's assignors. If, under the section quoted of the Constitution, the term "may be sued" is to be interpreted as though it read "must be sued," then there would be no escape from the conclusion which defendant's counsel urges, to wit, that this action was wrongly brought in a county where defendant corporation could not be sued, and hence that the judgment was rendered without jurisdiction. This precise question has been before our Supreme Court and very fully considered in several decisions.

[5] In these cases it has been held that section 16, art. 12, is permissive in its effect; that it is intended to give to a plaintiff the right to choose which of the counties he desires to prosecute his action in, and that, having chosen one of the counties enumerated, if it perchance happens to be one within which the principal place of business of the corporation is not located, the corporation sued cannot secure a change of place of trial on the ground that the action is not brought in the county of its residence. It is distinctly held that this constitutional provision does not deprive the superior court of any county of the state of jurisdiction to hear and determine all classes of actions generally, within the limits of its jurisdiction, as defined in another article of the Constitution. *Fresno National Bank v. Superior Court*, 83 Cal. 491, 24 Pac. 157; *Griffin & Skelly Co. v. Magnolia & Healdsburg Fruit Cannery Co.*, 107 Cal. 378, 40 Pac. 495; *Miller & Lux v. Kern County Land Co.*, 134 Cal. 586, 66 Pac. 856. Section 5 of article 6 of the Constitution defines the jurisdiction of the superior courts; the only limitation as to the place of commencement of any action is expressed in the concluding portion of that section, as follows: "Provided that all actions for the recovery of possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated." The causes of action set out in plaintiff's complaint in no way concerned the title or right to the possession of real estate, or the matter of any lien connected therewith.

[6] The superior court of Kern county had jurisdiction of the subject-matter of the action, and it obtained jurisdiction of defendant corporation by proper service of summons on its president. *Herd v. Tuohy*, 133 Cal. 55, 65 Pac. 139.

[7] The Legislature has the power, which it has exercised in the enactment of certain sections of the Code of Civil Procedure, to

determine in what counties trials of certain actions must be had. Of course, under the provisions of section 16, art. 12, and the decisions construing that section which have been hereinbefore cited, it could not be provided by statute that a change of place of trial could be had on the ground of residence in another county, where the conditions affecting the subject-matter are among those enumerated in said section 16. Had the defendant appeared in this action before judgment was taken and in time, it might have made a showing sufficient to entitle it to a transfer of the action for trial in Los Angeles county. "If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he answers or demurs, files an affidavit of merits, and demands, in writing, that the trial be had in the proper county." Code Civ. Proc. § 396. No appearance by answer or demurrer having been made, the judgment as entered against defendant is regular and valid.

The order appealed from is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

15 Cal. App. 503

EDWARDS v. SWEIGERT et al., Board of Trustees of the Police Relief and Pension Fund. (Civ. 790.)

(District Court of Appeal, First District, California. Feb. 27, 1911. Rehearing Denied March 29, 1911. Denied by Supreme Court April 28, 1911.)

1. MUNICIPAL CORPORATIONS (§ 187*)—POLICE OFFICERS—PENSIONS—PERSONS ENTITLED.

Under San Francisco Charter, art. 8, c. 10, §§ 2, 3, providing for the retirement and pensioning of police officers during their lives, and, under section 4, allowing a pension to the widow of an officer killed in performing his duty, the widow of one who, before his death, was retired for injuries and received a pension until his death, is not entitled to a pension.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 187.*]

2. STATUTES (§ 206*)—CONSTRUCTION—LANGUAGE.

Some effect must be given to every word and clause in a statute, if possible.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 283; Dec. Dig. § 206.*]

3. MUNICIPAL CORPORATIONS (§ 187*)—POLICE PENSIONS—PERSONS ENTITLED—WIDOWS OF OFFICERS "KILLED."

The word "killed," as used in San Francisco Charter, art. 8, c. 10, § 4, providing a pension for widows of police officers killed while performing duty, applies to death resulting from violence or external force.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 187.*]

For other definitions, see Words and Phrases, vol. 5, pp. 3930, 3931.]

4. MUNICIPAL CORPORATIONS (§ 187*)—POLICE PENSIONS—PERSONS ENTITLED.

Under San Francisco Charter, art. 8, c. 10, § 4, providing pensions for dependents of

police officers killed in performing duty, death need not actually occur during such performance; it being sufficient that injury occurred then, and death soon followed.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 187.*]

5. MUNICIPAL CORPORATIONS (§ 187*)—POLICE PENSIONS—PERSONS ENTITLED.

Under San Francisco Charter, art. 8, c. 10, § 4, providing pensions for dependents of police officers killed while performing duty, an officer cannot be held to have been killed in the discharge of his duty, though he was injured in its performance, where he was not thereby disabled until seven years later, and was thereafter on a disability pension for two years before his death.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 187.*]

Appeal from Superior Court, City and County of San Francisco; George H. Caba-niss, Judge.

Action by Mabel Edwards against Charles A. Sweigert and others, trustees of the Police Relief and Pension Fund. Judgment for plaintiff, and defendants appeal. Reversed, with directions.

Percy V. Long, City Atty., and John F. English, Asst. City Atty., for appellants. Breen & Kelly, for respondent.

HALL, J. Plaintiff is the widow of one John Clark Edwards, deceased, formerly a member of the police department of the city and county of San Francisco. She presented a petition to the board of police commissioners, who under the law constitute the board of trustees of the police relief and pension fund, praying to be allowed a pension, as the widow of a member of the said police department, killed while in the performance of his duty.

The board, without taking any evidence, denied her petition. She then filed a petition in the superior court for a writ of mandate to compel said board to hear her petition, and to take evidence thereon. To this petition the board filed a general demurrer, which was overruled, and upon the defendants refusing to plead further, judgment went for plaintiff. From this judgment, defendants in due time appealed to this court.

Respondent annexed to and made a part of her complaint in the superior court a copy of her petition to the board of police commissioners. It is the contention of appellants that the statement of facts in her said petition to the board showed that she was not entitled to any pension, and that it was therefore not the duty of said board to receive any testimony thereon, but that they properly disposed of the matter by denying her petition.

From her said petition it clearly appears, among other things, that her late husband, on the 3d day of March, 1900, while in the performance of his duty as a police officer, was injured; that on January 21, 1907, al-

most seven years after such injury, he was retired by reason of such injury upon a pension of \$50 per month, which continued to the day of his death, which occurred January 30, 1909, almost nine years after receiving the injury. And upon her information and belief she alleged in her petition that the "said injuries so received as aforesaid * * * by said John Clark Edwards were the direct and proximate cause of the death of the said John Clark Edwards."

[1] Appellants contend, first, that the widow of one who, prior to his death, is retired from the department for injuries, and receives a pension therefor until his death, is not entitled to a pension as such widow; and, second, that one who does not die for nearly nine years after being injured is not, within the meaning of the language of the charter, "killed while in the performance of his duty."

Provision is made in the charter of the city and county of San Francisco for pensions to members of the police department and certain of their relatives. These provisions are contained in sections 2, 3, 4, and 6 of chapter 10 of article 8. It is under section 4 that plaintiff claims. This section, so far as it is pertinent to this case, provides that: "The commissioners shall, out of the police relief and pension fund, provide for the family of any officer, member or employé of the department who may be killed in the performance of his duty, as follows: First. Should the deceased be married, his widow shall as long as she shall remain unmarried, be paid a monthly pension equal to one-half of the salary attached to the rank of decedent at the time of his death." Then follow provisions for other dependent relatives, in case decedent leaves no widow.

Assuming, for the purpose of discussing the first point made by appellants, that a person may be said to be killed while in the performance of his duty, who does not die for approximately nine years after receiving the injury, it is insisted that the language of the other sections relating to pensions limit the general language of section 4, and make it plain that the widow of an officer who, before his death, has drawn a disability pension, is not within the benefits of section 4.

Section 2 provides for the retirement and pensioning of any infirm or disabled member of the department who has arrived at the age of 65 years, and concludes as follows: "No such pension shall be paid unless such person has been an active member of the department for twenty years continuously next preceding his retirement, *and the same shall cease at his death.*" Section 3 makes provision for the retirement and pensioning of any member of the department disabled by reason of any bodily injury re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ceived in the performance of his duty; *the pension "to be paid to him during his life and to cease at his death."* Section 6 provides for pensions to certain dependent relatives of any member who, after 10 years service, shall die from natural causes, and concludes as follows: "But the provisions of this section shall not apply to any member of the department who shall have received any pension under the terms of this chapter."

The concluding clause of this section, and the language that we have italicized in sections 2 and 3, to the effect that the pensions therein referred to shall cease at the death of the member, indicate a general purpose that relatives of members who have been retired and themselves received pensions shall not be entitled to pensions.

But especially significant are the words in section 3, "*to cease at his death.*" It was under this section that John Clark Edwards became entitled to draw the pension that he received because of his injuries. His right to a pension was entirely the creature of this section, and by the terms of the section it was *to be paid to him during his life*. It was quite unnecessary to add the words "*and to cease at his death,*" if the only purpose was to terminate his pension at his death. A pension granted to a person necessarily terminates at his death, in the absence of words indicating the contrary; and especially is this so when the pension is "*to be paid to him during his life.*" The only effect the words in section 3 "*to cease at his death*" can possibly have is to operate in restraint of some general language elsewhere contained, under which some relative might claim a pension upon the death of the disabled member. This general language is found in section 4.

In both sections 3 and 4 the charter makers were providing for conditions growing out of injuries received by a member of the department in the performance of his duty. Such injuries might result in death at once or within a reasonable time. Such condition was provided for in section 4, by allowing a pension to the widow or other dependent relative. On the other hand, such injuries might result in disability for a greater or less time. For this condition they provided in section 3 a pension for the disabled member, "*to be paid to him during his life*"; and, to prevent the claim of a pension by his widow or other relatives under the claim that such member was "*killed while in the performance of his duty,*" they added the clause, "*and to cease at his death.*" This is the only construction of the law that will give any force or effect to the clause just quoted. It may work an inequality or hardship in some cases, but there are few laws that do not.

[2] It is a cardinal rule of construction of statutes that some effect must be given to every word and clause, if possible. Words

in a statute should never be construed as unnecessary and surplusage, if a reasonable construction can be adopted which will give force to and preserve all the words of the statute. *Gates v. Salmon*, 35 Cal. 576, 95 Am. Dec. 139; *Langenour v. French*, 34 Cal. 92; *Appeal of Houghton*, 42 Cal. 35; *People v. Perkins*, 85 Cal. 509, 26 Pac. 245; *Leversee v. Reynolds*, 13 Iowa, 310; 36 Cyc. 1128. The addition of the words "*to cease at his death*" to the clause in section 3, awarding a disability pension to a policeman, "*to be paid to him during his life,*" adds nothing to the meaning of the section, unless it be to cut off just such a claim as is made by plaintiff in this case. We think it must be given just this effect, and for this reason the petition that plaintiff presented to the board of police commissioners showed that she was not entitled to any pension, and it was unnecessary for the board to hear evidence thereon, and it could properly dispose of her application without such hearing.

[3] The views we have come to upon the first point discussed probably make it unnecessary to determine whether or not one who lives for approximately nine years after being injured while in the performance of his duties, and then dies as the result of such injuries, can be said to have been "*killed while in the performance of his duties,*" within the meaning of the police pension provisions of the charter. But, as the point made by the appellant in this regard, if well founded, is decisive of this appeal, it is not improper to pass upon it. The word "*killed,*" as used in the statute, conveys the idea of a death resulting from violence or external force.

[4] The petition of plaintiff nowhere alleges in terms that her late husband was killed while in the performance of his duties. It very properly simply alleges the actual facts, and thus clearly shows that he was injured while in the performance of his duties, and that such injuries resulted in his disability and retirement from service, upon a pension, about seven years later, and his death about two years still later. Do these facts show that he was "*killed while in the performance of his duties,*" within the meaning of the statute? The word "*while*" as used in the section has relation to the time during which the duties are being performed. Doubtless it is not necessary that both the injuries and the death occur while the officer is performing his duty as such officer, for we think that, both in popular language and legal phraseology, one may be said to have been killed while in the performance of his duty who is injured while thus employed, and soon thereafter dies from such injury. "In popular language and in legal phraseology, for some purposes, a party is said to have killed one on whom he has inflicted a blow of which the wounded person soon dies." *Martin v. Copiah County*, 71 Miss. 407, 15 South. 73.

But there must be some limit to the time one may survive an injury received *while* in the performance of his duty, beyond which, if his death result, it cannot be said he was *killed while in the performance of his duty*.

Looking to the analogy presented by the law of murder, it is the rule both of the statute of this and, we believe, of all the states, as well as by the common law, that a person charged with murder cannot be held responsible for the death of his victim, unless the death occur within a year and a day from the infliction of the injury. However, we are not called upon, by the facts of this case, to determine how soon one must die from injuries received while in the performance of his duty to come within the meaning of the words "killed while in the performance of his duty."

[5] It is sufficient to say that one who is injured while in the performance of his duties, and is not even disabled thereby for approximately seven years, and is then retired on a disability pension, and dies at the expiration of two years more while in retirement on such pension, cannot be said to have been *killed while in the performance of his duty*. For this reason the board of commissioners properly dismissed plaintiff's petition without taking evidence thereon.

For the reasons above set forth, the judgment is reversed, with directions to the trial court to sustain defendants' demurrer to plaintiff's complaint.

We concur: LENNON, P. J.; KERRIGAN, J.

15 Cal. App. 475

MURRAY SHOW CASE & FIXTURE CO. v. SULLIVAN et al. (Civ. 870.)

(District Court of Appeal, Second District, California, Feb. 24, 1911. Rehearing Denied by Supreme Court April 24, 1911.)

1. BILLS AND NOTES (§ 104*)—VALIDITY—DURESS.

That the president of a corporation told defendant manager that, unless a certain shortage was paid, he would rely on the manager's bond to collect the amount due was not a threat of arrest invalidating notes given by defendant in settlement of the shortage, even though defendant believed that failure to pay might result through the bonding company in a prosecution for embezzlement.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 242-247; Dec. Dig. § 104.*]

2. BILLS AND NOTES (§ 104*)—VALIDITY—DURESS—EXTORTION.

That the president of a corporation told defendant manager that, unless a certain shortage was paid, he would rely on the manager's bond to collect the amount due did not bring the case within the provisions of Civ. Code, §§ 1569, 1570, relating to duress, etc., or Pen. Code, §§ 518, 519, relating to extortion and threats constituting extortion, so as to invalidate notes given by defendant in settlement of the shortage.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 242-247; Dec. Dig. § 104.*]

3. CONTRACTS (§ 68*) — CONSIDERATION — DOUBTFUL CLAIM.

The compromise of a doubtful claim asserted in good faith constitutes a sufficient consideration for a new promise, even though it may ultimately be found that the claimant could not have prevailed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 328-330; Dec. Dig. § 68.*]

4. BILLS AND NOTES (§ 94*)—CONSIDERATION.

Where defendant conceded that a certain amount was due plaintiff, but disputed another sum claimed by the latter, the acceptance by plaintiff of defendant's notes for the total amount and the extension of time of payment for the amount conceded to be due, together with the waiver of right of action to recover on defendant's bond, constituted a sufficient consideration for a note covering the disputed amount.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 166-212; Dec. Dig. § 94.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Murray Show Case & Fixture Company, a corporation, against F. L. Sullivan and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Milton K. Young and John I. Stafford, for appellants. Schweitzer & Hutton, for respondent.

SHAW, J. Action to recover upon five promissory notes made and delivered by defendants to plaintiff's assignor.

The defense is based upon the alleged fact that in part the notes were without consideration, and that all were procured by fraud and threats to have defendant Sullivan arrested for embezzlement. The notes were duly made and delivered to the Acme Door & Glass Company, which transferred them to plaintiff. On June 21, 1906, one W. E. Little, who was a stockholder and president of the Acme Door & Glass Company, entered into an agreement with defendant Sullivan, whereby the latter was employed as manager of the Acme Door & Glass Company for a period of one year. Under the terms of the agreement, Sullivan's compensation was to be \$150 per month and 30 per cent. of the dividends derived from the stock owned by said Little in the corporation, which sum of 30 per cent. was to be due and payable after the stock had been carefully invoiced, and had been figured and rechecked for accuracy. Sullivan entered upon his duties and continued in the employ of the company for the period of one year covered by his contract, drawing his salary of \$150 per month, and, in addition thereto, received \$311.60 on account of the 30 per cent. of the amount paid Little as dividends upon his stock, which dividends were based upon an inventory of the property made in January, 1907. At the date of the agreement made between Little and Sullivan, whereby the latter was employed as manager of said Acme Door & Glass Company, Sullivan, pursuant to the terms of his

contract, procured from the Aetna Indemnity Company a fidelity bond conditioned for the faithful performance of the duties devolving upon him as the manager of said Acme Door & Glass Company. While so engaged as such manager, pursuant to the terms of said contract so made with Little, Sullivan, without right, appropriated goods of said Acme Door & Glass Company to the amount of about \$30, and also appropriated the sum of \$429.93, to which he was not entitled.

Soon after the expiration of his term of employment, he was called upon to make good the shortage and to adjust his affairs with the company, and also to repay the 30 per cent. of the dividend declared upon the stock of Little, for the alleged reason that the dividend had been wrongfully declared, inasmuch as the company had not made any profits during the year out of which to declare dividends. After this conversation, and nothing being done, the Acme Door & Glass Company, through Little, its president, wrote Sullivan that, unless he arranged to adjust affairs with the company on or before September 3d, that the matter would be placed in the proper channels for collection. Thereupon Sullivan called upon Little, and, as found by the court, denied owing said sum of \$311.60, and insisted he should not be required to refund said amount, but he made no denial as to other sums claimed on account of the overdraft and goods taken by him. Little, however, insisted upon the full amount being paid, whereupon Sullivan offered to give his notes, signed by himself alone, for the full amount claimed, which Little refused to accept, insisting that such notes must be signed by a co-maker; and thereupon Sullivan took the notes and left the presence of Little, and on the same day returned and delivered the notes executed by himself and defendant Annie F. Paul.

The court further finds that Little did not accuse the defendant of the crime of embezzlement; nor did he menace or threaten Sullivan with criminal prosecution upon the charge of embezzlement; nor threaten to cause his arrest or imprisonment, unless he would execute the notes set out in the complaint; nor menace or intimidate Sullivan in order to secure the execution and delivery of the notes; nor did he promise defendant that no prosecution or arrest would be made if Sullivan would execute the notes; nor is it true that Sullivan believed or feared that Little would cause his arrest or imprisonment; nor that he presented the notes to his codefendant Annie F. Paul under any menace or threats whatsoever. That upon the execution of the notes Little and the Acme Door & Glass Company surrendered and gave up all right, claim, and interest to indemnity under said fidelity bond so procured by defendant Sullivan, and canceled all claims thereunder.

[1] From these and other findings it clearly appears that the execution and delivery of the notes were not procured by fraud, duress,

intimidation, or threats to have Sullivan arrested for embezzlement, or any other offense. While the evidence touching the question is conflicting, the testimony of Little clearly tends to support the court's findings. It is true that when he discovered the shortage, and after being unable to obtain an adjustment from Sullivan, he called upon the agent of the bonding company, told him of Sullivan's shortage, made inquiry as to the company's liability upon the bond, and asked what he should do with reference to the matter. The agent advised him to notify the company, which he did by letter, dated September 6th. When he had the interview with Sullivan on September 7th, he told Sullivan in the course of the conversation that, unless the matter was satisfactorily adjusted, they would bring action to recover against the sum claimed. "He told me," says Sullivan, "that I was under \$5,000 bond there, and that he would recover that way"; "that he would rely on the bond to collect the amount due in some way." But this was not a threat of arrest, even though Sullivan believed, as he says he did, that his failure to pay the shortage might result through the bonding company in a prosecution for embezzlement. Little had a right to look to the bond for protection, and his telling Sullivan that he would rely upon the bond, unless the matter was adjusted, was clearly within such right. The case at bar bears no analogy to the cases of *Morrill v. Nightingale*, 93 Cal. 452, 28 Pac. 1068, 27 Am. St. Rep. 207, and *Mitchell v. Finnell*, 101 Cal. 618, 36 Pac. 123, in the first of which a criminal prosecution was instituted and dismissed in consideration of the giving of the notes, and in the second a criminal prosecution threatened, to avoid which the note was given without other consideration.

[2] Neither do the facts bring the case within the provisions of sections 1569, 1570, Civil Code, nor 518, 519, Penal Code. The contention of appellant is that merely suggesting procedure upon the bond implied a threat to injure the character of Sullivan, as well as a threat of arrest and imprisonment, and hence the notes given by Sullivan in settlement of his shortage should be held void. The mere statement of the proposition is sufficient answer thereto. Sullivan admitted a large part of the indebtedness. It was his duty to pay it at once. He was unable to do so; whereupon it was agreed that, if he would give his notes for the amount, including the claim in dispute, the payment thereof to be extended over a period of 18 months, with a satisfactory surety, they should be received in full settlement. He left Little, saying he would try to do it. He was under no restraint. There was no threat, other than that the company would, if necessary, invoke the law in aid of enforcing its rights. The contention is wholly without merit. *Wolff v. Bluhm*, 95 Wis. 257, 70 N. W. 73, 60 Am. St. Rep. 115; *Beath v. Chapeton*,

115 Mich. 506, 73 N. W. 806, 69 Am. St. Rep. 589; Wolf v. Troxell, 94 Mich. 573, 54 N. W. 383; Cass Co. Bank v. Bricker, 34 Neb. 516, 54 N. W. 575, 33 Am. St. Rep. 649.

[3] Appellant insists that there was no consideration for that portion of the note embracing the dividend of \$311.60 paid Sullivan. "The compromise of a doubtful claim asserted and maintained in good faith constitutes a sufficient consideration for a new promise, even though it may ultimately be found that the claimant could not have prevailed." Collection Co. v. Buckman, 150 Cal. 163, 88 Pac. 710 (9 L. R. A. [N. S.] 568, 119 Am. St. Rep. 164). Not only does the claim appear to have been in dispute, but it was asserted in good faith.

[4] Moreover we think the acceptance of notes and extending the time within which to pay the amount conceded to be due, and waiver of right of action to recover upon Sullivan's bond, if such right existed, would constitute a sufficient consideration for the note covering the amount of the dividend.

In his answer Sullivan alleged that Little and other directors of the Acme Door & Glass Company had entered into a conspiracy to defraud him by abstaining from declaring any dividend out of the profits earned during the last half of the year of his employment, and in the prayer of the answer asked that they be made parties to the action, and that he have an accounting. He offered no evidence whatever tending to establish the facts so alleged; nor does it appear that he ever asked for the order prayed for. Hence the absence of a finding upon the issue, or want of action on the part of the court in making the order, constituted no error.

It is unnecessary to discuss other points made by appellant, other than to say that an examination thereof discloses no merit in them.

The judgment is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

15 Cal. App. 480

CARR v. CARR et al. (Civ. 753.)

(District Court of Appeal, Third District, California. Feb. 24, 1911. Rehearing Denied by Supreme Court April 25, 1911.)

1. EXECUTORS AND ADMINISTRATORS (§ 444*)—ACTIONS—PERSONAL OR REPRESENTATIVE CAPACITY.

The complaint, in an action brought by an administrator to recover money deposited in the defendant bank, set out the death of intestate, that plaintiff was duly appointed and qualified administrator of deceased, that the deposit is the property of the estate, and that plaintiff, "as such administrator," had demanded of defendants a delivery to him, "as such administrator," of the money so on deposit, but in the title to the action the word "as" was not inserted after the name of the plaintiff. *Held*, that the averments clearly disclosed that plain-

tiff had brought the action as administrator, and not in his own right.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1817; Dec. Dig. § 444.*]

2. EXECUTORS AND ADMINISTRATORS (§ 451*)—TRIAL—FINDINGS—CONSTRUCTION AND OPERATION—CONCLUSION OF LAW.

A finding, in an action by an administrator to recover money deposited by deceased in defendant bank, that the deceased opened an account in his own name in the bank and thereafter made deposits on and drew from said account, and while such account remained with defendant bank deceased, in the presence of this son, caused the bank to change the deposit to the names of himself and his son, as "joint owners, payable to either or survivor," and that deceased thereby agreed with the bank that the account could be paid by the bank either to himself or his son during his lifetime and after his death could be paid to the son, does not support a conclusion that the deposit was the property of the deceased, and continued to be his property after such agreement, and at all times until his death.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1881; Dec. Dig. § 451.*]

3. GIFTS (§ 30*)—INTER VIVOS—DELIVERY—PROPERTY IN POSSESSION AND CONTROL—"VERBAL GIFT."

Under Civ. Code, § 1147, providing that a "verbal gift," which is defined by section 1146 as a transfer of personal property, made voluntarily, and without consideration, "is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there an actual or symbolical delivery," a transfer by a bank depositor of an account to his credit in the bank to himself and his son, with the right and power to each to draw on the account during their lives, with a direction to the bank to pay the residue remaining upon the death of either to the survivor, cannot operate as a gift inter vivos, since the donee is not given full and complete dominion of the thing.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 52-57; Dec. Dig. § 30.*]

4. GIFTS (§ 57*)—"DONATIO CAUSA MORTIS"—EXPECTATION OF DEATH.

Under Civ. Code, § 1149, which defines a "donatio causa mortis" as "one which is made in contemplation, fear or peril of death, and with intent that it should take effect only in case of the death of the giver," a transfer of a bank deposit by a depositor to himself and his son jointly, with the right and power to each to draw on the account during their lives, and a direction to the bank to pay the residue remaining upon the death of either to the survivor, cannot operate as a gift causa mortis, since it was intended that the transfer should take effect immediately and vest and be enjoyed in present.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 106; Dec. Dig. § 57.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3087-3091; vol. 8, p. 7670.]

5. TRUSTS (§ 34*)—CREATION—DEPOSIT OF MONEY IN BANK—INTENTION OF DEPOSITOR.

Under Civ. Code, § 2221, which, subject to section 852, declares a voluntary trust created as to the trustor and the cestui by any words or acts of the trustor indicating with reasonable certainty an intention on his part to create a trust; the subject, purpose, and beneficiary of the trust; and section 2222, defining acts and words by which a voluntary trust is created as to the trustee—a transfer of

a bank deposit by a depositor to himself and a son jointly, with the right and power to each to draw on the account during their lives, with a direction to the bank to pay the residue remaining upon the death of either to the survivor, shows an intention to create a trust in the depositor for his son and his son's joint benefit during their joint lives, with the remainder to the son at the depositor's death, or a reversion to himself on the son's death.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 44; Dec. Dig. § 34.*]

6. TRUSTS (§ 25*)—CREATION—LANGUAGE USED.

Where a trust can fairly be implied from the language used, as the intention of the parties, such intention will be executed as a trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 34-37; Dec. Dig. § 25.*]

7. TRUSTS (§ 25*)—CREATION—SUFFICIENCY OF LANGUAGE USED—INTENT.

The use of the words "trust" and "trustee," or any certain form of words, is not indispensable to the creation of a trust, but there must be some words which indicate with reasonable certainty a purpose to create a trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 34-37; Dec. Dig. § 25.*]

8. TRUSTS (§ 59*)—EXPRESS TRUST—LEGALITY OF PROVISIONS.

Under Civ. Code, § 2280, a valid trust in money may be created, with the power reserved by the trustor to practically revoke it by drawing on the trust fund until it is completely exhausted, before the beneficiaries can enjoy the fruits thereof.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 80; Dec. Dig. § 59.*]

Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by Daniel Carr, administrator of the estate of Michael Carr, deceased, against M. K. Carr and the Vallejo Commercial Bank. Judgment for plaintiff, and defendant Carr appeals. Reversed, with directions to enter judgment in favor of defendant Carr.

W. H. Morrissey and P. B. Lynch, for appellant. F. W. Hall and L. A. Hilborn, for respondent Vallejo Commercial Bank. Aitken & Aitken, for respondent Carr.

HART, J. This action was brought by plaintiff, as administrator of the estate of one Michael Carr, deceased, to recover from the defendants certain moneys which had been, in his lifetime, deposited by said Michael in the defendant bank.

Judgment passed for plaintiff, and the present appeal is by said M. K. Carr from said judgment, supported by a bill of exceptions.

[1] It is first contended that the omission to insert the word "as" after the name of plaintiff, in the title of the action, necessarily makes the action one prosecuted by plaintiff in his individual right, and not in his representative capacity. There is no merit in this claim, since the averments of the complaint themselves clearly and distinctly disclose that plaintiff brought the action as

the administrator of the estate of Michael Carr, deceased, and not in his own right.

The complaint sets out the death of deceased, and that he died intestate; that plaintiff was duly appointed administrator of the estate of said deceased, and that he duly qualified and is acting as such; that the money referred to in said complaint is the property of said estate; that "plaintiff, as such administrator of the estate of Michael Carr, deceased, demanded of said defendants, and each of them, * * * that they and each of them deliver to him, as such administrator, said money so on deposit; that said defendants have, and each of them has, refused, and still refuse, to deliver said money, or any part thereof, to plaintiff, as such administrator." These allegations are sufficient to show, and, as stated, do clearly show, that the action is prosecuted by plaintiff solely in his character as administrator of the estate of the deceased, and nothing more is or ought to be required to make the pleading perfectly safe as against an assault on the ground thus urged against it. *Burling v. Thompkins*, 77 Cal. 258, 19 Pac. 429, and cases therein cited.

[2] Upon the merits there is no dispute as to the facts. Indeed the facts of the transaction out of which the action arises are admitted by all the parties, and, as admitted, found by the court. The single question presented for solution, as I view the record, is as to their legal effect, or, stated concretely, the question propounded is whether the findings of fact warrant the conclusions of law and support the judgment.

From the pleadings, the evidence, and stipulations of the parties are gleaned the following facts from which the findings are deduced: On the 24th day of May, 1904, said Michael Carr opened a savings account with defendant bank, depositing therein on said day the sum of \$730. He continued to add to said deposit from time to time and at other times drew upon the same until the 11th day of September, 1908, on which date he had on deposit and credited to his account in said bank the sum of \$996.30. "On said September 11, 1908," so alleges the answer filed by defendant bank, "the said Michael Carr, in the presence of said M. K. Carr (his son), caused said bank to change said deposit, amounting to \$996.30, to the names of Michael Carr or M. K. Carr, as 'joint owners, payable to either or survivor,' and said Michael Carr thereby agreed with said bank that said account could be paid by said bank to either Michael Carr or M. K. Carr in the lifetime of Michael Carr, and, after the death of Michael Carr, could be paid by said bank to M. K. Carr." After said deposit or account was so transferred to Michael and M. K. Carr, jointly, the latter, on several different dates, drew on the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

same in small amounts. Michael Carr died on the 11th day of November, 1908, and thereafter M. K. Carr continued to draw on said deposit or account from time to time until he had withdrawn therefrom the total sum of \$255.

The complaint alleges that at the time of Michael's death there remained in the bank, of the deposit so transferred to Michael and M. K., the sum of \$976.30, for which judgment is prayed. The answer of the bank alleges that of the sum so deposited there remained at the time of the commencement of this action, but the sum of \$656.41. But the difference between the amount sued for and the amount which the bank claims represented the remainder on deposit at the time of the institution of this action is to be accounted for, manifestly, in the withdrawals by M. K. Carr from the account after the death of his father. The bank paid into court the said sum of \$656.41, representing the extent of the deposit at the time the action was begun, and asked that "the title to and ownership of the said money may be litigated between said plaintiff, as such administrator, and said M. K. Carr," etc.

The foregoing is a brief but an accurate statement of the admitted facts from which the court derived its findings, of which the following represents the gravamen of the controversy: "(4) That on May 26, 1904, said Michael Carr opened a savings account, in his own name, with said Vallejo Commercial Bank by making a deposit at that time of \$730. That thereafter said Michael Carr made deposits on and drew from said account; that the amount on deposit in said account at the beginning of business on September 11, 1908, was the sum of \$996.30. That on September 11, 1908, the said Michael Carr, in the presence of said M. K. Carr, caused said bank to change said deposit amounting to \$996.30 to the name of Michael Carr or M. K. Carr, as 'joint owners, payable to either or survivor,' and said Michael Carr thereby agreed with said bank that said account could be paid by said bank to either Michael Carr or M. K. Carr in the lifetime of Michael Carr, and, after the death of Michael Carr, could be paid by said bank to M. K. Carr. *That said deposit amounting to said sum of \$996.30 was the property of said Michael Carr, and continued to be the property of said Michael Carr after said bank had so changed said deposit, and at all times until the death of said Michael Carr.*"

There is, as must be manifest from the evidence as we have presented it here, absolutely no *direct proof*, of any kind or character whatsoever, authorizing the finding that after Michael Carr had caused the deposit to be transferred to himself and M. K. Carr, jointly, the title to or ownership of the money so on deposit and transferred remained at all times in said Michael. If any such finding of fact is warranted at all, it must

find the source of its support solely in the fact that, originally, the money deposited with the defendant bank was exclusively Michael's own property, supported by the further fact that, after said transfer, he retained, not only an ownership in the money, but the right and the power to withdraw it at any time during his life. Was the court justified from these facts, in finding as a fact, or concluding as a matter of law, that the sole ownership of the deposit in controversy after the transfer thereof, as described by the evidence and found by the court, still remained in Michael? Or, to state the proposition in another form, does the evidence warrant the conclusion, either of fact or of law, that Michael, although transferring the account to his credit in the bank to himself and his son, M. K., jointly, with the right and the unrestricted power in either to draw on said account during their lives, and with an express direction to the bank to pay the residue remaining, upon the death of either, to the survivor, did not intend that, upon his death, the sole ownership of whatever then remained of the deposit should vest in M. K. Carr?

It seems to me that to hold that the court's findings as to the intention of Michael Carr in the consummation of the transaction or its conclusion as to the legal effect thereof are supported by the evidence would involve a positive disregard of language whose meaning could hardly be less ambiguous or palpable. That Michael Carr intended that the bank should, upon his death, pay to M. K. Carr, for his sole benefit, whatever remained of the joint account at the happening of that event, is a proposition which, it appears to me, cannot admit of the remotest doubt or ground for cavil, under the facts as found by the court with respect to the circumstances attending the transfer of the deposit. If the fact of transferring the deposit to the account of himself and the appellant, as joint owners, with directions to the bank to pay the same out on the order of either while both were living and the remainder to the survivor upon the death of the one or the other, does not clearly and distinctly indicate that Michael Carr intended that, upon his death, his son, M. K. Carr, should be paid by the bank, and thus receive as exclusively his own whatever balance there was then remaining in the account, then it must be admitted that the English language is a most treacherous vehicle for the transmission of thought. If Michael did not intend that the appellant should be paid the money on deposit after his death, why did he use the word "survivor"? And, if he intended that, though the money should then be paid to him, he in turn should divide it between himself and other members of the deceased's family, or paid over to the administrator of his estate, why did he not so declare when he made the transfer, or at some time thereafter? There is, as seen, no evidence af-

firmatively showing or tending to show that he had any intention that the money remaining in the bank on his death should go to or be shared by any person or persons, other than M. K. Carr. And, in the ascertainment of what Michael intended by the employment of the word "survivor," as indicative of the specific thought in his mind at the time the transfer was made, the fact, as found by the court, that in so transferring said deposit he expressly made and declared himself and appellant *joint owners* of the deposit, with full and unhampered power in the latter to draw on and thus, if he so desired, to exhaust said deposit during the lives of both, cannot be cast aside as possessing no significance. Indeed, this fact, while of itself or taken alone would not necessarily prove Michael's intent to create a trust, or perhaps would carry little or no force as proof of such intent, is, nevertheless, of considerable force as an aid in the ascertainment of what effect the deceased intended the word "survivor," as thus used by him, should have. And I doubt not, as stated, that said fact very clearly discloses that Michael could have intended nothing less by the use of that word than what said word naturally and etymologically means and implies.

If, then, it appears reasonably certain from the evidence, as well as from the findings, as I think it undoubtedly does, that Michael's intention in this transaction was that, upon his death, M. K. Carr should become the sole owner of the residue of the money then remaining in the bank credited to their joint account, is it not the duty of the courts to carry out and execute such intention, if it can be done without impinging upon or doing violence to any rule or principle of law?

[3] It is unquestionably true, as respondent contends, that the transaction is lacking in some of the essential requisites or elements of a gift, either *inter vivos* or *causa mortis*, and the intention of Michael Carr cannot, therefore, be supported or effectuated upon the theory of either such methods of transferring personal property. Section 1147 of our Civil Code provides that "a verbal gift," which is a transfer of personal property, made voluntarily, and without consideration (section 1146, Civ. Code), "is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to be done." In the case here, Michael Carr, while clearly intending that M. K. should share as a joint owner during their lives in the deposit, still retained the power of entirely destroying or exhausting by his own act the subject of the transfer, and, obviously, M. K. was not given full and complete dominion over and control of said deposit, a requisite essential to the perfection of a valid gift.

[4] A "donatio causa mortis" "is one which is made in contemplation, fear, or peril of death, and with intent that it shall take effect only in case of the death of the giver." Section 1149, Civ. Code.

Here it was clearly intended that the transfer of the deposit jointly to Michael and M. K. Carr should take effect immediately—that is, that M. K.'s interest in said deposit should vest and be enjoyed in *presenti*—which, of course, destroys any ground for supposing an intention in Michael to make a gift of the deposit to M. K. "in contemplation, fear, or peril" of his own death.

[5] But the manifest intention of Michael Carr can be sustained through the agency of a trust, and that such was the mode by which he intended that the appellant should share in the deposit during the life of Michael, and, upon the latter's death, to receive from the bank the remainder in his sole and exclusive right, I think the evidence and the findings beyond all peradventure disclose.

Section 2221 of the Civil Code reads: "Subject to the provisions of section 852, a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor indicating with reasonable certainty: 1. An intention on the part of the trustor to create a trust; and 2. The subject, purpose, and beneficiary of the trust."

Section 2222 of said Code provides: "Subject to the provisions of section 852, a voluntary trust is created, as to the trustee, by any words or *acts* of his indicating, with reasonable certainty: 1. His acceptance of the trust, or his acknowledgment, made upon sufficient consideration, of its existence; and 2. The subject, purpose and beneficiary of the trust."

[6] Mr. Perry, in his treatise on Trusts, says: "If a trust can *fairly be implied* from the language used as the intention of the parties, the intention will be executed through the medium of a trust."

[7] Nor, in order to create a trust, is it indispensable or even necessary to use the words "trust" or "trustees." Estate of Smith, 144 Pa. 428, 22 Atl. 916, 27 Am. St. Rep. 641, and cases therein cited. Under our law Michael Carr was authorized to create a trust for himself and his son, M. K. Carr, in the manner and form disclosed by the evidence. *Hellman v. McWilliams*, 70 Cal. 452, 11 Pac. 659.

Testing the facts proved and found here by the law as thus briefly stated, I find this situation in the case at bar: One capable of creating a trust; the subject, purpose, and beneficiary thereof clearly manifested; the acceptance of said trust by the trustee (the bank), evidenced by its act of accepting the deposit or the subject of the trust, subject to the conditions and provisions thereof; and the acts and the use of language by the trustor, if he be a trustor, indicating, I think, with reasonable certainty, an intention to create a trust. There are many cases,

both in this and other jurisdictions, holding that a trust was the legal effect of substantially the same state of facts as is found here. I shall, however, notice a few California cases only.

In *Booth v. Oakland Bank*, 122 Cal. 19, 54 Atl. 370, a Mrs. Bell requested, in writing, the teller of the bank to add the names of her two sisters to her savings account, so that she or either of said sisters could draw on the fund. The officer of the bank arranged her account as thus directed by Mrs. Bell, and subsequently she furnished the bank with the signatures of her sisters. She also apprised her sisters, then living in the East, of what she had done. The teller of the bank testified that he stated to Mrs. Bell that, under the new arrangement, her sisters could draw the money in her (Mrs. Bell's) lifetime, and that she replied "that it made no difference; they would not do it." The court, sustaining the claim that there was sufficient evidence before the court to show that a trust had been created by the act of Mrs. Bell, and reversing the judgment of nonsuit from which the appeal was prosecuted, says: "There can be no doubt of the intention of Mrs. Bell in this matter, and that intention should be consummated, if the law will permit it; and if there is any ground upon which the evidence would justify a judgment in favor of the plaintiffs the motion for a nonsuit should have been denied. * * * I do not think it necessary to determine whether the control over the fund reserved by Mrs. Bell is to be regarded as a power of revocation, or whether the whole transaction is to be regarded as a trust in her favor of so much of the fund as she might see proper to withdraw in her lifetime, and of the remainder for her sisters. In either case the practical result is the same, for a power of revocation as to the whole may be exercised as to a part, and, when so exercised, does not affect the remainder."

The only distinction discernible between the *Booth Case* and the one at bar is that in the former it was clearly not intended that the cestuis que trustent should draw on the fund during the lifetime of the trustor, although having the legal right to do so, while here, as seen, it was expressly declared by the trustor that both the beneficiaries under the trust, Michael and M. K., should receive from the bank trustee whatever either might choose to ask for out of the trust fund during the lives of both, with the remainder to the survivor.

In the case of *Sprague v. Walton*, 145 Cal. 232, 78 Pac. 646, one Moses Sprague, in whose name there were certain savings bank deposits which were community property, "being at the time sick and confined to his bed, obtained from the banks the form of an authorization which would enable his wife to draw the deposits standing in his name, and he executed and delivered to her two orders in the form prescribed. They were substan-

tially the same in terms, and the one addressed to the Sacramento Bank read as follows: 'January 22, 1900. I hereby authorize the Sacramento Bank to allow my wife, Mrs. N. M. Sprague, to draw any money standing to my credit on Deposit No. 17,097, fol. 825, in said bank and to have the right of survivorship.' On the 30th of January Mrs. Sprague drew out the whole of the several deposits and immediately redeposited them in the same banks, but in her own name. On the 16th of March following Moses Sprague died. Letters testamentary were issued to his wife in July, 1900, and she took possession of his estate, but died in June, 1901, leaving the administration unclosed. Upon her death the plaintiff, Frederick D. Sprague, and the defendant, B. F. Walton, were appointed joint executors in her place. Subsequently her will was proved and letters testamentary were issued to her daughter, the defendant Hattie S. Walton. As executrix of her deceased husband's will, Mrs. Sprague never charged herself with anything on account of said deposits, and what remained of them passed into the hands of her executrix, who claims that they were a gift from her father to her mother and constituted no part of his estate." In an action to recover said money by one of the executors of the estate of Moses Sprague, deceased, against the executrix of the estate of Mrs. Sprague, deceased, the contention of the latter was that the transaction by which Moses transferred said savings deposits to his wife involved a gift, but this contention was not sustained by the trial court, which found that said transaction was devoid of some of the essential elements of a transfer by gift. The Supreme Court, speaking through the Chief Justice, while declaring that the evidence tending to show that Moses Sprague intended a gift of the deposits "was very persuasive," said that it was not in the power of an appellate court to "make a finding nor direct one where the evidence, however persuasive, is opposed to a presumption, as in this case." The court, however, reversed the order for error of the trial court in excluding certain testimony proposed by the defendant, and in view of a retrial, felt constrained to make the following suggestion: "Even if it should be found that it was not the intention of Moses Sprague that his wife should draw out the deposits or change them to her own account in his lifetime, the form of the orders ('with right of survivorship') indicates his intention that she should take them as survivor after his death; and if such was his intention the transaction would be brought within the doctrine of *Booth v. Oakland Bank*, 122 Cal. 19, 54 Pac. 370, where it was held that an arrangement substantially the same as in this case constituted the bank a trustee of the deposit for the benefit of the parties to whom the depositor desired the money to be paid in case of her death. The fact that Mrs.

Sprague actually drew the money before her husband's death would not defeat the intention to create a trust in her favor."

I am unable to perceive any substantial distinction between the foregoing cases and the one at bar. If the "right of survivorship" in *M. K. Carr* is not clearly indicated as the intention of Michael Carr by his employment of the word "survivor" in making the transfer of the deposit to himself and *M. K. Carr*, as joint owners, then, as I have before in effect declared, the word as so used is not only perfectly meaningless, but must have been thus employed by Michael with the deliberate purpose that it should be regarded and treated as superfluously used, or employed without an intention on his part to thereby convey any particular thought in his mind when the act of transferring the deposit took place. But it must be assumed that he meant something or to convey some thought in his mind with regard to the transfer by the use of that word, and I am unable to reconcile its use under the circumstances with any other idea than that it was so employed for the purpose of expressing the extent or scope and nature, in legal effect, of the transfer. If, as I think is clearly true, he intended that *M. K.* should exercise the right of survivorship in the deposit, then, it seems to me, it becomes very clear that the intent in his mind, at the time of transferring it, was to establish a trust in said deposit for his and appellant's joint benefit during their joint lives, with the remainder to the latter or a reversion to himself on the death of the one or the other, according as that event might happen.

The cases of *Denigan v. Hibernia, etc., Society*, 127 Cal. 137, 59 Pac. 389, and *Denigan v. S. F. Savings Union*, 127 Cal. 142, 59 Pac. 390, 78 Am. St. Rep. 35, cited by counsel for respondents in support of the judgment here, are where one *Ellen Denigan* deposited with said bank certain moneys, which were her separate property, in the names of herself and husband; in the last-mentioned case the deposit being made payable to the individual order of either. *Ellen* subsequently died, and thereupon *James Denigan*, her surviving husband, caused the moneys so deposited in both banks to be transferred to a new account entitled "*Frank Denigan or James Denigan*," with directions to the bank from both *Denigans* in the last mentioned of the two cases to pay to the individual order of either. *James Denigan* was a nephew of *Frank Denigan*, and upon the death of the latter *James* brought suit against the *Hibernia Loan Society* for the remainder of the money on deposit in said bank, without any deduction for an amount paid by the bank out of said deposit to one *Connolly* on the order of *Frank Denigan* in his lifetime, and after the money had been transferred to himself and *James*. The action against the *San Francisco Savings Union* was by said *James* to recover the

amount of the deposit in said bank in the name of *Frank Denigan* and plaintiff.

In both cases the plaintiff's right to the money rested entirely upon the title or right which *Frank Denigan* had thereto, and in both cases the contention of the plaintiff was that *Frank* acquired a perfect title to the money through a gift thereof by his wife, *Ellen*. The Supreme Court held that the evidence failed to disclose a gift in either case. Like the case here, there was wanting in the transactions, to constitute a completed gift, the element of unqualified dominion over the deposits by *Frank Denigan*. As the court say: "There is no presumption in favor of a gift (*Grey v. Grey*, 47 N. Y. 552; *White v. Warren*, 120 Cal. 322 [49 Pac. 129, 52 Pac. 723]); and in the present case the idea of a gift is inconsistent with the retention by the wife of the right in herself to withdraw the whole of the money from the bank." But, under our theory of the case at bar, it is obvious that these cases are not in point. There are no acts or language connected with the transactions which would furnish the slightest indication of an intention upon the part of *Ellen Denigan* to create out of the deposits a trust, either in favor of herself and husband or in favor of her husband alone. While, as seen, no certain form of words is required in the creation of a trust, there must, nevertheless, be *some words*, it matters not what they are, which indicate with reasonable certainty a purpose to create a trust. Civ. Code, § 2221; *Estate of Smith*, supra; *Egerton v. Brownlow*, 4 H. L. Cas. 210; *Cushing v. Blake*, 30 N. J. Eq. 689; *Pomeroy's Eq. Jur.* § 1001.

[8] Nor is there anything decided in the *Denigan* Cases at cross purposes with the proposition that a valid trust in money may be created, with the power reserved by the trustor to practically revoke it by drawing on the trust fund until it is completely exhausted, before the beneficiaries can enjoy the fruits thereof. Section 2280, Civ. Code; *Hellman v. McWilliams*, 70 Cal. 452, 11 Pac. 659; *Nichols v. Emery*, 109 Cal. 325, 41 Pac. 1089, 50 Am. St. Rep. 43.

But respondent contends that the case of *Booth v. Bank*, supra, is not in point here, for, he insists, all that is decided in that case is that the trial court erred in granting a motion for a nonsuit, and that it was the duty of said court to review and consider the evidence upon its merits, to determine whether a valid trust had been established by the act and words of *Mrs. Bell*; and he declares that this case is to be differentiated from that, in that the court here did pass upon the evidence and decide the questions of fact upon the merits of the controversy, and that its findings are conclusive upon this court. But the court went further in the *Booth* Case than merely to review the ruling of the trial court upon the motion for a nonsuit. It very clearly laid down the rule

that, where the intention to create a trust is indicated with reasonable certainty by any words or acts of the party having the right to create a trust of the particular personal property involved in the transaction, it is the duty of the courts to so construe such transaction as to execute such intention, and it is further shown that the facts developed in that case up to the point where the nonsuit was ordered, if true, or if believed, were enough to establish a trust, or beneficial interest in the deposit, in favor of the sisters of Mrs. Bell, enforceable after the latter's death. Moreover, in the case at bar, it is to be observed that there does not, and, indeed, there could not, arise, as in *Noble v. Learned*, 153 Cal. 247, 94 Pac. 1047, any question of conflict in the evidence. The findings themselves, as we have pointed out, disclose with "reasonable certainty" that, when Michael transferred the deposit to himself and M. K. Carr, his intention was that, after his death, the sole and exclusive right and title to the remainder should vest in and be enjoyed by the latter. The language following that finding, italicized herein, "that said deposit amounting to said sum of \$996.30 was the property of said Michael Carr, and continued to be the property of said Michael Carr after said bank had so changed said deposit, and at all times until the death of said Michael Carr," involves the statement of a mere legal conclusion, unsupported by the finding of fact immediately preceding it, or by any other finding, or by any evidence produced.

If (I may repeat) any meaning is to be given to the word "survivor," as employed by Michael Carr in the transfer of the deposit to himself and appellant, it must be accorded that signification which ordinarily and naturally it would have when used in connection with the disposal of one's estate to take effect after the death of the owner, and, giving to it such meaning, it seems to me that there is no escape from the proposition that Michael adopted the means disclosed by the evidence as (to him) the most satisfactory manner and form of making his son, the appellant here, a joint beneficiary during their joint lives and the sole beneficiary after his death of so much of his estate as is involved in the deposit with which this litigation is concerned, or, in case he survived M. K., the same to revert to him. This being so, it is, as I have shown, the duty of the courts to respect and execute his intention through the medium of a trust which, as I think clearly appears from this record, can be done in perfect harmony with the facts proved and found. No argument in answer to this construction of the transaction involved here can be erected around the proposition that, in disposing of the deposit

in the manner shown here, Michael thus displayed partiality to one son as against the respondent and the other members of his family, if there be others. A man, as is said in *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773, "is the disposer by law of his own fortune, and the sole and best judge as to the time and manner of disposing it."

There are, doubtless, many cases where persons, in the testamentary disposition of their property, have omitted to make provision for certain heirs or persons standing in the same degree of relationship to them as those upon whom they have bestowed by testament or otherwise a liberal share of their bounty, and in which there does not appear any well-founded, natural or moral reason why such partiality by the ancestor should thus have been evinced. Such cases often present circumstances which appeal strongly to one's sense of justice, and which, if the law permitted, would no doubt frequently lead judges to interpose their power and adjust the matter of the distribution of such estates in accordance with the principles of what may be termed natural justice. This may be one of such cases. But the courts cannot, in the determination of questions like those submitted here, be influenced or controlled by the fact that the ancestor has excluded from his bounty certain of his heirs, in the absence of a showing of fraud, mental incompetency, or that his act has been superinduced by undue influence practiced upon him. Whatever might have been Michael Carr's specific reason for displaying partiality, if in truth any was shown, it was certainly satisfactory to him, and, as it is not shown, nor claimed, that he was, when he transferred the deposit, mentally incompetent to transact business, or that he was fraudulently imposed upon or unduly influenced by M. K., or any other person, and thus induced to transfer said deposit, no reason can be suggested why his intention as to the disposition of that money should not be made effective, so long as it can be done without offending any rule or principle of law.

As stated, the alleged finding that the deposit was at all times the sole property of Michael Carr is not a finding of fact, but obviously an unsupported conclusion of law. The defendant was and is entitled to a judgment on the findings of the court, and, in accordance with this view, the judgment appealed from is reversed, with directions to the court below to cause to be entered judgment on the findings in favor of the defendant, M. K. Carr.

We concur: CHIPMAN, P. J.; BURNETT, J.

15 Cal. App. 461

CARPENTER v. ASHLEY et al. (Civ. 800.)

(District Court of Appeal, Third District, California. Feb. 23, 1911. Rehearing Denied by Supreme Court April 24, 1911.)

1. APPEAL AND ERROR (§ 1024*)—REVIEW—CHANGE OF VENUE.

An order refusing a change of venue, based on conflicting evidence, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4028; Dec. Dig. § 1024.*]

2. MALICIOUS PROSECUTION (§ 56*)—BURDEN OF PROOF.

One suing for malicious prosecution has the burden of proving malice and want of probable cause.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 112-116; Dec. Dig. § 56.*]

3. MALICIOUS PROSECUTION (§ 20*)—"PROBABLE CAUSE."

"Probable cause" for a prosecution is a suspicion founded upon circumstances warranting a reasonable man to believe that the charge is true.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 26-28; Dec. Dig. § 20.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5618-5620; vol. 8, p. 7765.]

4. MALICIOUS PROSECUTION (§ 71*)—PROBABLE CAUSE—NATURE OF QUESTION.

In a suit for malicious prosecution, what facts and circumstances amount to probable cause is a question of law for the court, and whether they exist in a particular case is a question of fact for the jury.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 161, 162; Dec. Dig. § 71.*]

5. MALICIOUS PROSECUTION (§ 64*)—PROBABLE CAUSE—EVIDENCE—SUFFICIENCY.

In a suit for malicious prosecution, evidence held to show probable cause.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 152; Dec. Dig. § 64.*]

6. MALICIOUS PROSECUTION (§ 38*)—RIGHT TO RECOVER.

Actions for malicious prosecution are not favored, since they tend to discourage punishment of offenders.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 79; Dec. Dig. § 38.*]

7. MALICIOUS PROSECUTION (§ 24*)—LIABILITY—EFFECT OF ACQUITTAL.

One is not liable for malicious prosecution, if he had reasonable grounds for his belief of accused's guilt, and acted thereon in good faith, though accused was not convicted.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 50; Dec. Dig. § 24.*]

8. APPEAL AND ERROR (§ 1057*)—ADMISSIBILITY—MATTERS ADMITTED.

In an action for malicious prosecution, it was not prejudicial error to exclude the record in another criminal case in which plaintiff was convicted, offered merely to show that on account of imprisonment limitations had not run, where defendants did not deny plaintiff's allegation of such imprisonment, and admitted it in open court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199; Dec. Dig. § 1057.*]

9. MALICIOUS PROSECUTION (§ 58*)—EVIDENCE—MATERIALITY.

In an action for malicious prosecution for perjury in a civil suit, the judgment roll in that suit was admissible to show that under the issues therein made plaintiff's alleged false testimony was immaterial, since, if his testimony was immaterial, it could not be a proper basis for a perjury charge.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 117-124; Dec. Dig. § 58.*]

10. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In an action for malicious prosecution for perjury in a civil suit, error in excluding the judgment roll in that suit, offered to show want of probable cause, was harmless, where the matter was shown on cross-examination of plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199; Dec. Dig. § 1057.*]

11. WITNESSES (§ 269*)—CROSS-EXAMINATION.

Where, in an action for malicious prosecution, a witness testified that defendants acted as attorneys for the people in a prosecution, it was proper to ask him, on cross-examination, whether they were district attorney and assistant, respectively.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. § 269.*]

12. MALICIOUS PROSECUTION (§ 58*)—EVIDENCE—MATERIALITY.

In an action for malicious prosecution for perjury in a civil suit, evidence as to facts leading to the bringing of that suit was properly excluded, as being immaterial.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 117-124; Dec. Dig. § 58.*]

13. MALICIOUS PROSECUTION (§ 59*)—EVIDENCE—MATERIALITY.

In an action for malicious prosecution for perjury in a civil suit, it was proper to receive testimony given on the trial of that suit and presented to the grand jury, as bearing on the question of probable cause.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 125-137; Dec. Dig. § 59.*]

14. APPEAL AND ERROR (§ 206*)—REVIEW—OBJECTIONS NOT MADE BELOW.

An objection to testimony as being "not cross-examination" cannot be made for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1288; Dec. Dig. § 206.*]

Appeal from Superior Court, San Joaquin County; F. H. Smith, Judge.

Action by A. H. Carpenter against A. H. Ashley and another. Judgment for defendants, and plaintiff appeals. Affirmed.

A. H. Carpenter, for appellant. Nicol & Orr, C. L. Neumiller, and A. H. Ashley, for respondents.

BURNETT, J. The action was brought by an attorney at law against two other attorneys for malicious prosecution and conspiracy, whereby, it is alleged in the complaint, said defendants "corruptly, maliciously, and without probable, or any, cause, prosecuted plaintiff before the grand jury and before a trial jury in the superior court for the crime of perjury," securing an indictment for said

offense, and subjecting the defendant therein to the expense, annoyance, and ignominy of a public trial lasting five days and resulting in his acquittal.

Every allegation in the complaint impugning the motive, or challenging the good faith of defendants, or charging the want or probable cause for said prosecution is denied in the answer. There was a demand and motion for a change of venue on the part of plaintiff, supported by his affidavit, in which some startling and rather grotesque accusations are made against the defendants, to the effect that "they are and were skilled in the art of securing verdicts and manipulating the members of the panel, and, aside from such skilled manipulations, they exercised such influence and power over the citizens who were or might be called to pass upon their conduct as to make it impossible for plaintiff or any one else to get a fair trial where they were parties to the action." But, conceding that plaintiff's strange averments are not inherently improbable, and that his affidavit should be accorded the same consideration as that of any other person, it is sufficient to say that every suggestion therein of improper influence is positively denied, and every implication of bias or prejudice on the part of the citizens of the county is expressly negated in the counter affidavits filed by defendants and used at the hearing of the motion.

[1] Under the familiar rule of conflicting evidence, therefore, it is unquestionable that the order denying the application for a change of the place of trial cannot be disturbed.

It is stated by appellant that "after the denial of said motion the plaintiff, having had the personal experience of the defendants' skill in securing verdicts, waived a jury, and the case was tried by the court, who promptly gave judgment to the defendants on their motion for a nonsuit." Appellant does not complain, apparently, so much that the judgment was given "promptly," as he deplores the mistake he made in assuming that the great skill of defendants could not influence the court to decide at all against the law and the evidence.

[2-4] Be that as it may, the legal principles involved are well established and may be stated in the language of the Supreme Court, as they have been thoroughly considered and clearly enunciated in the three following cases: *Ball v. Rawles*, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174; *Davis v. Pacific Teleph., etc., Co.*, 127 Cal. 312, 57 Pac. 764, 59 Pac. 698; and *Booraem v. Potter Hotel Co.*, 154 Cal. 99, 97 Pac. 65. "It is incumbent upon the plaintiff, and the burden of proof is upon him in an action of this kind, to prove both malice and want of probable cause." "Probable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true."

"What facts and circumstances amount to probable cause is a pure question of law. Whether they exist or not in any particular case is a pure question of fact. The former is exclusively for the court, the latter for the jury."

With these elementary principles in view, we deem it unnecessary to go beyond an examination of the question of probable cause for said prosecution.

[5] The evidence introduced by plaintiff included his indictment by the grand jury, on June 10, 1901, for perjury alleged to have been committed on May 31, 1900, and the record of his trial thereon, resulting in a verdict of not guilty. The indictment was based upon the testimony of plaintiff given at the trial of the cause of *McGorray v. Robinson* in the superior court of San Joaquin county, to the effect that "he, the said A. H. Carpenter, on or about the blank day of January, 1892, sent by mail to Bernard McGorray at Rochester, New York, the deed, meaning thereby a certain deed," describing a deed to the property, the title to which was involved in the said suit of *McGorray v. Robinson*, said deed purporting to convey said property to Bernard McGorray by Stephen W. McGorray, and "signed, sealed, and delivered in the presence of A. H. Carpenter" and acknowledged before J. H. Tam, a notary public, on the 29th day of December, 1891. The pleadings in said cause of *McGorray v. Robinson*, consisting of the complaint, answer, and cross-complaint, and answer to the cross-complaint, were then offered by plaintiff and received in evidence. The verified complaint therein was filed, it appears, on November 15, 1899, and therein it was alleged that "plaintiff is now and for more than seven years last past has been the owner in fee" of the land described.

The verified answer and cross-complaint was filed December 21, 1899, in which, among other things, it was denied that plaintiff ever had been the owner of any of the property described in the complaint. To the cross-complaint the plaintiff, on January 20, 1900, filed an answer in which he alleged that "he is now and always has been since the 29th day of December, 1891, the owner in fee of all the real property described in the complaint." It was further shown herein by the evidence that at the trial of the said *McGorray* case, H. T. Fee, a deputy county recorder of San Joaquin county, produced and read in evidence, from volume 72 of Deeds of said county, the record of the deed set out in the indictment; that Bernard McGorray, who was plaintiff in that case and grantee in said deed, and who was a client of plaintiff herein, testified that the recorded deed had been sent by its grantor (Stephen McGorray) to and received by him (Bernard) through the mail, at Rochester, N. Y., in 1892; that he then and there saw

upon it the recorder's marks or certificate and the acknowledgment certificate of the notary; "that he knew the deed was made in December, 1891, and his only manual receipt thereof was so by mail;" that thereafter, at the said McGorray trial, Carpenter (plaintiff herein) testified that he drew the deed and witnessed it; that he had it recorded; that furthermore he testified: "I am sure of this, that the envelope—it was enclosed in a long envelope and it was my envelope—and I am sure that I backed it, and Mr. McGorray may have put it in a letter, in with the deed; I don't know; It is so long ago; have forgotten"; and he was sure that it was sent to McGorray at Rochester; that thereafter the cross-complainants called Deputy Recorder Eschback, who brought with him said deed and testified that it had not been out of the recorder's possession after it was filed for record. Afterwards Mr. Carpenter had himself recalled, and he testified that the deed he sent might have been a prior deed, executed in 1883, but it appeared that the said deed of 1891 was the only one that had ever been recorded. It is true that Mr. Carpenter, in one portion of his testimony, declared it to be his impression that he had sent the deed; in another portion that such was his recollection; but it is a fair inference from all his testimony that he intended to have the court understand that he had mailed this identical deed to Bernard McGorray at Rochester, N. Y.

From the foregoing it follows that Mr. Ashley had probable cause for believing: (1) That the testimony of Mr. Carpenter in the trial of said cause of McGorray v. Robinson was material to the issue involved in said action. This is indeed clear, since the litigation directly concerned the ownership of a certain tract of land, and plaintiff claimed under said deed of 1891, and the testimony of Carpenter related to the delivery of said deed. It is true that, in a separate defense to the action, it was averred that the said deed was executed and delivered in trust; but inconsistent defenses are permitted under our practice, and it is manifest that the denial of ownership hereinbefore quoted raised an issue as to the delivery of the deed. (2) That the testimony of said Carpenter was false, being contradicted by the testimony of said deputy recorder Eschback, and of Bernard McGorray, who testified that he received the said deed through the mail in an envelope addressed in the handwriting of his brother Stephen. There are other inconsistencies also revealed in the testimony at said trial, which we deem unnecessary to notice specifically, tending to discredit said testimony of Carpenter.

Mr. Ashley then having probable cause to believe that false testimony was given by Carpenter on a material matter in the trial of an action, it is reasonable to conclude that said Ashley actually did believe that

such testimony was given, that it was willful, and that perjury was therefore committed. Being district attorney of the county, it is reasonable and just, therefore, to conclude that Ashley considered it his duty—and, so believing, it was his duty—to present the matter to the grand jury, and, in case of indictment, to prosecute Carpenter for the crime of perjury. It was accordingly presented to the grand jury with a transcript of the testimony taken at the said trial of McGorray v. Robinson, and it appears, also, that Mr. Carpenter testified before the grand jury, going over, as he says, "the entire ground," and, furthermore, that Mr. Ashley advised the grand jury that the evidence was sufficient to constitute the crime of perjury on the part of Carpenter, and therefore to indict him.

Without intimating in the slightest degree an opinion as to the guilt or innocence of Mr. Carpenter of the charge against him, we have no hesitation in saying that the showing made by plaintiff at the trial herein not only failed to disclose the want of probable cause for his prosecution by the district attorney and his codefendant, George F. McNoble, who was the assistant district attorney, but, to the contrary, in the attempt to establish his case, plaintiff's evidence revealed sufficient facts and circumstances, known to the defendants, to constitute, so we must hold, reasonable grounds for believing that the charge made against the plaintiff was true.

[6] It is well to remember, also, that the evidence against the plaintiff must be viewed here in the light of the following familiar principles, that "actions for malicious prosecution have never been favored in law, although they have been readily upheld when the proper elements therefor have been presented. It is for the best interests of society that those who offend against the laws shall be promptly punished, and that every citizen who has good reason to believe that the law has been violated shall have the right to cause the arrest of the offender.

[7] For the purpose of protecting him in so doing, it is the established rule that if he have reasonable grounds for his belief, and act thereon in good faith in causing the arrest, he shall not be subjected to damages, merely because the accused is not convicted." *Ball v. Rawles*, supra.

[8] There was no error in the court's ruling sustaining an objection to the introduction in evidence of the record in the case of *People v. A. H. Carpenter* on a charge of subornation of perjury. It was offered only for the purpose of showing, on account of the imprisonment of plaintiff, that the statute of limitations had not run against the present action. The evidence was unnecessary by reason of the failure of defendants in their answer to deny the allegation as to the imprisonment, and in addition it may be

said the incarceration was admitted in open court.

[9] Plaintiff offered in evidence the judgment roll in the said case of Bernard McGorray v. Kate Robinson, for the purpose of showing that, under the issues therein made, his alleged false testimony was entirely immaterial. Manifestly this was a circumstance of importance. If the testimony was entirely immaterial, it could not be made the basis for a charge of perjury. Upon the hypothesis that it was immaterial, since the evidence upon a motion for a nonsuit must be construed as favorably for the plaintiff as possible, the inference would have to be indulged that the district attorney knew or believed it was immaterial. Hence it would be evidence that the prosecution was instituted without probable cause. The court, therefore, committed a technical error in admitting the judgment roll only for the purpose of showing that there was such a case.

[10] The error, however, was without prejudice, for the reason that on the cross-examination of plaintiff the pleadings were read into the record without restriction, and besides the pleadings show, as we have already seen, that the testimony of plaintiff *was* material.

[11] Appellant complains because the court overruled his objection to the two following questions asked on cross-examination of the witness J. A. Plummer: "Mr. Ashley was then district attorney of this county?" and "Mr. George F. McNoble was assistant district attorney?" The witness, who was counsel for the defendant in the trial of the perjury charge, had testified in his direct examination that "Mr. Ashley and Mr. McNoble acted as attorneys for the people in that case." Hence said questions were proper cross-examination. But the contention is little short of frivolous, because plaintiff alleges in his complaint that Arthur H. Ashley was the district attorney and George F. McNoble, the assistant district attorney of the county.

[12] The court was clearly right in sustaining defendants' objection to the question asked of Bernard McGorray: "You may state the facts that led to the institution of that suit that is entitled Bernard McGorray v. Kate Robinson." The answer to the question could have no bearing whatever upon the materiality of plaintiff's testimony in the cause, and the facts that induced McGorray to bring the suit would not be evidence of the motives of these defendants in the prosecution of plaintiff.

[13] To the offer of the testimony of F. Eschbach, given upon the trial of McGorray v. Robinson, which was presented to the consideration of the grand jury, plaintiff objected upon the ground that it was "incompetent,

irrelevant, immaterial, and cannot be proven in that way." Reliance is had upon the cases of Reid v. Reid, 73 Cal. 206, 14 Pac. 781, and Thomas v. Black, 84 Cal. 221, 23 Pac. 1037. In the former it was held that, "under section 273 of the Code of Civil Procedure, the stenographer's transcript of the testimony, in a civil case, given by a party in a prior action, although certified to by the stenographer as being correct, is not admissible in a subsequent action as evidence of what he said on the former trial." In the Thomas Case, *supra*, the deposition sought to be introduced was not certified or authenticated in any way whatever, and the witness had no opportunity to correct it. The cases are not in point here, however, for the reason that appellant admitted that the transcript contained a correct statement of the testimony of the witness. It required no further authentication. It was proper to introduce it in evidence as the testimony of the witness in the trial of the McGorray Case, and, as read before the grand jury, constituted an important circumstance in the consideration of the question of probable cause.

[14] Appellant also urges in his brief that it was "not cross-examination," but no such objection was made at the trial.

We have endeavored to notice all the points made by appellant, but we are convinced that there is no ground for interfering with the action of the court below.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(159 Cal. 651)

HIGGINS v. LOS ANGELES GAS & ELECTRIC CO. (L. A. 2,587.)(Supreme Court of California. April 7, 1911.
Rehearing Denied May 5, 1911.)**1. APPEAL AND ERROR (§ 867*)—REVIEW—EXTENT OF REVIEW ON GRANTING OF NEW TRIAL—REVIEW OF VERDICT.**

Where a motion for a new trial is denied on all grounds save one and is granted on the sole ground that the court erred in sending an exhibit to the jury in their consultation room, the terms of the order eliminate the question of the sufficiency or insufficiency of the evidence to support the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3477; Dec. Dig. § 867.*]

2. TRIAL (§ 307*)—DELIBERATIONS OF JURY—TAKING ARTICLES TO JURY ROOM—STATUTES.

Code Civ. Proc. § 612, being the one express provision of the law bearing upon the right of juries to use exhibits or upon the right of the court to permit juries to use exhibits in their deliberations, and relating solely to the "papers" which have been introduced in evidence, is to be construed in view of the fact that the restrictive rule of the common law extended only to papers containing printing or writing and of the obsolete distinction between sealed and unsealed instruments, not as a limitation of the power of the court in the matter of other exhibits, but as a modification and extension of the common-law rule touching exhibits containing writings.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 307.*]

3. TRIAL (§ 307*)—CUSTODY AND DELIBERATION OF JURY—TAKING ARTICLES TO JURY ROOM—INSTRUCTIONS AS TO USE.

The rule which should guide the court and govern the jury in the use of exhibits is that the court may permit the jury to take with them and use in their deliberations any exhibit where the circumstances call for it, with a cautionary instruction as to the nature and use they may make of the exhibit, and the jury may use the exhibit according to its nature to aid in weighing the evidence which has been given and in reaching a decision upon a controverted issue.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 307.*]

4. TRIAL (§ 310*)—CUSTODY AND DELIBERATION OF JURY—EXPERIMENT BY JURORS.

The jury may carry out experiments with the articles and exhibits taken to the jury room within the lines of the evidence that has been offered; but, if their experiments do not fall fairly within the scope and purview of the

evidence and influence their verdict, they are reversible error.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 310.*]

5. TRIAL (§ 344*)—VERDICT—IMPEACHING VERDICT BY JURORS.

A jury is not allowed to impeach its verdict by showing what improper methods it employed to arrive at it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 813; Dec. Dig. § 344.*]

6. APPEAL AND ERROR (§ 1069*)—REVIEW—HARMLESS ERROR—CONDUCT AND DELIBERATIONS OF JURY.

Where the jury, in an action by a landlord for damages to his property by an explosion, have been permitted to take to the jury room an electric flash light similar to the one which it was contended had caused the explosion, after the court had stopped an experiment in court intended to show how the light would produce a spark, and in an answer to a special interrogatory declared that the explosion was caused by a spark from the flash light, the special verdict, if erroneously arrived at, is immaterial to the case and harmless, where, had it been shown that the explosion was caused by a fire in the stove by plaintiff's tenant as contended by defendant, its liability would not have been lessened.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4136, 4138, 4139; Dec. Dig. § 1069.*]

7. NEGLIGENCE (§ 89*)—IMPUTED NEGLIGENCE—CONTRIBUTORY NEGLIGENCE OF TENANT.

The right of a landlord to recover for injuries to his property by a third person cannot be defeated by proof of the contributory negligence of his tenant.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 130-137; Dec. Dig. § 89.*]

8. NEW TRIAL (§ 50*)—CONDUCT OF JURY—CUSTODY.

Where the jury, in an action to recover for damages to plaintiff's building from an explosion alleged to have been caused by defendant's negligence, were conducted by the sheriff on their way to lunch in an ordinary and convenient route which happened to pass the building, and it is not shown that they knew the building in passing or that their attention was directed to it, and where it is shown that the building itself had been repaired at the time of the jury's passing it, it is not ground for setting aside the verdict for plaintiff.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 50.*]

9. LANDLORD AND TENANT (§ 55*)—INJURIES BY TENANT—EVIDENCE.

In an action by a landlord against his tenant for damages to the leased building from an explosion alleged to have been caused by defendant's negligence, evidence held to support a verdict for the plaintiff.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 55.*]

10. EVIDENCE (§ 543½*)—OPINION EVIDENCE—COMPETENCY OF EXPERT WITNESSES.

Where a witness, called in an action to recover damages to plaintiff's building from an explosion alleged to have been caused by defendant's negligence, testified that he knew the building before the explosion and had examined it afterwards, and further testified as an expert with over 20 years' experience as a builder as to the cost of repairing the building and the length of time it would take, held, that the witness' knowledge of the building was sufficient upon which to predicate his expert testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2359; Dec. Dig. § 543½.*]

11. DAMAGES (§ 111*) — DESTRUCTION OF BUILDING—LOSS OF RENTAL.

In an action by a landlord against his tenant for damages to plaintiff's building from an explosion caused by defendant, the measure of damages is what the plaintiff really lost in rents by reason of the premises being destroyed by the explosion during such time as it would take with reasonable diligence to repair such building, and this is so whether plaintiff restored the building or not.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 274-278; Dec. Dig. § 111.*]

Department 2. Appeal from the Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Thomas Higgins against the Los Angeles Gas & Electric Company. Judgment for plaintiff, and, from an order granting defendant's motion for new trial, plaintiff appeals. Order granting new trial reversed.

J. Wiseman Macdonald and Thomas P. Higgins, for appellant. Wm. A. Cheney, Gibson, Trask, Dunn & Crutcher, and Le Roy M. Edwards, for respondent.

HENSHAW, J. This action was brought to recover damages from defendant for injuries caused to a building, the property of plaintiff. The damage was caused by an explosion of gas. This explosion occurred in a restaurant of a tenant of the plaintiff, Cressaty by name. The facts attending the explosion have recently been set forth by this court in its consideration of the case of *Merrill v. Los Angeles Gas & Electric Company*, 111 Pac. 534. It is sufficient to refer to that case; but it is to be borne in mind that that action was for personal injuries occasioned to a patron of Cressaty's restaurant, while the present action is to recover damages occasioned to plaintiff's building while in the possession of a tenant.

Trial was had before a jury. The defendant, as part of its evidence, showed that, the gas leak being in a dark and obscure place, its employes approached the leak with an electric flash light, and while the man holding the flash light was in close proximity to the leak the explosion occurred. The flash light used to inspect the leak was never recovered. It was probably destroyed by the explosion. But a similar flash light was introduced in evidence by the defendant, and the contention was made that it was impossible for this flash light as used to give out any spark which would cause the ignition and explosion of the gas. It was also in evidence that an oil stove in the restaurant was burning at the time of the explosion, and that this oil stove was some 44 feet from the place where the gas was escaping. It was contended by plaintiff that the explosion was probably occasioned by a spark from the electric flash light, and he introduced evidence to establish the fact that a flash light such as that before the jury could produce a spark. It was contended by defendant that

the explosion was occasioned by the flame of the oil stove, and that Cressaty, plaintiff's tenant, was negligent in not having extinguished the light of the stove after demand by defendant's employes that he do so. To demonstrate that the flash light could give out, and might have given out, a spark sufficient to cause the explosion, plaintiff, in rebuttal of the evidence of defendant's experts to the contrary, put an expert witness on the stand who so testified. Asked to demonstrate before the jury how the spark could be produced and to produce it, he proceeded to unscrew the cap of the flash light and undertook to make a spark by the use of a pair of pliers. Under objection the court stopped this experiment, manifestly for the reason that, to be of value to the jury, a spark should be produced from the flash light under conditions of use like those attending the explosion. Argument was indulged in before the jury pro and con over the possibility of so producing a spark, and the flash light was passed from hand to hand and inspected by the jury. While deliberating over their verdict, the jury requested to have with them in the jury room the flash light. The court permitted them to do so. Special interrogatories were submitted to the jury, amongst them one in answer to which it declared that the explosion was caused by a spark from the flash light and not from the flame of the oil stove. The general verdict was for plaintiff. Defendant moved for a new trial.

[1] The court denied the motion as to all grounds save one, and granted the new trial "on the sole ground that the court erred in sending into the jury in their consultation room the flash light." The terms of this order eliminate from consideration the question of the sufficiency or insufficiency of the evidence to support the verdict. *Kauffman v. Maier*, 94 Cal. 270, 29 Pac. 481, 18 L. R. A. 124; *Siemens v. Oakland, etc., Ry.*, 134 Cal. 496, 66 Pac. 672. There are left for consideration two matters: First, was it error calling for a new trial for the court to have permitted the jury to take with them to their room and to have with them during their deliberations the flash light introduced in evidence by respondent? Second, alleged errors of the court arising in the trial of the case.

[2] The only express provision of the law bearing upon the right of juries to use exhibits or upon the right of the court to permit juries to use exhibits in their deliberations is found in section 612 of the Code of Civil Procedure, and this has to do solely with "papers" which have been introduced in evidence. One curious in such matters can learn from the common law why this section of the Code was adopted and why also it is confined to papers. The common-law rule was that jurors were allowed to take with them in their deliberations only

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

such instruments as were under seal, and that they were not permitted to take with them any unsealed papers excepting by consent of the parties. The reason for this, according to Lord Hale and Lord Gilbert, was that jurors were supposed to be, and for the most part were, unlettered men. They could not read. A writing conveyed to them nothing. But in the case of sealed instruments, as these jurors were drawn from the vicinage, they were quite apt to be familiar with the armorial bearings of their neighborhood great from which the seals were derived. An instrument under seal, therefore, spoke for itself, and the jurors were permitted to take such instruments with them, not for the purpose of reading the instrument itself, but rather for the purpose of verifying their recollection of the seal and testing its genuineness. The curious inquirer will also find that it was not uncommon for one who had not risen to the dignity of possessing an armorial bearing to set the stamp of his teeth as his seal upon the instrument, and hence the old time phrase of "proving it to (by) his teeth." But, in the case of other exhibits not involving a knowledge of reading or writing, it seems to have been a matter of discretion with the court to allow the jury to take them into the jury room in aid of their deliberations. This rule, as to papers, however, was in force at a time when learning in letters was so rare and the premium upon such learning so high that a felon could save his neck by proving his ability to read a verse of scripture. It was to save the possibility of the question arising in this state as in 1812 it arose in the state of Pennsylvania (*Alexander et al. v. Jameson et al.*, 5 Bin. 238) that the section of the Code was adopted. All distinction between sealed and unsealed instruments had been abolished, and, as the restrictive rule of the common law upon the power of the court had gone only to papers containing printing or writing, it was necessary only to modify that rule as was done by section 612. Therefore section 612 is not to be construed as a limitation of the power of the court in the matter of other exhibits, but as a modification and extension of the common-law rule touching exhibits containing writings.

It will be noted that depositions are excluded by the section. This is for the very obvious reason that depositions may, and usually do, contain matters not admissible in evidence which matters have been eliminated from the consideration of the jury. To permit the jury to take depositions with them would be to put them in possession of this excluded evidence.

[3] In this lies the suggestion of the true rule guiding the court and governing the jury in the use of exhibits. The court may permit the jury to take with them and use in their deliberations any exhibit where the circumstances call for it, observing the prop-

er precaution of instructing the jury in the nature of the use which they shall make of the exhibit. It is a fundamental rule that all evidence shall be taken in open court, and that each party to a controversy shall have knowledge of, and thus be enabled to meet and answer, any evidence brought against him. It is this fundamental rule which is to govern the use of such exhibits by the jury. They may use the exhibit according to its nature to aid them in weighing the evidence which has been given and in reaching a conclusion upon a controverted matter.

[4] They may carry out experiments within the lines of offered evidence; but if their experiments shall invade new fields, and they shall be influenced in their verdict by discoveries from such experiments which will not fall fairly within the scope and purview of the evidence, then, manifestly, the jury has been itself taking evidence without the knowledge of either party, evidence which it is not possible for the party injured to meet, answer, or explain.

Typical instances of the improper and proper experimental use of exhibits by a jury are found, respectively, in *Wilson v. United States*, 116 Fed. 484, 53 C. C. A. 652, and *Taylor v. Commonwealth*, 90 Va. 109, 17 S. E. 812. In the first of these cases the indictment charged the defendant with smuggling opium "prepared for smoking purposes." A sealed can had been introduced in evidence by the prosecution and asserted to contain a sample of the smuggled opium. No testimony was given tending to show that the can contained opium prepared for smoking purposes, and yet it was conceded that it was essential to a conviction (since the offense was so laid) to show not only that the can contained opium, and that it was smuggled opium, but also that it was opium "prepared for smoking purposes." In this condition of the evidence the court instructed the jury that it might take the can to the jury room, open it, and extract some of the contents; that they would not be permitted to make a chemical examination of the contents; but that they could in the jury room test the extracted samples and learn to their satisfaction whether or not it would burn, and use the information so obtained in determining whether the can contained "opium prepared for smoking purposes." The Circuit Court of Appeals, in holding this instruction to be erroneous, said: "Surely, if the attorney for the government, as was his duty, had offered evidence going to show that the can in question contained opium for smoking purposes, the defendants would have been legally and justly entitled to have proved, if they could, that it contained no such thing; in which latter event there must have been a verdict of not guilty, for there was nothing else offered tending to show that there was any opium prepared for smoking purposes

in the case. Yet the jury was left to determine that essential fact for themselves, by experiment, and in the absence of the defendants, who were thus wholly deprived of the opportunity to contest the correctness of the jury's experiments, and of the possibility of giving any evidence upon one of the essential facts involved in the prosecution." *Taylor v. Commonwealth* was a case of murder. It was the assassination from ambush at midday of six or seven innocent and unsuspecting people. By the Supreme Court of Virginia it is described as "an inhuman and wholesale massacre of innocent and unsuspecting men, women, and children traveling peaceably upon the public highway." In the ambushade of the assassins were found certain cartridge shells which had been discharged from a 45-75 Winchester rifle. Defendant was charged with this murder. It was shown by the prosecution that he carried a rifle of this description and caliber. The defendant introduced his rifle in evidence and with it four empty shells which he proved were fired from his rifle. It was contended that the marks of the firing pin upon the cartridge shells found in the ambushade were so different from the marks of the firing pin upon the shells introduced by the defendant in evidence as to establish to a certainty that the shells found in the ambushade were not fired from defendant's rifle. During the trial the rifle admitted in evidence was inspected by the jury but was not taken to pieces. After retiring to deliberate the jury asked if the gun could be sent to them. This was done without objection from either side. After verdict of guilty defendant moved in arrest of judgment, contending that the jury had improperly taken the gun to pieces and examined the plunger or firing pin. It was shown in support of the motion that the jury had actually done this thing, and that from their examination had concluded that the plunger or firing pin had been tampered with. The Supreme Court of Virginia very properly upheld the verdict, the conduct, and the experiment of the jury. The purpose of the introduction of the gun in evidence was to show that its firing pin did not strike the cartridge in a particular way. The gun was offered by the defendant to establish his contention in this regard. A more acute prosecuting attorney might have caused the examination to have been made in open court, and thus have demonstrated the trick and fraud; but his failure to do so afforded no ground for overthrowing the verdict of an intelligent and scrutinizing jury, which, making its own examination of the evidence admitted to prove or disprove the very fact, discovered that the plunger "had been recently tampered with and fixed for the occasion of the trial." These cases, we have said, are typical. In the one the jury was permitted to

make an experiment without knowledge to the parties of the method or process which was employed. It was an experiment addressed to evidence necessary to the prosecution's case which should have been offered in court. To permit the jury to gather this evidence without the presence of the defendant and without the possibility of knowledge upon his part as to the method by which their conclusion was reached and without the possibility of contesting the correctness of their experiment was, as the court justly held, the equivalent of the taking by the jury of evidence out of court, and a deprivation of the constitutional right of the defendant to be present at the taking of all evidence in his case. Upon the other hand, in the Virginia case the jury was not experimenting along lines without the evidence. It merely subjected an exhibit to a more critical examination than had been made of it in court, and by such examination reached a conclusion upon a contested fact by a more careful scrutiny of an exhibit introduced for the very purpose of affording evidence of the fact.

In this state it was held, in *People v. Conkling*, 111 Cal. 616, 44 Pac. 314, that it was error demanding a new trial, when certain of the jurors, to satisfy themselves at what distance a rifle discharged would powder-mark cloth, procured a rifle out of the courtroom and experimented with it. Here was a clear case of the jury's obtaining evidence by unauthorized experiments made without the presence and knowledge of the defendant. But, on the other hand, in *People v. Mahoney*, 77 Cal. 530, 20 Pac. 73, clothing worn by the deceased at the time of the homicide was, upon the jury's request, sent to the jury room, and in the matter of the *Thomas Estate*, 155 Cal. 488, 101 Pac. 798, it was held that a memorandum book admitted in evidence was properly allowed in the jury room in aid of the jury's deliberations.

In most of the cases, because of the very nature of the exhibit and of all the possible uses to which it may be put in the jury room, there is no occasion for the court to admonish the jury or to caution and limit it as to the nature of the use or experiment which shall be made. But where, from its nature, it may be susceptible to improper use, as in the case of the can of opium, it is the duty of the court, by instruction to the jury, to limit and restrict that use.

Coming to the case at bar, it is certain that the trial judge conceived that he had fallen into error in allowing the jury to take with them and to experiment with an exhibit which they might subject to an improper use, without limiting the scope of their experiments by proper instruction. It will be remembered that the court checked one experiment in the courtroom during its progress, and it is probable that the judge thought that by delivering the exhibit to the jury he had

prepared the way for them to perform the very experiment which he had forbidden.

[5] Since a jury is not allowed to impeach its verdict by showing what improper methods it employed to reach it, the need of such cautionary instructions in a proper case becomes imperative, and we would by no means disturb the ruling of a trial court granting a new trial if it appeared that injury resulted from its failure to give such instructions.

But if, on the other hand, it could not have resulted in injury to the defendant even if the jury did perform an improper experiment and from it reached its conclusion that the explosion of gas was caused by a spark from the flash light, then clearly no new trial should be granted for an error which could not have resulted in injury. To this consideration we now come.

[6] The special verdict that the explosion was caused by a spark from the flash light was not material to the case, and defendant's position would not have been bettered if the jury had found that the cause of the explosion was not the spark from the flash light, but the fire from Cressaty's stove. It is to be remembered that this is not Cressaty's action to recover, which might be defeated by proof of his own contributory negligence. It is the action of his landlord, and, unless it can be said that the landlord was responsible for the negligent act of the tenant so as to defeat the landlord's recovery, the statement just made is unanswerable.

[7] Upon this proposition something of what was said by this court in *Merrill v. Los Angeles G. & E. Co.*, supra, is applicable. We are not cited to any authority supporting respondent's position that a landlord would be responsible for the tenant's negligence, and, indeed, the rule is directly to the contrary. "Deplorable, indeed, would be the situation of landlords if they were liable to be harassed by actions for the culpable negligence of their tenants." *Cheetham v. Hampson*, 4 D. & East. 319. See, also, *Kalis v. Shattuck*, 69 Cal. 594, 11 Pac. 346, 48 Am. Rep. 568; *White v. Montgomery*, 58 Ga. 204; *Batterman v. Finn*, 32 How. Prac. (N. Y.) 502. Since the landlord is not responsible for the negligence of the tenant, proof of that negligence could not be used to defeat his recovery for injuries to his property, and thus, if it were established that the negligence of the gas company, running concurrently with the negligence of the tenant, united to produce the injury to the property, the landlord would have his recourse against both or either for the reasons given in *Merrill v. Los Angeles G. & E. Co.*, supra. Therefore, in this case, the finding that the spark from the flash light caused the explosion, even if erroneous, or if erroneously arrived at, could not have worked injury to the defendant.

[8] It is next urged that the court erred "in taking the jury during their delibera-

tions, and without the consent of the defendant or its attorneys, pass the building which was damaged, and thereby affording said jury an opportunity of viewing said premises." The evidence upon this point discloses merely that the sheriff in charge of the jury, conducting the members to lunch, led them by an ordinary, natural, and convenient route, which happened to pass plaintiff's building. This was the only way in which the court "took the jury." The jury was not conducted past the building for the purpose of inspection. It does not even appear that they knew they were passing the building, much less that their attention was directed to it. The building itself had been repaired at the time, and the circumstance was of so trifling a character that even if the case had been criminal it would not be a ground for disturbing the verdict. Thus Wharton lays it down that a mere casual visit of the jury to the scene of the res gestæ, as where the jury when taking exercise under the custody of an officer walked by such scene is no ground for setting aside the verdict. Wharton, *Crim. Pl. & Pr.* (9th Ed.) § 834. The proposition is fully supported by authority, and, certainly, the rule would be no more rigid in a civil case than in a criminal.

The measure of damages touching loss of rents was accurately given to the jury. *Linforth v. San Francisco G. & E. Co.*, 156 Cal. 62, 103 Pac. 320.

[9] It was in evidence that it would take from 60 to 75 days to restore the building to its condition before the explosion. It was shown that the rental value of the destroyed building amounted to \$700 a month. The jury's award for loss of rents was \$1,264.75, and it was within the evidence.

[10] Mr. Rebman qualified as an expert of 22 years' experience as a contractor and builder. He testified that he "knew the building known as Nos. 114-116-118 West Second street prior to February 13, 1907, and had examined the building after the explosion." His testimony as to the cost of repairing the building and the length of time it would take to restore it, it is said, was inadmissible, in that it was not shown that he had sufficient knowledge of the character of the building before the explosion. He did, however, testify that he knew the building before the explosion and examined it afterward. Here was sufficient upon which to predicate his expert testimony, and, if defendant desired more elaborate information as to the extent of his knowledge, he should have been examined to that end.

[11] The court instructed that the plaintiff was entitled to recover such an amount as the jury might find that "he really lost in rents by reason of the premises being destroyed by the explosion during such time as it would take with reasonable diligence to repair such building." It is urged that as the building was originally two stories in height,

and that the plaintiff had rebuilt it to but one story in height, and, "as plaintiff never intended to restore the second story," it was error for the court to allow the plaintiff to recover as damages the rent lost during such time as it would take with reasonable diligence to restore it. We think respondent herein misconstrues the true meaning of the rule of damages. Plaintiff is not entitled to recover only in the event that he proposes to restore the building to its former condition. He had a two-story building with a certain rental value until it was injured through the negligence of the defendant, and he was entitled to recover his loss of rents occasioned by that negligence up to the time when he could with diligence have restored the building, whether in fact he ever restored it or not.

This answers all of the grounds urged by respondent in support of the court's order granting a new trial.

None of them, as we have undertaken to show, is tenable, and for the reasons given the order granting a new trial is reversed.

We concur: LORIGAN, J.; MELVIN, J.

159 Cal. 694

COOK v. W. S. RAY MFG. CO.
(S. F. 5,151.)

(Supreme Court of California. April 10, 1911.)

1. CORPORATIONS (§ 503*)—VENUE—PRINCIPAL PLACE OF BUSINESS.

Code Civ. Proc. § 395, provides that all actions must be tried in the county in which some of the defendants reside. Const. art. 12, § 16, provides that a corporation may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs, or in the county of the principal place of business of the corporation subject to the power of the court to change the place of trial. *Held*, that an action against a corporation may at the option of the plaintiff be commenced in any of the counties designated in the constitutional provision other than the one in which the corporation has its principal place of business, and prosecuted to final judgment where commenced, unless the corporation can show sufficient ground for a change other than its residence.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1935, 1936, 1943; Dec. Dig. § 503.*]

2. CORPORATIONS (§ 513*)—ACTION—VENUE—ALLEGATIONS OF COMPLAINT.

In an action against a domestic corporation to recover damages for breach of warranty of the quality of goods sold, an allegation in the complaint that the goods were sold and delivered by the defendant to plaintiff in S. county was sufficient to show that the venue of the action was properly laid in S. county under Const. art. 12, § 16, providing that a corporation may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 513.*]

3. CORPORATIONS (§ 503*)—ACTION—VENUE—CONSTRUCTION OF CONSTITUTIONAL PROVISION.

Const. art. 12, § 16, provides that "a corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of the corporation is situated, subject to the power of the court to change the place of trial as in other cases." *Held*, that the punctuation of this section of the Constitution does not require the construction that it allows a corporation to move for a change of the place of trial only when the action has been commenced in the county of its principal place of business.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 503.*]

4. CONSTITUTIONAL LAW (§ 249*)—EQUAL PROTECTION OF LAWS—VENUE OF ACTIONS AGAINST CORPORATIONS.

Const. art. 12, § 16, provides that a corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs, or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases. Code Civ. Proc. § 395, provides that all actions must be tried in the county in which the defendants or some of them reside. Section 392 provides that certain actions based on claims of interest in or damages to real property must be tried in the county where the land is situated. *Held*, that in view of the fact that at the time of the adoption of the Constitution all the corporations of the state had designated the city of San Francisco as their principal place of business, and that to have compelled litigants to commence and prosecute their actions against corporations in San Francisco would have subjected them to ruinous expense, a reasonable basis existed for a distinction, in respect to actions of a transitory nature between corporations and natural persons, though such basis might not have existed in respect to real actions as provided for in section 392, and hence the state constitutional provision is not violative of the fourteenth amendment of the federal Constitution as denying to corporations the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 710; Dec. Dig. § 249.*]

In Bank. Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

Action by Fred R. Cook against the W. S. Ray Manufacturing Company. From a judgment for plaintiff, defendant appeals. Affirmed.

L. A. Redman (Jewel Alexander, of counsel), for appellant. Will M. Beggs and R. C. McComish, for respondent. Page, McCutchen & Knight, amici curiæ.

BEATTY, C. J. The defendant in this action is a California corporation, having its principal place of business in the city and county of San Francisco. The action was commenced in the county of Santa Clara to recover damages for breach of warranty of the quality and fitness of certain galvanized

sheet iron which it was alleged was sold and delivered by the defendant to the plaintiff in said county of Santa Clara. The defendant demurred to the complaint, and at the same time filed its demand, affidavits, and motion for an order changing the place of trial to said city and county of San Francisco, "where said defendant resides and has its principal place of business." This is an appeal from the order denying that motion, and involves a consideration of our constitutional and code provisions relating to the place of trial of those civil actions, in which our domestic corporations are defendants.

[1] By section 395 of the Code of Civil Procedure it is provided that all actions (with certain exceptions, among which the present does not fall) must be tried in the county in which the defendants or some of them reside. It has been frequently held in this state that a corporation resides at its principal place of business, and, if the rights of the parties depended upon the statute alone, the order denying the motion of defendant could not be upheld. But by section 16 of article 12 of the Constitution it is provided that: "Sec. 16. A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." And this has been held to mean, not merely that an action against a corporation may, at the option of the plaintiff, be commenced in one of the designated counties other than the one in which the defendant has its principal place of business, but that it may be prosecuted to final judgment where commenced, unless the defendant can allege and show some sufficient ground for a change of the place of trial distinct from the fact that the residence of the corporation is in another county. *Trezevant v. Strong & Co.*, 102 Cal. 49, 36 Pac. 395; *Miller & Lux v. Kern County Land Co.*, 134 Cal. 589, 66 Pac. 856. So far as the construction of the Constitution and statutes of California is concerned, the doctrine of these cases has never been questioned, except possibly in *Grocers' Union v. Kern County Land Co.*, 150 Cal. 466, 89 Pac. 120, but it is here contended that the constitutional provision above quoted, as construed by this court, excludes our domestic corporations from the benefit of a statutory right conferred upon all natural persons resident of the state, and is for that reason violative of the fourteenth amendment of the Constitution of the United States, and whether this is so or not is the sole question to be decided.

[2] It is true that the appellant urges the objection that the complaint does not show that the breach of contract alleged there-

in occurred in Santa Clara county, but we have no doubt that it does.

[3] It is also contended by the respondent that the punctuation of section 16, article 12, of the Constitution, requires a construction which would allow a corporation to move for a change of the place of trial only when the action has been commenced in the county of its principal place of business. We do not consider this the proper construction of the section, and do not see how such construction would aid the disposition of the present appeal. If the main feature of said section as construed in the cases above cited is violative of the fourteenth amendment of the federal Constitution, no construction of its final clause could save it, and, if it is not violative of the fourteenth amendment, the construction contended for is of no consequence in this case.

[4] Aside from these minor questions, thus briefly considered, all that we have to decide in this case is, as above stated, whether section 16 of article 12 of the Constitution of California, as heretofore construed, is in its application to transitory actions, such as this, violative of a right secured to our domestic corporations by the fourteenth amendment to the federal Constitution. To sustain its contention on this point the appellant relies principally upon the decision of this court in the case of *Grocers' Union v. Kern County Land Co.*, 150 Cal. 466, 89 Pac. 120. That case does clearly overrule our unanimous decision in *Miller & Lux v. Kern County Land Company*, as the case was presented on the first appeal. 134 Cal. 586, 66 Pac. 856. It is perhaps not in conflict with the point actually decided on the second appeal of the *Miller & Lux* case, though the correctness of the first decision was there assumed. In neither of those cases, however, was the point suggested or considered, upon which the decision in the *Grocers' Union* Case turned, and upon which the appellant here claims a reversal of the order denying its motion for a change of the place of trial. In that case for the first time we were asked to consider the bearing of our code provisions as to venue upon section 16, article 12, of our Constitution, as affected by the fourteenth amendment, and it was there decided, in effect, that our Legislature by section 392 of the Code of Civil Procedure has declared it to be the permanent policy of the state that certain actions based on claims of interest in or damages to, real property, must be tried in the county where the land is situate; that the right conferred upon landowners by this provision is a substantial and valuable privilege; that there is no imaginable reason why corporations owning lands within the state should be denied a right common to all other landowners, and, therefore, that the effect of such denial is to deprive them of the equal protection of the laws, contrary to the inhibition of the fourteenth amendment.

It is here contended that by section 395 of the Code of Civil Procedure it is declared to be the permanent policy of the state that in a large class of actions, including the present case, the trial must be in the county where the defendant or some of the defendants reside, that the privilege is a valuable one, and that there is no reason for excluding our domestic corporations from its advantages. If there is a flaw in this reasoning, it consists in ignoring the essential difference between real and quasi real actions, and those personal actions covered by the terms of section 16, article 12, of the Constitution—the class of actions which the debates in the constitutional convention prove that the members had in mind when considering and adopting said section. It was notorious at that time that nearly all of the California corporations had designated San Francisco as their principal place of business, and that while they had offices in San Francisco where their books and accounts were kept, their stocks transferred, and their directors' meetings held, they were operating mines and factories, and making contracts to be performed in distant parts of the state; that the nature of their business must necessarily involve them in frequent litigation arising out of torts and breaches of contract; that, if all such cases must be tried in San Francisco, the business of the local courts would be congested; that there would be unreasonable and unnecessary delay in bringing contested cases to trial, and the complaining parties often subjected to ruinous expense in prosecuting their claims. These considerations, none of which affect the class of cases provided for in section 392 of the Code of Civil Procedure, were deemed by the framers of our Constitution sufficiently important to justify the discrimination which they made between corporations and natural persons as to the venue of personal actions, and so it seems to us, at least so far as it affects actions for breaches of contracts, damages for personal injuries, and the like. And here lies the distinction between this case and *Grocers' Union v. Kern County Land Co.* In that case it was found that there was no conceivable reason for any discrimination between corporations and natural persons as to the privilege of being sued only in the county where the land affected was situate. Here it appears that there were at the time our Constitution was adopted weighty considerations justifying the discrimination as to actions arising out of breach of contract. The same conditions which prevailed at that time still continue, though modified to some extent by the fact that other places outside of San Francisco are now the principal places of business of many large corporations formed since the adoption of the Constitution, which, however, may be held to have accepted as one of the

conditions of their corporate existence the particular provision of our Constitution here in question. "If the views above stated are correct, this case is governed by the principle affirmed in *Cincinnati St. Railway Co. v. Snell*, 193 U. S. 30, 24 Sup. Ct. 319, 48 L. Ed. 604—the principle, that is to say, that the fourteenth amendment safeguards only fundamental rights, and not the mere form which the state may deem proper for their enforcement. That was a case involving a discrimination made by a statute of the state of Ohio between corporations and natural persons as to the venue of personal actions, and the statute was upheld by the Supreme Court of the United States without any dissenting opinion."

The order of the superior court is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

(159 Cal. 494)

SIMONEAU v. PACIFIC ELECTRIC RY. CO. (L. A. 2,213.)

(Supreme Court of California. March 13, 1911.)

1. RAILROADS (§ 317*)—RATE OF SPEED AT CROSSING — ORDINANCES — CONSTRUCTION — TRACKS—"STREET RAILWAY."

An ordinance required cars operated over street railway tracks to be equipped with fenders, and prohibited running cars upon any street railway track, upon or over any street crossing within a certain district of a city, at a greater speed than four miles an hour, and over street crossings outside of such district, but within the city, at more than eight miles an hour. An accident occurred within the city limits at a street intersection, where for a considerable distance in either direction the track was laid on a private right of way which was fenced. The track was laid with customary railroad T-rails above the ground, except that at crossings the rails were flush with the ground, and the intersections were open, but protected with cattle guards, and had signs "Look out for the cars." The track was used by both interurban and local cars. Deceased was struck by a local car running for the greater part of its course over the city streets, and, after leaving the streets, over the defendant's private right of way to the city limits, and stopping at street crossings on signal. Held, that the crossing was not within the ordinance prohibiting a greater speed than eight miles an hour, as the applicability thereof does not depend upon the nature of the car, but upon the nature of the track, and such track at such place was not a street railway track.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1009-1012; Dec. Dig. § 317.*]

2. STREET RAILROADS (§ 2*)—WHAT CONSTITUTES "STREET RAILWAY."

A "street railway" is defined as "a railroad constructed upon the surface of the public street in towns or cities; a tramway," and "a railroad on the surface of the streets for the convenience of passengers; a surface railroad, as in a city," and "is one constructed and operated on and along the streets of a city or town, or to and from its suburbs."

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 2-4; Dec. Dig. § 2.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6693-6696.]

3. STREET RAILROADS (§ 2*)—WHAT CONSTITUTES STREET RAILROAD—MOTIVE POWER.

Whether a railway is a street railway does not depend solely upon the motive power, but other features are to be considered, as the location and method of construction of the track, the manner of the operation of the cars, and the general purpose of the enterprise.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 2-4; Dec. Dig. § 2.*]

4. STREET RAILROADS (§ 2*)—WHAT CONSTITUTES STREET RAILROAD—MOTIVE POWER—ORDINANCES.

An essential element of a street railway in the ordinary acceptance of the expression is that the road should run along and upon a street or road in such manner as not to exclude the public from such street or road as a public highway, and, where a track was laid along a private right of way in such a manner as to exclude the general public from the use of any part of the strip, it was not a street railway track, nor would the fact that the rails were laid flush with the surface at a street crossing so that vehicles and passengers might cross convert the track at such point into a street car track.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 2-4; Dec. Dig. § 2.*]

5. PLEADING (§ 124*)—TRAVERSE.

Where a complaint alleged that the defendant was operating a line of street cars upon various streets and thoroughfares of a city, and particularly along a certain avenue crossing certain intersecting streets, and set forth an ordinance, and that defendant negligently and wantonly caused its car to be run at a greater speed than the ordinance allowed, and the answer did not deny ownership, but alleged that the car which collided with plaintiff's decedent was being operated upon a private right of way of the defendant running over a street to the suburb, that said line was a part of an interurban railway system, and that said street crossed a railway track at its private right of way, and was not a street crossing within the meaning of the ordinance, while not denying that the car was being operated upon a street railway track, clearly evidenced an intent to set up facts showing the inapplicability of the ordinance, and was good for that purpose.

[Ed. Note.—For other cases, Pleading, Cent. Dig. § 256; Dec. Dig. § 124.*]

6. PLEADING (§ 120*)—TRAVERSE.

It is not necessary, in order to raise an issue, that a denial be made in the precise words of the averment sought to be controverted, but any averment in an answer which, if found to be true, necessarily shows that the allegation of the complaint as to the same matter is untrue, is a good traverse, and sufficient as a denial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 244, 253, 254, 257, 258; Dec. Dig. § 120.*]

7. RAILROADS (§ 344*)—INJURIES AT CROSSINGS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Where a complaint alleged that a motorman on approaching a crossing gave a signal indicating that the car would stop, but failed to do so, the question of the signal has a double bearing, as showing negligence on the part of the motorman in failing to slow down, and as overcoming the inference that deceased was guilty of contributory negligence in attempting to cross. Hence, if the custom of so signaling were shown, it could be considered in both aspects.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 344.*]

8. DEATH (§ 69*)—ACTION—DAMAGES—EVIDENCE.

In an action against a street railroad company for negligence in running over and killing a man, testimony of the widow that one of their children, a little girl, was crippled in the right arm, and had been under the surgeon's care for a number of months, and that another little girl had a shoulder blade turned around, and had been doctoring for a good many years, and was still under the doctor's care, was admissible on the question of damages.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 86, 87; Dec. Dig. § 69.*]

9. DEATH (§ 86*)—ACTION—DAMAGES.

Under Code Civ. Proc. § 377, providing that, when the death of a person is caused by the wrongful act or neglect of another, either his heirs or personal representatives may maintain an action for damages, and that such damages may be given as under all the circumstances may be just, the jury is authorized to take into consideration the pecuniary injury resulting to those who were most nearly related to the deceased, and who in the ordinary course of human affairs would probably have been the most benefited by his labor if he had lived.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 114, 119; Dec. Dig. § 86.*]

10. DEATH (§ 81*)—ACTION—DAMAGES—LOSS OF SOCIETY, ETC.

While solace for wounded feelings may not be included in damages awarded, the loss of society, comfort, and care to a wife and children, as well as their support, may be considered in so far as they affect the question of pecuniary loss to them by the death of the husband and father.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 81.*]

11. DEATH (§ 86*)—ACTION—DAMAGES—PECUNIARY LOSS.

The pecuniary loss suffered by the heirs of a person killed by reason of his death may be either a loss arising from the deprivation of something to which such heirs would have been legally entitled if the person had lived, or a loss arising from a deprivation of benefits which, from all the circumstances of the particular case, it could be reasonably expected such heirs would have received from the deceased had his life not been taken, although the obligation resting on him to bestow such benefits may have been a moral obligation only.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 114-119; Dec. Dig. § 86.*]

12. PARENT AND CHILD (§ 3*)—SUPPORT OF CHILD—PARENT'S DUTY—MEDICAL ATTENTION.

A father is bound to supply proper medical attention to his children.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 33-36; Dec. Dig. § 3.*]

13. TRIAL (§ 54*)—DAMAGES—EVIDENCE—ADMISSIBILITY.

In an action for the death of the father, evidence offered on the question of damages as to the crippled condition of his children is not inadmissible merely because of its tendency to excite the sympathies of the jury, as that may be guarded against by instructions that the evidence can only be considered as bearing on the question of the pecuniary loss.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 126-128; Dec. Dig. § 54.*]

14. DEATH (§ 32*)—ACTION FOR—DAMAGES—THEORY.

Code Civ. Proc. § 377, provides that, where the death of an adult is caused by the wrongful act of another, his heirs or personal representatives may sue for damages against the per-

son causing the same, or, if such person be an employé, against his employer also, if responsible for his conduct, and that such damages may be given as under the circumstances are just. *Held*, that the statute is framed to give the damages to the family of deceased as a family, and does not contemplate a division of the award into proportional parts, the various heirs taking not as heirs or by succession, but as beneficiaries of the statute, and that, while only one action will lie, recovery can be had in it for the damages sustained by each person included in the term "heirs."

[Ed. Note.—For other cases, see Death, Cent. Dig. § 47; Dec. Dig. § 32.*]

In Bank. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Richard F. Simoneau, administrator of the estate of William Alexander Campbell, deceased, against the Pacific Electric Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Gibson, Trask, Dunn & Crutcher and Norman S. Sterry (John H. Lathrop, of counsel), for appellant. Ernest E. Wood, for respondent.

SLOSS, J. Action by the administrator of the estate of William Alexander Campbell to recover damages for injuries causing the death of his intestate. The plaintiff recovered a verdict and judgment in the sum of \$7,000. The defendant appeals from an order denying its motion for a new trial.

Campbell's injuries were received while he was trying to cross the track of the defendant corporation at a point where said track intersects Thirty-Eighth street in the city of Los Angeles. The complaint alleges negligence on the part of the defendant in a number of particulars, of which we need mention only the following: It is averred that the agents of the defendant in charge of its car were negligently and wantonly operating the said car at a rate of speed greatly in excess of eight miles an hour and at a rate of more than twenty miles an hour; that they "sounded a whistle twice just prior to the time of reaching the said crossing as an indication that the car would slow down and stop at said crossing, and then, on the contrary, negligently failed to cause the said car to slow down pursuant to said signal and thereby misled the said Campbell as to the rate of speed at which the said car would approach the said crossing;" and that the defendant negligently failed to equip its car with a life-saving fender. In addition to the general allegations of negligence in respect of excessive speed and the failure to equip the car with a fender, the plaintiff set up the terms of an ordinance of the city of Los Angeles limiting, as he claimed, the rate of speed at the place of the accident to eight miles an hour and requiring at such place the use of a fender. We shall have occasion to refer to this ordinance more in detail

hereafter. The answer, in addition to denying or undertaking to deny the various averments of negligence on the part of the defendant, alleged that Campbell's injuries were due to contributory negligence on his part.

The jury returned a general verdict, and also returned answers as follows to interrogatories submitted by the court:

"Interrogatory No. 1. If you find that the deceased came to his death by reason of the negligence of the defendant, did that negligence consist in the running of the car at an excessive rate of speed or a lack of fenders on the car? Answer. Excessive speed.

"Interrogatory No. 2. Was the deceased guilty of contributory negligence or did he act with ordinary care and prudence? Answer. First clause, No. Second clause, Yes."

The case was submitted to the jury under instructions based on the theory that the ordinance of the city of Los Angeles limiting the rate of speed of cars and requiring the use of fenders applied to the place where the accident occurred. The jury were accordingly instructed that if Campbell, while in the exercise of ordinary care for his own safety, was struck and killed by a car operated by the defendant, the plaintiff was entitled to a verdict if the car was being operated at a rate of speed in excess of eight miles an hour, and if Campbell's death was caused by this excessive rate of speed. The court further instructed the jury that the failure to provide a fender, if such failure was the cause of Campbell's death, entitled the plaintiff to a verdict under like conditions.

The defendant contends that under the undisputed evidence concerning the location and nature of the track upon which the car was operated the ordinance had no application with reference either to the rate of speed or the use of a fender. The jury seems by its answer to special interrogatory No. 1 to have based its verdict upon the first ground, and it will be sufficient in discussing the point to consider the question of speed alone. The ordinance in question is numbered 12,829, and is entitled, "An ordinance requiring cars operated over street railway tracks to be equipped with fenders therein described, and regulating the operation of cars on street railway tracks in the city of Los Angeles." Section 1 provides for the use of a fender. Section 2 reads as follows: "That from and after the passage of this ordinance it shall be unlawful for any person, firm or corporation to run or operate, or cause to be run or operated, any street car, or any car, upon any street railway track, upon or over any street crossing or intersection within the following district in the city of Los Angeles at a greater speed than four miles an hour, or upon or over any

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

street crossing or intersection outside of said district, but within the city of Los Angeles, at a greater speed than eight miles an hour. * * * The ordinance then describes a district within which the four-mile limit shall apply, said district not including the place where the accident in question occurred.

It appears by the undisputed evidence that the place where the accident occurred was within the limits of the city of Los Angeles and on the defendant's line of track running from Los Angeles to Long Beach. This line, after running in part over the streets of Los Angeles, entered upon a strip of land running north and south and held and owned by the defendant as a private right of way. This strip was intersected at a right angle by Thirty-Eighth street. For a considerable distance in either direction from the crossing of Thirty-Eighth street, exceeding a mile to the north of such crossing, this right of way was fenced in. Except where Thirty-Eighth street and other streets crossed the line of road, the track was laid with T-rails upon ties above the level of the ground in the manner customary in the construction of steam roads. Thirty-Eighth street was a paved street, and where it crossed the line of railroad was built up flush with the top of the rails. The fence inclosing the right of way had openings at Thirty-Eighth street, but the crossing was protected by cattle guards as steam railroads usually are. At said point the defendant maintained a railroad crossing sign bearing the words "Look out for the cars." The track was used by both the interurban cars running between Los Angeles and Long Beach and by some local cars. The car which struck Campbell was a car running for the greater part of its course over the city streets and, after leaving the streets, over the private right of way to the then city limits. It was operated as a local car stopping on signal to take and discharge passengers. At the time of the accident it was south-bound.

Under these circumstances, was the point where Thirty-Eighth street crossed the track one of the places at which, under a fair construction of the ordinance, a speed in excess of eight miles an hour was prohibited? The ordinance makes it unlawful to operate "any street car or any car upon any street railway track upon or over any street crossing or intersection" at a greater speed than that specified. It will be observed that the applicability of the ordinance does not depend upon the nature of the car which is being operated. The running of any car, whether street car, or other, is within the terms of the prohibition. But, in order to come within the ordinance, the car must be operated "upon a street railway track upon or over any street crossing or intersection." The question, then, is whether such track as the one above described is a street railway

track. Upon a consideration of the usual meaning of the words, as well as the uniform current of authority, this question must be answered in the negative.

A street railway is defined in the Century dictionary as "a railroad constructed upon the surface of the public street in towns or cities; a tramway"; in the Standard dictionary as "a railroad on the surface of the streets, for the convenience of passengers; a surface railroad, as in a city." Our own court in *Board of Railroad Com'rs v. Market St. Ry.*, 132 Cal. at page 683, 64 Pac. 1067, quoting with approval the case of *Bloxham v. Consumers', etc., Co.*, 36 Fla. 539, 18 South. 444, 29 L. R. A. 507, 51 Am. St. Rep. 44, uses this language: "The term 'street railroad' applies only to such roads, the rails of which are laid to conform to the grade and surface of the street, and which is otherwise constructed so that the public are not excluded from the street as a public highway, which runs at a moderate rate of speed, compared with commercial railroads, which carries no freight, but only passengers from one part of a thickly populated district to another, in a town or city and its suburbs." In *Hannah v. Met. St. R. Co.*, 81 Mo. App. 79, the court says: "A 'street railway' has been variously defined. As the name indicates, the primary meaning of 'street railway,' or 'street railroad,' is one constructed and operated on and along the streets of a city or town for the carriage of persons from one point to another in such city or town or to and from its suburbs." Similar expressions are to be found in many cases. *Philadelphia v. McManes*, 175 Pa. 28, 33, 34 Atl. 331; *Nichols v. Ann Arbor & Y. St. R. Co.*, 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371; *Massachusetts Loan & Trust Co. v. Hamilton*, 88 Fed. 588, 32 C. C. A. 46; *Diebold v. Traction Co.*, 117 Ky. 146, 77 S. W. 674, 63 L. R. A. 637, 111 Am. St. Rep. 230, 25 Ky. Law Rep. 1275; *Freiday v. Sioux City, etc., Co.*, 92 Iowa, 191, 60 N. W. 656, 26 L. R. A. 246; *T. & H. Elec. Co. v. Simon*, 20 Or. 60, 25 Pac. 147, 10 L. R. A. 251, 23 Am. St. Rep. 86; *South & N. A. R. Co. v. Highland Ave. & B. R. Co.*, 119 Ala. 105, 24 South. 114.

Whether or not a railway is a street railway does not depend on the motive power. *Nichols v. A. A. & Y. S. R. Co.*, supra; *McNab v. United Ry., etc., Co.*, 94 Md. 719, 51 Atl. 421. Various features are to be considered. Among those are the location and method of construction of the track, the manner of the operation of the cars, and the general purpose of the enterprise. Here, however, we are confronted by a somewhat narrower question. The ordinance speaks, not of the operation of street railways, but of cars upon street railway tracks. It would seem clear that in the definition of this term the location and manner of construction are most important factors. The decisions above cited, and particularly that of this court in *Board of R. R. Com'rs v. Market St. Ry.*

Co., supra, indicate that an essential element of a street railway in the ordinary acceptance of the phrase is that the road should run along and upon a street or road in such manner as not to exclude the public from the use of such street or road as a public highway. Applying this test, there can be no doubt that the track of the defendant, in so far as it was laid along its private right of way in such manner as to exclude the general public from the use of any part of the strip, was not a street railway track.

The respondent draws attention to the fact that for the width of Thirty-Eighth street the track was laid flush with the surface so that passengers and vehicles might cross on the street. It cannot be said that this part of the track was thereby converted into a street railway track. A street railway, as we have seen, is one running along a public street, not across one. To adopt the contention of the respondent in this regard would mean that the track of every commercial or steam railroad which in entering the city of Los Angeles crossed any street became to the extent of the width of such street a street railway track. This is obviously not the intent of the ordinance.

We have already expressed the opinion that, giving to the words used their ordinary meaning, the language of the ordinance requires that its applicability be made to depend upon the nature and location of the track, rather than upon the character of the particular car that is running upon the track. And, apart from any consideration of mere definition of words, we think the ordinance is given a more reasonable effect by this interpretation. If it were to be held that for the purposes of this particular case the track in question was a street railroad track because the car that hit Campbell was a local or street car, the logical result would be that a car operated as a through passenger or freight car over the same track would not be required to observe the limits of speed. It would follow, too, that such through car when running on city streets over tracks which are ordinarily classed as street railway tracks would be free from such limitations. So read, the ordinance would afford very little protection to the public. The ordinance should be construed so as to require both interurban and local cars to be equipped with fenders and to limit their speed when running over street crossings upon those portions of the tracks which are laid upon public streets in the manner which has been described as pertaining to street railways, but to exclude them from the effect of the ordinance when they are being operated upon tracks of the character here described.

From these views, it follows that the court was in error in giving the instructions above referred to. The same reasoning requires the conclusion that defendant's requested instruction No. 4, to the effect that the ordi-

nance limiting speed was not applicable, should have been given. The appellant also urges that it was error to admit the ordinance in evidence. It may be that this ruling could be defended on the ground that the character of the track could not be definitely known until the evidence was all in. The introduction of the ordinance in advance of proof of the character of the track would be a matter going merely to the order of proof, and would in itself be unimportant if on proof of the facts, as shown by this record, the court had instructed the jury that the ordinance was not to be considered.

It is contended by the respondent that the pleadings fail to raise an issue as to the applicability of the ordinance. We think this contention is based on too narrow a consideration of the averments and denials. The complaint alleges that the defendant was operating a line of street cars upon various streets and thoroughfares of the city of Los Angeles, and particularly along Long Beach avenue in said city, and past the intersection of Long Beach avenue with Thirty-Eighth street of the city of Los Angeles. It then alleges the substance of the ordinance, and declares that the defendant negligently and wantonly caused its car to be run at a greater speed than eight miles an hour. The answer does not deny that the defendant was the owner of a line of street cars operated as stated, but alleges that the car with which Campbell collided was being operated upon a private right of way of the defendant running from the city of Los Angeles to the city of Long Beach; that said line was a part of the interurban railway system, and that the said street, to wit, Thirty-Eighth street, crossed the said railway track at its private right of way, and was not a street crossing or intersection within the meaning of the said ordinance set out in the complaint.

If it be said that the answer does not deny that the car was being operated upon a street railway track, it is to be observed that the fact of such operation is not, in express terms, averred in the complaint. But, beyond this, the answer does clearly evidence an intent on the part of the pleader to set up facts showing the inapplicability of the ordinance, and we think succeeds in effecting this purpose. It is not necessary, in order to raise an issue, that a denial be made in the precise words of the averment sought to be controverted. "Any allegation in an answer which, if found to be true, necessarily shows that the allegation of the complaint as to the same matter is untrue, is a good traverse, and sufficient as a denial." *Burris v. People's Ditch Co.*, 104 Cal. 248, 253, 37 Pac. 922; *Perkins v. Brock*, 80 Cal. 320, 22 Pac. 194; *Stetson v. Briggs*, 114 Cal. 511, 46 Pac. 603.

The errors committed with reference to the ordinance necessitate a reversal. The case seems to have been submitted to the jury

without regard to any averment of negligence other than those arising from the ordinance. Upon a new trial, the plaintiff will, of course, be entitled to offer evidence in support of each specification of negligence pleaded, including the claim that, irrespective of any legislative limitation, the defendant's car was operated at a speed in excess of that which would be permitted in the exercise of due care. A discussion of some further points may be useful as a guide for rulings upon a new trial.

The complaint alleges as an element of negligence that the motorman on approaching Thirty-Eighth street gave a signal (two whistles) as an indication that the car would stop. The answer to this allegation is not so direct as it might have been. If the point were of vital importance, we should be inclined to think the denial sufficient to raise an issue on the question whether the blowing of two whistles was intended and ordinarily understood to give notice of an intention to stop. But, since there is to be a new trial, this need not be decided. The defendant on a proper showing may be granted leave to amend its answer.

The question of this signal of two whistles has a double bearing. It is counted on by plaintiff as establishing negligence on the part of the defendant in failing to slow down or stop after indicating an intent so to do, and is further urged as tending to overcome the inference—otherwise perhaps irresistible under the facts shown in the record—that Campbell had been guilty of contributory negligence. We think that, if the custom or practice of so signaling were shown, it would be legitimate matter to be considered in both aspects. That failure to follow the announced signal would tend to show negligence on the part of the motorman is not disputed. And on the issue of contributory negligence the evidence might conceivably be such as to authorize the jury to infer that the signal constituted an invitation to approach the track in the belief that the car was about to stop at Thirty-Eighth street. But these issues of negligence on the part of the defendant and of Campbell must be determined in the light of the evidence that may be introduced on a new trial. Such evidence may vary materially from that contained in the present record. There is therefore no occasion for us to attempt to say whether in the trial already had there was sufficient evidence to justify the submission to the jury of the questions whether the signal had the meaning alleged in the complaint, and whether the conduct of the decedent was free from such negligence as to bar the action.

One further suggestion may be made regarding the issue of contributory negligence. In view of what we have said in discussing the applicability of the ordinance, it seems clear that the track at the point where Campbell undertook to cross partook more of the

nature of a steam railroad than of a street railroad track. The language of the District Court of Appeal in *Heitman v. Pac. Elec. R. Co.*, 10 Cal. App. 397, 402, 102 Pac. 15, 17, is in point: "Without assuming to hold that in all cases and under all conditions the crossing of an interurban electric railway is to be governed by the same rules as those applied to steam railways, we nevertheless feel that the rule of precaution laid down in *Herbert v. Southern Pac. Co.*, 121 Cal. 227, 230 [53 Pac. 651], is applicable here." Instructions 14, 17, 18, and 19, given by the court at the request of the defendant, embodied these views, and stated them as favorably to the defendant as it has a right to demand. This appeal was first heard by the District Court of Appeal for the Second Appellate district, which, after filing an opinion for affirmance of the order, granted a rehearing. On the rehearing, the justices were unable to agree. The original opinion considered, among other things, a point made by appellant with regard to the admission of testimony bearing on the amount of damage. We approve, and adopt that court's statement and discussion of the point, as follows:

"The wife of the deceased was permitted, against the objection of defendant, to testify that one of the children of herself and the deceased, a little girl, was crippled in the right arm and had been under the surgeon's care for seven or eight months; and that another little girl had a shoulder blade turned around, that it was so from birth, and that she had been doctored for a 'good many years' and was still under the doctor's care. We are of the opinion that this evidence was admissible. The courts have not attempted to declare any general rules to be applied in determining the evidence which may be considered by the jury in ascertaining what damages are just in an action of this kind. Even in reviewing the conclusions of the jury in view of the circumstances of the special cases under consideration (section 377, Code Civ. Proc.), it has been found to be impracticable to designate the particular elements of the loss for which damages may be awarded in such an action. Following the English court's declaration of the purpose of Lord Campbell's act, after which our statute is patterned, our own Supreme Court has said the action under section 377 of the Code of Civil Procedure is intended 'for compensating the families of persons killed, not for the solacing of their wounded feelings.' *Munro v. Dredging Co.*, 84 Cal. 515, 523 [24 Pac. 303, 18 Am. St. Rep. 248]. Of the statute of 1862, which preceded the Code provision, it was said: 'The statute intends the recovery to be a humane provision for those who have lost their natural protector, through the negligence of another.' * * * 'The jury is authorized to take into consideration the pecuniary injury resulting to those who were most nearly related to the deceased, and who in the ordinary course of

human affairs would probably have been the most benefited by his future labors if he had lived.' *Taylor v. Western P. Co.*, 45 Cal. 323, 333. While solace for wounded feelings may not be included in the damages awarded, the loss of society, comfort, and care to a wife and children, as well as their support, may be considered in so far as they affect the question of pecuniary loss to them by the death of the husband and father. *Beeson v. Green Mountain Co.*, 57 Cal. 20, 38; *Green v. Southern Pac. Co.*, 122 Cal. 563 [55 Pac. 577]. And so it was held proper for a trial court to instruct the jury that the value of the services of a mother to her children in their nurture and instruction, and in their moral, physical, and intellectual training, might be considered in estimating the damage to them by her death, and that the value thereof was not to be determined by the value of such services as rendered by a hired servant, but should be ascertained in the light of the ability and willingness of the mother to perform such services, and also that the pecuniary interest of the children in such services did not of necessity terminate with their arrival at the age of majority. *Redfield v. Oakland Co.*, 110 Cal. 277, 288 [42 Pac. 822, 1063]. The pecuniary loss suffered by the 'heirs' of a person killed, by reason of his death, 'may be either a loss arising from the deprivation of something to which such heirs would have been legally entitled if the person had lived, or a loss arising from a deprivation of benefits which, from all the circumstances of the particular case, it could be reasonably expected such heirs would have received from the deceased had his life not been taken, although the obligation resting on him to bestow such benefits on them may have been a moral obligation only,' says Shaw, J., in *Sneed v. Marysville Gas Co.*, 149 Cal. 704, 710 [87 Pac. 376, page 378]. If the latter class does not include them, the benefits which might be expected from the kindly relations of the parties and the peculiar disposition of the deceased towards his family may be added to the foregoing (*Cook v. Clay St. Co.*, 60 Cal. 604), and as affecting these questions evidence of the ill health and invalid condition of the wife have been held to be properly admitted. *Evarts v. Santa Barbara, etc., Ry. Co.*, 3 Cal. App. 712, 715 [86 Pac. 830].

"Much of this kind of evidence so admitted is open to the objection urged by appellant, and which was sustained in the cases of *Green v. Southern Pacific Co.*, 122 Cal. 563 [55 Pac. 577], and *Mahoney v. S. F. Ry. Co.*, 110 Cal. 471 [42 Pac. 968, 43 Pac. 518], to wit, that it tends to create a sympathy for, or prejudice in favor of, the plaintiffs, but in those cases it was said that the testimony there under consideration could have been offered for no other purpose. The evidence before us cannot be so limited in its effect. The testimony introduced in those cases tended to show only that the children of the

deceased (plaintiffs) had no means of their own. Had it been shown in addition to this that the children were unable to maintain themselves by work, a different question might have arisen. Section 206, Civ. Code. The obligation of support under this section is held to be cast upon the father of an invalid daughter, although over 18 years of age, and the wife who is awarded the custody of such invalid in a divorce proceeding is entitled to an allowance for her maintenance. *Anderson v. Anderson*, 124 Cal. 48, 54 [56 Pac. 630, 57 Pac. 81, 71 Am. St. Rep. 17]. Among the necessities which a father is called upon to supply to his children none is more clearly recognized than proper medical attention. While to the well child, food, clothing, and education, according to the parent's circumstances, are sufficient, if the child be either a temporary or permanent invalid, additional care may be required. Whether or not this shall constitute one of the elements of loss to the family of the deceased must be determined by the facts of the case under consideration. If it be urged that the ordinary support of the normal child might be considered by the jury from their own observations, there could be no such standard for sick or crippled children, as the case of each must be determined by evidence as to his or her condition. If a defendant fears the effect considered in the *Mahoney* and *Green* Cases where evidence otherwise competent is admitted, this may be provided against by instructing the jury as to such evidence, in the same manner as is done in respect to that relating to the loss of society, that it can only be considered as an element of pecuniary loss. We are unable to see upon what ground the evidence here under consideration could have been excluded.

"The statutes of some of the other states from which cases have been cited are so unlike our own that these are of little aid. Thus the statutes of the state of Illinois made the 'wife and next of kin' the beneficiaries in such an action, and the damages recovered are distributed among them in the same proportion as personal property of a deceased intestate is distributed under the statute for distribution in estates. Following this, it is held: 'The amount to be recovered is what the statute regards as the pecuniary value of the addition to such estate left as the deceased, in reasonable probability, would have made to it, and left, if his death had not been so wrongfully caused.' *Chicago v. Woolridge* [174 Ill. 330] 51 N. E. 701, 702. Under such a theory of the action, it is apparent that the wage-earning and accumulating capacity of the deceased would be the sole question of inquiry, and that cases decided in such a jurisdiction are so out of harmony, both with our statutes and decisions, they can be given little weight in our consideration. It seems unnecessary to distinguish the cases cited by appellant from

Illinois and other states in which similar statutory provisions obtain. It has been expressly held in this state that the wage-earning capacity of the deceased was not the measure of damages. *Skelton v. Pacific Lumber Co.*, 140 Cal. 507, 512 [74 Pac. 13]. So, also, an instruction in effect directing the jury to consider and ascertain the losses of father and children respectively by the death of the mother as distinct elements in the lump sum of damages awarded was held proper in such a case. *Johnson v. S. P. Co.* [154 Cal. 285] 97 Pac. 520, 526.

"While there can be but one action, and the recovery to which all persons included in the term 'heirs' are entitled must be had therein or be deemed to be waived (*Daubert v. Western Meat Co.*, 139 Cal. 480 [69 Pac. 297, 73 Pac. 244, 96 Am. St. Rep. 154]), the loss of each and all must be considered. The statute does not provide for a distribution among the members of the family who take as the beneficiaries of the statute. There was such a provision in the statute of 1862, but it was not incorporated in the Code, thus indicating an intention to restore the action to what it was originally intended to be, a means of providing for the family and each member thereof that which each could have expected to receive in the way of comfort and support from the lost father had he lived and kept the family together, bestowing upon each such portion of his earnings as he or she were entitled to or required. It is not intended that the amount recovered shall be divided into integral or proportional parts. The persons entitled do not take as heirs or by succession, but as beneficiaries of the statute; 'the statute being framed upon the theory that the heirs will always constitute the family of the deceased.' For this reason, it was held that collateral kindred who may come technically within the meaning of the word 'heirs,' used in section 377, can only recover by alleging and showing some special damage. *Burk v. Arcata*, 125 Cal. 364 [57 Pac. 1065, 73 Am. St. Rep. 52]."

The order denying a new trial is reversed.

We concur: SHAW, J.; ANGELLOTTI, J.; MELVIN, J.; HENSHAW, J.

15 Cal. App. 543

PECK v. PETERSON. (Civ. 852.)

(District Court of Appeal, First District, California. March 6, 1911.)

1. LANDLORD AND TENANT (§ 167*)—WRONGFUL ACT OF TENANT—LIABILITY OF LANDLORD.

A landlord is not liable for injuries to adjacent land by the diversion of surface water by the tenant by plowing without the landlord's direction or control.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 678; Dec. Dig. § 167.*]

2. APPEAL AND ERROR (§ 1071*)—HARMLESS ERROR—FINDINGS.

A finding in a suit to enjoin defendant from wrongfully diverting surface water on plaintiff's land that a natural water course ran from defendant's land which naturally carried the surface water thereon upon plaintiff's land became immaterial, even if unsupported, where the evidence supported another finding that defendant's land was higher than plaintiff's and the rain-water falling thereon naturally flowed down upon plaintiff's land.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.*]

3. WATERS AND WATER COURSES (§ 119*)—SURFACE WATER—RAINWATER—LIABILITY.

The owner of higher lands has an easement over lower adjacent lands to discharge surface or rain water thereon in its natural flow, whether it follows a water course or merely a depression in the ground.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 131-134; Dec. Dig. § 119.*]

4. TRIAL (§ 395*)—FINDINGS.

A finding that "paragraphs 3, 4, and 5 of plaintiff's complaint are untrue" is not to be commended as a form for making findings of fact.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 932; Dec. Dig. § 395.*]

5. WATERS AND WATER COURSES (§ 119*)—SURFACE WATER—DRAINAGE—INCREASING NATURAL FLOW.

While an upper landowner is entitled to have his surface water discharged upon adjacent lower land according to its natural flow, he cannot change the natural manner of discharge by conducting the water by new channels in greater quantities onto the lower lands, thereby increasing the burden of the servient owner.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 131-134; Dec. Dig. § 119.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Florence E. Peck against P. A. Peterson. From a judgment for defendant, plaintiff appeals. Reversed.

Wm. M. Aydelotte, for appellant. Jas. A. Hall, for respondent.

HALL, J. Plaintiff and defendant are the owners of adjoining tracts of land, situate in Santa Cruz county, separated by a division fence. Plaintiff filed a complaint against defendant, in which she alleged that defendant had excavated and constructed a ditch or drain on and across defendant's land to the line of plaintiff's land, and thence under the division fence into and upon plaintiff's land, and thereby diverted from its natural course the water falling on defendant's land, and caused the same to be discharged and to flow over and upon the lands of plaintiff, to her damage in the sum of \$1,000. Plaintiff prayed for damages and an injunction.

Defendant not only filed an answer denying the allegations constituting the gravamen of plaintiff's action, but, also, by way of cross-complaint, set up "that across the

land of defendant, through his said orchard and thence on and across the said land of the plaintiff there runs a natural waterway that naturally carries the flood or surface water that falls and flows on the land of the defendant over, upon and across the said land of plaintiff, and which said natural waterway has always existed." It is further alleged that plaintiff in December, 1907, caused a dam to be built immediately below where the said natural waterway leaves the land of defendant in such a manner that the flood waters were prevented from running in their natural channel, and were backed up and caused to overflow onto the orchard of defendant, to his damage in the sum of \$250. It is also alleged "that at various times during the past two years said plaintiff has caused deep furrows to be plowed across said natural water course on the said land in such a manner as to cause the flood waters to back up over defendant's said land and orchard and injure the same, all to his damage in the sum of \$500." The court made findings in accordance with the contentions of defendant, and gave judgment accordingly, enjoining plaintiff from doing the acts complained of, and for \$100 damages. Plaintiff moved for a new trial, which the court denied in these words: "I have very serious doubts whether the findings are supported by the evidence; but, as the decision of this case is, in my opinion, just and equitable, the plaintiff's motion for a new trial will be denied, and it is so ordered." The appeal is from this order.

Appellant attacks several of the findings as unsupported by the evidence. One of these is the finding "that the said plaintiff did at many times during the past two years cause deep furrows to be plowed across said natural water course on her land in such a manner as to cause the flood water to back up on defendant's said land and orchard, and injure the same."

[1] After a careful reading of all the testimony in the record, we have been unable to find a single word that supports the finding that plaintiff at any time caused deep or any furrows to be plowed across the alleged water course. During all the time mentioned in the complaint her said land was rented to and in the possession of tenants. Such plowing as was done was done by the tenants without any direction or control from plaintiff, and for any damage thus resulting she would not be liable. The court found that the defendant had been damaged by the acts of plaintiff in the sum of \$100. This damage is found to have been caused in part by the said cross-plowing, but how much was done by the cross-plowing does not appear, nor can it in any way be ascertained from the findings. The finding as to the cross-plowing is thus a material one, upon which the judgment for damages in part rests.

[2] Appellant also attacks the finding of

the court, made in substantially the language of the cross-complaint, as to the existence of a natural water course, over and across the land of defendant and plaintiff, that naturally carries the flood and surface water, that falls upon the land of defendant, over and upon the land of plaintiff. This finding is, however, unimportant and immaterial in view of the fact that upon ample evidence the court also found, in accordance with the allegation of the cross-complaint, "that the said land of defendant is higher in elevation than the land of plaintiff, and the surface water caused by heavy rains naturally flows and is accustomed to flow and discharge itself from defendant's land over and across plaintiff's land."

[3] It is the established law of this state that the owner of upper land has an easement over lower and adjacent land for the discharge of surface or rain water as it is accustomed to naturally flow; and it is quite immaterial whether such surface water flows through a water course, strictly speaking, or through a simple depression in the surface of the earth. *Larrabee v. Cloverdale*, 131 Cal. 96, 63 Pac. 143; *Sanguinetti v. Pock*, 136 Cal. 466, 69 Pac. 98, 89 Am. St. Rep. 169.

[4] The court also made a finding in the following words: "That paragraphs 3, 4, and 5 of plaintiff's complaint are untrue." It is insisted that this is not a finding of fact at all. Certainly it is not one to be commended as a model. If it be construed as a finding to the effect that all the allegations in said paragraphs are untrue, it is in direct conflict with the admissions of the pleadings as to some at least of said allegations. However, we do not deem it necessary to discuss this finding in detail. The record is in such shape as makes it difficult to understand the evidence. The witnesses testified with reference to a map, and because of frequent references to this map much of the evidence is quite unintelligible when read from the record.

From the language of the court in denying the motion for a new trial, it is evident that the court had serious doubts as to the correctness of its conclusion as to the facts. [5] As the cause must be retried because of the lack of evidence to support the finding first discussed, it is not improper to point out that though an upper landowner has the right to have surface and rain water flow onto adjoining lower lands, as it has been accustomed naturally to flow, and such lower landowner has no right to obstruct such flow, such upper landowner has no right to increase the burden upon the servient tenement by causing the natural mode of its discharge to be changed to the injury of the servient tenement, by conducting it by new channels in greater quantities onto particular parts of the lower land, and the like. *Ogburn v. Connor*, 46 Cal. 347, 13 Am. Rep. 213. There is much evidence in the record

tending to show that defendant in the first instance violated this rule, and did collect the surface water on his land and convey it in greater quantities to the land of plaintiff. Indeed he testifies himself that he excavated a channel through his land to the land of plaintiff so as to drain his orchard, and also so as to take water from a roadway that apparently otherwise could never reach the land of plaintiff. This apparently resulted in plaintiff putting in an obstruction at her boundary line that caused a greater amount of water to collect and stand upon the land of defendant than naturally would have collected there.

While it is not strictly the province of this court to advise such a course, we do not think it entirely out of place to suggest that the parties litigant in this case might profitably avoid the expense of further litigation in this case by the exercise of a little neighborly good will and forbearance in an effort to adjust their conflicting claims to the advantage of both of them.

Appellant makes no other point requiring notice.

The order is reversed.

We concur: **LENNON, P. J.; KERRIGAN, J.**

15 Cal. App. 557

In re **MILLER'S ESTATE**. (Civ. 889.)
(District Court of Appeal, First District, California. March 8, 1911.)

1. EXECUTORS AND ADMINISTRATORS (§ 509*)—ACCOUNTING—OPENING.

Under Code Civ. Proc. § 473, providing that the court in its discretion may open judgments, etc., an order vacating an administrator's final accounting, which was granted upon the affidavit of the attorney of nonresident legatees protesting against the allowance of the account, and upon letters written by those legatees protesting against the allowance, was not erroneous.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2199-2219; Dec. Dig. § 509.*]

2. EXECUTORS AND ADMINISTRATORS (§ 499*)—COMPENSATION—STATUTES.

Where a special administration was had, and fees and commissions were paid to the special administrator and his attorney under Code Civ. Proc. § 1417, those fees are not to be deducted from the compensation of the regular administrator and his attorney prescribed by Code Civ. Proc. §§ 1618, 1619, providing for payment of a certain percentage to each.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2130; Dec. Dig. § 499.*]

Appeal from Superior Court, Santa Cruz County; Lucas J. Smith, Judge.

In the matter of the estate of John Peter Miller. S. C. Rodgers, public administrator, appeals from an order settling his final account as administrator. Modified and affirmed.

Harry J. Bias, for appellant. E. C. Kramer, for respondent.

KERRIGAN, J. This is an appeal from an order settling the final account of an administrator.

Shortly after the death of John Peter Miller, special letters of administration were issued upon his estate to L. L. Fargo. Thereafter, on April 12, 1907, general letters with the will annexed were regularly issued to S. C. Rodgers, the public administrator of Santa Cruz county in the superior court of which county the settlement of the estate was pending. In due course the administrator filed his final account and petition for the settlement thereof, which account was in due course approved as rendered. Thereafter a motion, made under section 473, Code of Civil Procedure, by certain absent heirs and legatees, to set aside and vacate that order, was granted. Subsequently, upon second hearing of the administrator's account, and objections thereto filed by said heirs and legatees, said account was settled as presented, except as to the administrator's commission and the fees of his attorney; that is to say the court deducted from the fees and commissions allowed by law to the administrator and his attorney a sum equal to the fees and commissions which it had theretofore allowed the special administrator and his attorney, and also disallowed two items of \$150 each charged by the administrator and his attorney, respectively, for special services alleged to have been rendered by them to the estate. The court further ordered that the administrator be finally discharged upon paying over to the respective legatees or their attorney the residue of the estate in his hands as shown by the account thus settled.

The appeal is by the administrator, and he contends, first, that the court erred in setting aside and vacating his account; second, that it also erred in reducing the amount of commissions and fees charged by him and his attorney for their general services in the settlement of the estate; and, third, that the court erred in disallowing the two items of \$150 each charged for special services by him and his attorney.

[1] First, as to the order vacating and setting aside the first order settling the administrator's account. We cannot hold with the contention of appellant that this order was erroneous, because made upon an insufficient showing. In such a matter much is left to the discretion of the trial court; and in view of the evidence offered upon the motion and admitted without objection, consisting of letters from the legatees residing out of the state protesting against the allowance of the account, the affidavit of their attorney, and the files and records of the estate, we are not prepared to say that the court's bus-

ed its discretion in setting aside the said order.

As to the appellant's second contention, namely, that the court erred in reducing the amount of the commission of the administrator and the fees of his attorney for their general services in the settlement of the estate, the amount charged in the account was \$344.49 as commission of the administrator—which sum is the statutory percentage on the amount of the estate, as provided in section 1618, Code of Civil Procedure—and the same amount was charged as the fees of the administrator's attorney, in accordance with section 1619 of the same Code. As we have already mentioned, there had been a special administration in this estate, and the special administrator and his attorney had been allowed by the court certain compensation upon the settlement of said special administrator's account. It was the contention of the legatees that the amount of compensation allowed to the special administrator and his attorney for their services should be deducted from the percentage fixed by the statute for the administrator and his attorney, and that these latter should receive only the difference between that percentage and the amount already received from the estate by the special administrator and his attorney. The court, while not altogether adopting this view as to the compensation of the administrator's attorney, did adopt it as to the administrator, and allowed the administrator only the sum of \$100.49.

We think the court's construction of the law in this regard was erroneous. Where there has been a special administration in an estate, the special administrator is entitled to compensation, for which a reasonable amount must be fixed by the court. Code Civ. Proc. § 1417. Where there are joint, or successive, administrators or attorneys, there may be an apportionment of the statutory commissions and fees; but we find nothing in the Code which warrants any deduction from the percentage fixed by section 1618, Code of Civil Procedure, as the commission of the administrator merely because a special administrator has acted in the matter of the same estate, and been compensated from its funds. Under the language of sections 1618 and 1619 of said Code, we think the administrator and his attorney are entitled to the fixed percentages therein provided, and that the court cannot diminish the same. *Carver Estate*, 123 Cal. 102, 55 Pac. 770.

As to the charge made by the administrator and his attorney of \$150 each for special services, we think the court was justified upon the showing made in disallowing these two items. In any event, it was a matter of discretion with the trial court, and it was not exercised in such a way as to call for any revisory action by this court.

In the order from which the administrator appeals, there is a direction that he be charged with the sum of \$688, purporting to be the difference between the aggregate of commissions and fees charged by the special administrator, the administrator, and their attorneys, and the sum allowed by said order to the administrator and his attorney. It is not quite clear how this figure is arrived at; but it is sufficient to say that the present administrator cannot be charged with fees which have in the past been allowed by the court to a special administrator and his attorney.

The trial court is directed to modify its order in accordance with the views herein expressed, and to allow and approve the administrator's account in all respects except as to the two items of \$150 each charged for special services of said administrator and his attorney, and, as thus modified, the order appealed from is affirmed, appellant to recover his costs upon this appeal.

We concur: LENNON, P. J.; HALL, J.

15 Cal. App. 541

HADSALL v. CASE et al. (FERNANDEZ, Intervener). (Civ. 927.)

(District Court of Appeal, Second District, California. March 4, 1911.)

1. APPEAL AND ERROR (§ 123*)—ORDERS APPEALABLE—ORDERS SUSTAINING DEMURRER.

In view of Code Civ. Proc. § 939, providing the time within which appeals may be taken from certain orders, not including an order sustaining a demurrer to the complaint, an appeal does not lie from an order sustaining a demurrer to the complaint; the ruling being reviewable only on appeal from the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 123.*]

2. APPEAL AND ERROR (§ 123*)—PLEADING (§ 223*)—PLEAS IN INTERVENTION—SUSTAINING DEMURRER.

The rules applicable to pleadings in general apply to pleadings in intervention, so that judgment should be entered against intervener upon sustaining a demurrer to his complaint in intervention without leave to amend, from which judgment intervener could appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 123;* Pleading, Cent. Dig. § 568; Dec. Dig. § 223.*]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by H. S. Hadsall against Fred H. Case and others, in which Michael M. Fernandez intervenes. From an order sustaining demurrers to the complaint in intervention, intervener appeals. Appeal dismissed.

Harker, Overmyer & Seymour, for appellant. Scarborough & Forgy, Williams & Rutan, F. O. Daniel, and Hunsaker, Britt & Fleming, for respondents.

SHAW, J. By leave of court, Michael M. Fernandez filed his complaint in interven-

tion in the above-entitled action. A demurrer interposed thereto was sustained, whereupon, within the time granted for so doing, he filed an amended complaint in intervention, to which both plaintiff and defendants interposed demurrers. The several demurrers were sustained without leave to amend, and the purported appeal is from the order sustaining the demurrers.

[1] An appeal does not lie from an order sustaining a demurrer, but such ruling may be reviewed on an appeal from the judgment. Section 939, Code Civ. Proc.; *Ashley v. Olmstead*, 54 Cal. 616; *Agard v. Valencia*, 39 Cal. 292.

[2] The rules applicable to pleadings in general apply with equal force to pleadings in intervention. The demurrers interposed to the complaint of the intervener raised an issue of law, which, upon trial, by sustaining the demurrers, the court determined in favor of the parties so demurring. Judgment against the intervener, as in other cases where a demurrer to a complaint is sustained without leave to amend, should have followed, from which, inasmuch as to him it was a final determination of the case, he could have prosecuted his appeal at once and thus have the order of which he complains reviewed.

The purported appeal must be dismissed, and it is so ordered.

We concur: ALLEN, P. J.; JAMES, J.

15 Cal. App. 537

WONG FUNG HING v. SAN FRANCISCO
RELIEF AND RED CROSS FUNDS.
(Civ. 916.)

(District Court of Appeal, Second District,
California. March 4, 1911.)

1. VENUE (§ 40*)—RESIDENCE OF DEFENDANT
—CHANGE OF PLACE OF TRIAL.

Under Code Civ. Proc. § 395, providing that actions shall be tried in the county in which defendants, or some of them, reside, a defendant, on proper demand, is entitled to an order changing the place of trial to the county of his residence, in the absence of any counter showing by plaintiff.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. § 61; Dec. Dig. § 40.*]

2. VENUE (§ 37*)—CHANGE OF PLACE OF TRIAL—CONVENIENCE OF WITNESSES.

Under Code Civ. Proc. § 397, subd. 3, authorizing the court to change the place of trial for the convenience of witnesses, a motion either to change the place of trial, or to retain it for trial in a county other than the proper county, based on the convenience of witnesses, will not be entertained where defendant appears by demurrer only.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. §§ 56-58; Dec. Dig. § 37.*]

3. VENUE (§ 72*)—CHANGE OF PLACE OF TRIAL—CONVENIENCE OF WITNESSES.

The court in passing on a motion for a change of the place of trial for the convenience of witnesses must disregard the proposed testi-

mony of witnesses not material to some issue of fact raised by the pleadings.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. § 127; Dec. Dig. § 72.*]

4. VENUE (§ 72*)—CHANGE OF PLACE OF TRIAL—CONVENIENCE OF WITNESSES.

Where the complaint stated a cause of action for conversion of merchandise, and defendant did not plead payment by check or otherwise on account of the merchandise, the testimony of witnesses to prove the forgery of plaintiff's name on an undelivered check given by defendant in payment for the merchandise could not be considered in determining a motion to change the place of trial for the convenience of witnesses.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. § 127; Dec. Dig. § 72.*]

Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by Wong Fung Hing, doing business under the name of the Chong Kee Company, against the San Francisco Relief and Red Cross Funds. From an order denying a change of place of trial, defendant appeals. Reversed.

Gray & Cooper, for appellant. Powers & Holland, for respondent.

SHAW, J. Defendant appeals from an order of court denying its application for a change of the place of trial from Los Angeles county, where the action was commenced, to the city and county of San Francisco.

Defendant is a corporation having its principal place of business in the city and county of San Francisco. No demurrer was interposed to the complaint. With its verified answer, merely denying all the allegations of the complaint, defendant filed an affidavit of merits, in due form and sufficient in substance, showing that defendant was a corporation having its principal place of business in the city and county of San Francisco, and accompanied by a demand in writing, therewith filed, demanding that the place of trial be changed from the county of Los Angeles to the city and county of San Francisco, upon the grounds, first, that the city and county of San Francisco, and not the county of Los Angeles, was the proper county wherein said action should be tried; and, second, that the convenience of witnesses would be promoted by such change. While defendant's application was being heard, and before the final disposal thereof, plaintiff moved that the case be retained in Los Angeles county for trial, upon the ground of the convenience of witnesses, and filed affidavits in support of such motion. Upon the final hearing the court made an order that the motion for a change of place of trial be denied, and that the trial of the case be retained in Los Angeles county, for the reason that the convenience of witnesses would be promoted by such retention.

[1] It clearly appears that defendant was a resident of San Francisco at the time of

the commencement of the action, and, hence, upon demand duly made therefor, was, in the absence of a counter showing, entitled to an order changing the place of trial to the county of its residence. Section 395, Code Civ. Proc. Assuming, then, that, notwithstanding such right on the part of defendant, the court might, nevertheless, upon a proper showing that the convenience of witnesses would be subserved thereby, retain the case for trial in Los Angeles county, the question presented for determination is whether the facts set forth in the affidavits presented by plaintiff justified the order made by the court. Subdivision 3 of section 397, Code of Civil Procedure, provides that the court may, on motion, change the place of trial, "when the convenience of witnesses and the ends of justice would be promoted by the change." Manifestly, until an answer is filed and issues of fact joined, it cannot be said a production of witnesses upon a trial will be required.

[2] Hence a motion either to change the place of trial or to retain it for trial in a county other than the proper county, based upon the convenience of witnesses, will not be entertained where the defendant appears by demurrer only. *Cook v. Pendergast*, 61 Cal. 76; *Armstrong v. Superior Court*, 63 Cal. 411. In the former case it is said: "But where no issue of fact has been raised, as where the motion to change the place of trial is made when defendant has appeared only by demurrer to the complaint, how can the court intelligently determine that it will be for the convenience of witnesses to change the place of trial, or to retain the action for trial in the county designated in the complaint?"

[3] Therefore, in passing upon motions for a change of place of trial, where an answer is filed, it is the duty of the court to disregard the proposed testimony of an alleged witness which is not material to some issue of fact made. *Miller & Lux v. Kern Co. Land Co.*, 140 Cal. 132, 73 Pac. 836; *Ennis-Brown Co. v. Long*, 7 Cal. App. 313, 94 Pac. 250. It is clear that plaintiff could not successfully resist defendant's motion, unless it appeared from his affidavits that the testimony of the witnesses whose convenience was to be thereby subserved would be material and competent upon the trial of the issues involved. Applying this rule, it is apparent from an examination of the record herein that the facts did not justify the court in making the order from which defendant appeals.

The complaint alleges that on April 20, 1906, plaintiff was the owner of certain goods, wares, and merchandise then deposited upon the wharf of the Pacific Mail Steamship Company in the city and county of San Francisco; that on said date an association known as the Citizens' Relief Committee, composed of persons whose names are un-

known to plaintiff, did wrongfully and without the knowledge and consent of plaintiff take and carry away said goods, wares, and merchandise, and converted the same to its own use and benefit; that thereafter said Citizens' Relief Committee did transfer the said goods, wares, and merchandise to defendant, who took and received the same with full knowledge that the same belonged to plaintiff and had been taken without right or authority, which goods, wares, and merchandise defendant did then and there receive, convert, and appropriate to its own use and benefit; that the value of the goods so converted was \$612.73; and that defendant did on January 14, 1907, by an instrument in writing signed and duly executed by the officers and agents of the defendant, acknowledge its indebtedness to plaintiff in said sum of \$612.73, and did by said writing promise and agree to pay said sum to plaintiff, which allegations are followed by an allegation of demand and nonpayment. Defendant's answer, as before stated, consists only of a specific denial of each of these allegations, other than that of demand and nonpayment. The issues being thus established, we must look to the affidavits of plaintiff to ascertain whether or not the testimony therein set forth would be material and competent upon a trial of such issues. It is alleged in the complaint that defendant executed an instrument in writing, acknowledging its indebtedness to plaintiff for the value of the goods, and by said writing did promise and agree to pay plaintiff the value thereof, to-wit, the sum of \$612.73. The action, however, is not based upon this promise, but upon the alleged conversion of the goods. It appears from defendant's affidavit that this writing consisted of a check, whereby the Bank of California was ordered to pay to the order of plaintiff \$612.73. Plaintiff in his affidavit does not deny this statement, but states "that defendant, on January 14, 1907, drew its draft or check in favor of this plaintiff on the Bank of California for said sum of \$612.73, which said check or draft was never delivered to this plaintiff, but came into the possession of some other person or persons," who forged the name of plaintiff thereon and collected the amount on said forged indorsement from the Bank of California; "that said check so made, as aforesaid, by the defendant is now in the possession of defendant; that the only issue to be tried in this action, as this plaintiff is informed and believes and so alleges the fact to be, is the question of the genuineness of the indorsement of the names of Chung Kee Company and Wong Fung Hing on the said check." The names of a number of witnesses were given, with a statement to the effect that all of said witnesses will testify that the names of Chung Kee Company and Wong Fung Hing, so indorsed upon the check, are forgeries; and the names of other

witnesses are given who, it is stated, will testify to facts tending to show that plaintiff never indorsed said check and never received or collected the amount due thereon, and that at one time defendant was of the opinion that the indorsements on the check were genuine, and by letters and orally expressed its surprise that plaintiff claimed the same to be forged. The check was never delivered to plaintiff. He bases no claim thereon. Defendant does not plead it in payment of plaintiff's claim, nor allege that it has made any payment to plaintiff on account of the alleged conversion of his goods.

[4] Under the pleadings, the proposed testimony set forth in the affidavits tending to prove the indorsement of plaintiff's name upon the undelivered check to have been forged, and that he had not received or collected the amount thereof, would be wholly immaterial to any issue involved therein.

The order is reversed, and the trial court instructed to make an order granting defendant's motion upon the ground first mentioned in its demand for change of place of trial.

We concur: ALLEN, P. J.; JAMES, J.

15 Cal. App. 561

JONES et al. v. GRIEVE et al. (Civ. 782.)
(District Court of Appeal, Third District,
California, March 8, 1911.)

1. APPEAL AND ERROR (§ 934*)—QUESTIONS REVIEWABLE—FINDINGS—PRESUMPTIONS.

The court on appeal from a judgment for plaintiff must assume, findings of fact having been waived, that the trial court found every fact necessary to support the judgment which the pleadings and evidence would warrant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781; Dec. Dig. § 934.*]

2. EVIDENCE (§ 434*)—PAROL EVIDENCE—WRITTEN INSTRUMENTS—FRAUD.

Fraud inducing the execution of a contract reduced to writing may be proved by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2005-2020; Dec. Dig. § 434.*]

3. SALES (§ 38*)—FRAUDULENT REPRESENTATIONS—MATTER OF OPINION.

A representation by a seller of a jack as to its potency is a representation of a fact, and not a matter of mere opinion.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 65-77, 85; Dec. Dig. § 38.*]

4. SALES (§ 52*)—FRAUD—EVIDENCE.

In a suit to cancel a contract for the purchase of a jack, evidence held to show that the seller's representation as to the jack's potency was false; that it was made as an inducement to the buyer to purchase; that the buyer relied thereon; and that the representation was material.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 136-144; Dec. Dig. § 52.*]

5. SALES (§ 38*)—FRAUD—KNOWLEDGE OF SELLER.

Where a seller of a jack had owned it but a short time, and knew who formerly owned it,

and had the means of knowledge as to the jack's potency, a false representation as to its potency made unqualifiedly and with intent to induce the buyer to act was actual fraud.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 65-77, 85; Dec. Dig. § 38.*]

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action by P. A. Jones and others against Dell Grieve and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Stephen C. Asbill, Herbert V. Keeling, and J. V. Kelleher, for appellants. C. M. Crawford, for respondents.

CHIPMAN, P. J. This is an action to have canceled a contract for the sale of a certain jack. The cause was tried by the court without a jury, and plaintiffs had judgment, from which and from the order denying their motion for a new trial defendants appeal.

Plaintiffs set out in their complaint a written contract (Exhibit A) dated March 26, 1908, between plaintiffs and defendants. It is signed by Chas. Asbill, who is admitted by defendants to have had full authority to represent them in the sale to any extent. It reads: "1st: That Chas. Asbill party of the first part has this day sold to Jones Bro's & Jones parties of the 2nd part one Black Jack with white points, for the consideration of Seven Hundred Dollars, \$700.00. 2nd: That said Jack shall be paid for by Jones Bro's & Jones parties of the 2nd part, in the following manner to-wit: That Chas. Asbill party of the first part shall receive as payment all fees of said Jack for the season (year) of 1908. The same fees to be made in payment on said Jack. Jones Bro's & Jones further agree to pay all fees to Chas. Asbill party of the 1st part for each following season until the sum of Seven Hundred Dollars (\$700.00) shall have been paid in the above manner specified. That Chas. Asbill party of the 1st part shall offer (after?) the payment of the sum of Seven Hundred Dollars, deliver into the hands of Jones Bro's and Jones a bill of sale for said Jack." On April 5, 1908, the parties entered into another written agreement (Exhibit B), which is referred to as a modification of the contract (Exhibit A). It makes some changes in the manner of payment, but contains no new feature having any bearing upon the questions presented by the appeal. Defendants were served with notice of rescission and offer to restore the jack to their possession, April 14, 1909; the ground being that the said agreement of April 5, 1908, "was procured by fraud and misrepresentation; * * * that said jack was a good foal-getter, which was false." The offer being refused, the action was commenced April 30, 1909. The judgment declares the two said contracts to be void and cancels the same, upon condition

that plaintiffs pay to defendants \$52.50 for service of said jack less \$21, costs of suit, the contracts to be canceled on such payment being made and the jack to become the property of defendants.

It is averred in the complaint that plaintiffs entered into the agreements to purchase said jack "solely for breeding purposes (serving mares) all of which was well known to defendants at the time of and prior to the time of the execution of said agreement and the said modification thereof, and that the said jack had not then, and never has had since, any value whatever, other than his value for said purposes." Then follow averments that defendants, with intent to deceive and defraud plaintiffs, at said times, falsely represented to them that said jack was "a good foal-getter," which was untrue, which defendants well knew, and that at said times "plaintiffs believed the said false and fraudulent representations and statements of defendants to be true, and acted on them as such, and that they would not have entered into or executed the said agreement or the said modification thereof but for their belief in the truth thereof, and that plaintiffs first discovered that said representations were false and fraudulent and untrue on or about the 15th day of March, 1909." The answer is a specific denial of the accusatory averments of the complaint, and it avers "the true facts to be that, at the time of the purchase by plaintiffs of said jack, the only guaranty whatsoever the defendants gave to plaintiffs, was the guaranty of one F. B. Chandler, a former owner of said jack, the substance of which was verbally stated to defendants at the time, a written copy thereof being subsequently furnished to them." This guaranty is set out in the answer, and reads: "I do hereby guarantee that the black jack, which I have sold to Asbill & Grieve and is about seven years old, will serve a mare and get her with foal, providing he lives and continues in good health, and is given a reasonable trial."

Plaintiff Zeno Jones testified: "During the month of March, 1908, myself and coplaintiffs in this action were approached at Lower Lake by Charles Asbill (brother of Stephen Asbill) with a proposition to buy a certain jack which he (Charles Asbill) then had in Lower Lake, Lake county. He told us that he would sell the jack on certain terms, and we there agreed to buy the jack as the terms were quite liberal, and a written contract for the purchase of the jack was then and there drawn up and signed by ourselves and Charles Asbill, as per 'Exhibit A' attached to plaintiffs' complaint herein. At this time Charles Asbill was asked by either myself or my brother or my cousin Herbert, plaintiffs herein, as to whether the jack was a good foal-getter, and he told us that he was a good foal-getter." No objection was made to this testimony. The witness was then asked the following question: "Did he,

Charles Asbill, say to you at that time that he would guarantee the jack to be a good foal-getter?" Defendants objected on the grounds that the question was incompetent, irrelevant, and immaterial, and that the written contract cannot be varied by parol agreements made at the time of its execution and that no foundation has been laid for the question. The court overruled the objection and the witness answered: "Yes; he said that he would guarantee the jack to be a good foal-getter, and I believed said representation to be true, and acted upon it as true, and would not have entered into the contract of purchase of said jack, had I not believed the said statement and representation that said jack was a good foal-getter, to be true." The witness then testified that about two weeks later defendant Asbill stated to plaintiffs that he, Asbill, was not satisfied with the contract, "and wanted to draw up a new one." Continuing, witness testified: "After considerable argument as to terms, a new contract was drafted and entered into by Stephen Asbill and ourselves, as per 'Exhibit B' attached to plaintiffs' complaint herein. Stephen Asbill at that time promised to send up a written guaranty that the jack was a good foal-getter. We purchased the jack solely for breeding purposes, which was well known to defendants at the time of the purchase; and said jack had no value whatever, except his value for breeding purposes. Said Charles Asbill, at the time the first contract was entered into, was very insistent that we should buy the jack, and finally said to us that he would make us an offer that we could not refuse. We could not determine that said jack was not a good foal-getter, until a short time prior to our serving notice of rescission of the agreement of sale on the defendants. * * * We have complied with the terms of the contract of sale on our part in every respect. We did not stand the jack during the season of 1909, for the reason that we had then learned that he was of no value as a breeder. The jack served sixteen mares during the breeding season of 1908 during which season, and (he?) was properly bred to said mares and nine of them our own and seven belonging to other parties, and there are now three mule colts living, the issue of such breeding. The jack received good care and treatment. None of the mares so bred by us to the jack were ever bred to a jack before so far as I know. Nine of these mares bred were mares that had colts before. We did not breed the jack to any mares in the spring of 1909, as we did not think that the jack had lived up to his guaranty. So on March, 15, 1909, we sent Mr. Asbill and Mr. Grieve an announcement of our rescission of the contract of purchase, copies of which are annexed to our complaint and marked 'Exhibits C and D.' Mares were bred to the jack during the months of April, May, and June, 1908, and ordinarily mares will show their pregnancy

within six months after they are bred. No written guaranty was ever furnished us of the jack by either Stephen or Charles Asbill."

Plaintiff Andrew Jones testified to like effect, and that the written guaranty afterwards sent was that the jack "would serve one mare and get her with foal," which was not accepted. Also, that "the mares kept returning to the jack after being bred, and by the month of June, 1908, I was convinced that the jack was no good." He also testified that he understood that the jack had been purchased by the Asbills not long before said sale, and that he had been owned by one Chandler. Like testimony was given by witness Herbert Jones. Witness Turner testified to having bred two young mares to said jack in 1908 without results. There was other testimony that the jack was a good "performer," but lacked procreative potency. Expert testimony was also given that a "jack that is a good foal-getter ought to get 75 per cent. of the mares served with foal," and that "a jack that only got three mares out of sixteen with foal" was not "a good foal-getter." The evidence submitted by defendants controverted in some respects, but not in all, the account of the transaction as given by plaintiffs. The trial court accepted the testimony of plaintiffs as true and so must we.

[1] We must assume that the court found every fact necessary to support the judgment which the pleadings and evidence would warrant. Findings of fact were waived.

[2] Defendants in their brief admit "that prior to entering into said contracts defendants represented to plaintiffs that said jack 'was a good foal-getter,'" but they deny "that the evidence proves this representation to be a fraudulent one." 2 Pomeroy's Equity Jurisprudence, § 876, is cited as setting forth the elements essential to constitute fraud: (1) Its form as a statement of fact; (2) its purpose of inducing the other party to act; (3) its untruth; (4) the knowledge or belief of the party making it; (5) the belief and reliance of the one to whom it is made; (6) its materiality. We had occasion in *Hodgkins v. Dunham et al.*, 10 Cal. App. 690, 103 Pac. 351, to state what we understand to be the law applicable to this class of cases, and our view received the approval of the Supreme Court by its refusal, upon petition of defendants, to order the case heard in that court. The points involved in the present case are fully discussed in the case cited, and need not be here repeated. It is there shown that the fraud could be proven "notwithstanding that the contract was in writing and the representations were not."

[3] Recurring to the elements enumerated by Mr. Pomeroy, as noted above, we cannot agree with defendants that the representation as to the jack's potency was "but a mat-

ter of opinion." There is to a stock breeder nothing "vague" or "indefinite," nor would men "widely differ" as to the meaning of a representation that an animal "is a good foal-getter." Even lawyers, unfamiliar with the farm, or with stock breeding, would hardly be excusable for mistaking the meaning of a vendor of a breeding animal who made such a representation.

[4] That the representation was untrue that the plaintiffs believed the defendants and relied and acted upon it, and that the fact was material, we think satisfactorily appears. The only debatable points are, Was the representation made for the purpose of inducing defendants to act and did defendants know or believe the representation to be true? We think the evidence shows clearly enough that it was made as an inducement to defendants to purchase the jack. No other reasonable motive can be attributed to defendants in making it.

[5] Upon the other point it appears that the defendants had owned the jack but a short time, but they knew who formerly owned the animal and they had the means of knowledge as to the jack's potency. Besides, when they made an unqualified and unexplained material representation with intent to induce plaintiffs to act, plaintiffs had the right to assume that defendants believed their representation to be true. "Actual fraud is committed when one, with intent to induce another to enter into a contract, makes a positive assertion in a manner not warranted by the information of such person, of that which is not true, even though he believes it to be true. A party will always be held to make good his statement in the form in which he makes it." *Muller v. Palmer*, 144 Cal. 305, 77 Pac. 954, Syl.; Civ. Code, § 1572.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

15 Cal. App. 548

NAYLOR v. ADAMS. (Civ. 771.)

(District Court of Appeal, Third District, California. March 6, 1911.)

1. APPEAL AND ERROR (§ 640*)—RECORD—TRANSCRIPT—SUFFICIENCY—RULES OF COURT.

Where a transcript failed to comply with Supreme Court rules 7 and 8 (78 Pac. viii), respectively, providing the size of paper upon which it should be written and the arrangement of the various material, an appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2788; Dec. Dig. § 640.*]

2. BROKERS (§ 43*)—EMPLOYMENT TO SELL LAND—RIGHT TO COMMISSION—CONTRACT.

Under Civ. Code, § 1624, providing that an agreement employing a broker to sell real estate for a commission is invalid, unless the same or some memorandum thereof is in writing, signed by the party sought to be charged, letters written by the owner of real estate authorizing a

broker to sell or exchange it are a sufficient writing.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. § 43;* Frauds, Statute of, Cent. Dig. § 131.]

3. BROKERS (§ 86*)—ACTIONS FOR COMPENSATION—EVIDENCE—SUFFICIENCY.

In an action by a broker for his compensation in selling land, evidence held to support a judgment awarding him compensation.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 116-120; Dec. Dig. § 86.*]

4. CONTRACTS (§ 324*)—WORK AND LABOR—ACTIONS—NATURE AND FORM OF REMEDY.

Where the terms of a special contract have been varied or modified by the agreement of the parties, an action for the amount due for work and labor should be in the form of *indebitatus assumpsit*, and not upon the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1549-1557; Dec. Dig. § 324.*]

5. WORK AND LABOR (§ 27*)—ACTIONS—EVIDENCE—CONTRACT.

In *indebitatus assumpsit* for work and labor under a contract, the entire performance of which was prevented by subsequent changes in the agreement, the contract itself is admissible as an admission of the standard of value, or as proof of value, or as proof of any other fact necessary to the recovery.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 53; Dec. Dig. § 27.*]

6. APPEAL AND ERROR (§ 1013*)—REVIEW—FINDINGS—CONCLUSIVENESS.

A finding by the trial court in an action for work and labor as to the value of the services is conclusive on appeal where based upon the original contract under which the work was begun, but which was afterwards varied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3393-3395; Dec. Dig. § 1013.*]

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Charles E. Naylor, Jr., against Frank P. Adams. From a judgment for plaintiff, defendant appeals. Affirmed.

M. J. Cheatham, for appellant. Naylor & Riggins, for respondent.

HART, J. An opinion in this cause, affirming the judgment and order of the court below, was filed by this court on December 16, 1910. A petition for a rehearing was granted by this court on the grounds: (1) That the case had not, before the filing of said opinion, been submitted on the merits; the only question then under submission having arisen on a motion to dismiss the appeal for reasons which will later appear. (2) That the writer of the opinion fell into error as to certain testimony.

Upon a reconsideration of the case we have found no reason for receding from our former conclusion that the evidence is sufficient to support the findings that a contract was entered into between Adams and Stanley by which the latter was employed to secure a purchaser of the former's land; that Stanley was to receive for that service certain compensation, of which more will appear hereafter in this opinion; that Stanley

did secure such purchaser, and that Adams finally disposed of the land to the purchaser so secured.

We here adopt a part of the former opinion:

"This is an action by plaintiff to recover the sum of \$600 for commissions alleged to have been earned by his assignors for consummating a real estate deal by which defendant and one Draper exchanged properties. The claim was assigned to plaintiff by the real estate firm of Murdock & Son and one Herbert Stanley, a member of said firm, who personally managed the transaction. The case was tried by the court and plaintiff awarded judgment in the sum sued for. This appeal is from said judgment and the order denying defendant a new trial.

[1] "Respondent has filed a motion to dismiss these appeals on the ground that the transcript does not conform to the requirements of rules 7 and 8 of the Supreme Court (78 Pac. viii), and but for the fact that the record is not so voluminous or bulky as to require in its examination more than ordinary labor we would without the least reluctance grant the motion. The transcript was prepared according to the method prescribed by sections 953a, 953b, and 953c of the Code of Civil Procedure. Rule 7, *supra*, provides that, when the transcript is prepared in accordance with the sections of the Code of Civil Procedure referred to, 'the paper on which the same is written and the backs for binding the same must not exceed ten inches in length and eight inches in width, and the same must be bound together on the left-hand side.'

"The transcript here is somewhat larger in size than as prescribed by the foregoing rule, but we might perhaps pass this objection to the consideration of the record without notice but for the flagrant violation of rule 8 in the preparation of said transcript. In the hope that it may be of advantage to those of the profession who appear to be at all times otherwise too much occupied to look up and examine the rules laid down by the Supreme Court governing the appellate practice in this state, we here reproduce rule 8: 'The pleadings, proceedings and statement shall be chronologically arranged in the transcript, and each transcript shall be prefaced with an alphabetical index, specifying the folio of each separate paper, order, or proceeding, and of the testimony of each witness; and the transcript shall have at least one blank fly-sheet cover. The chronological arrangement of the several parts of the transcript, and a strict compliance with the other requirements of this rule, will be exacted of the appellant or party filing the record here in all cases, by the court, whether objection by the opposite party be made or not; and for any failure or neglect in these respects, which is found to obstruct

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the examination of the record, the appeal may be dismissed.'

"The transcript here does not even approximately conform to the requirements of said rule. In the first place, the proceedings constituting the record are not chronologically arranged in the transcript. The transcript begins, without any introduction, with the testimony taken. There were introduced at the trial some 18 exhibits, which were filed and marked as exhibits, consisting of letters between the parties evidencing the agreement, and said exhibits, as well as some mortgages and deeds also received in evidence, are, in lieu of being inserted in the transcript, as they should have been, lumped together in an appendix of some 50 pages following the testimony. Moreover, the transcript is not marked by folios, as prescribed by rule 8, and consequently the index prefacing the same specifies the pages only, and even then does not designate the pages on which the exhibits may be found. While there is absolutely no excuse for presenting this or any record in the shape in which we find it, we will nevertheless, as already intimated, consider the case on its merits. We will therefore deny the motion to dismiss with the warning that the conclusion thus announced as to said motion is not to be accepted as a precedent for the course of this court in the future as to similar motions in which there is merit for the reasons upon which the present motion is urged."

[2] In the year 1909 said Herbert Stanley entered into negotiations with defendant for the purpose of securing authority as agent to sell the latter's land, consisting of some 1,600 acres situated in Tehama county. Stanley addressed a letter to Adams inquiring whether the latter's ranch was for sale or exchange, and requesting him to state his price for said ranch, subject to the 5 per cent. commission ordinarily allowed for such services. Adams' reply was that his ranch comprised 1,600 acres of land, for which he would take \$10 an acre in cash or \$12.50 per acre on an exchange for other property. Upon the receipt of this letter, Stanley undertook to sell or exchange Adams' ranch, and thereafter, Stanley having interested different persons in the proposition, a series of letters passed between Adams and Stanley concerning the proposed sale and the commission which Stanley was to receive should he succeed in disposing of the ranch. On one occasion Stanley addressed a letter to Adams, in which he advised him that he (Stanley) could make a deal by which the ranch could be exchanged for certain Alameda real estate. After looking into and considering this proposition, Adams wrote a letter to Stanley, among other things, saying: "I will say in answer to your letter offering the Alameda property that I think it is inflated, and I will not pay commissions on inflated property in full. Now, to be candid with you, I will tell you what I think is fair.

I will pay \$800.00 for a cash sale at \$10.00 per acre, or I will pay \$400 for an exchange of property that I will consider a fair exchange. That is 5 per cent. on value. I think it is not right to ask anybody to pay on inflation." Thereafter Stanley interested a Mr. T. B. Draper, of Oakland, in the Adams property, and together they went to Tehama county and visited and inspected said property. Draper was the owner of several pieces of improved real estate in the city of Berkeley. After Stanley and Draper returned to Oakland from Tehama county, the former addressed a letter to Adams, proposing to give in exchange for his ranch said real estate of Draper, which was valued at \$20,000. This proposition involved a straight trade—that is, it was to be an even exchange of the two properties without any money being paid by the one to the other. The exchange on this basis did not take place, as we shall presently see. Stanley and Adams thereafter exchanged letters regarding the commissions which Stanley was to receive in the event the trade between Adams and Draper was effected. Adams, on the urgent request of Stanley, finally visited Berkeley and looked over and examined Draper's properties with a view of exchanging, upon some basis, his ranch for said properties. Stanley's letter, asking Adams to make said visit, read, in part, as follows: "* * * But I will say now, come down at once, and if you do not consider that I have earned \$800, when you see property here worth \$20,000, for your ranch, I will take \$400." Adams, at the time of inspecting the Draper real estate, did not appear to be favorably impressed with the proposition of exchanging his ranch therefor, and returned to his home without doing anything definite one way or the other with regard to the proposed exchange.

Thereafter Stanley addressed a letter to Adams, complaining that the latter was not treating him fairly, and inclosing a written agreement, embracing the terms upon which Stanley was willing to negotiate the sale or exchange of the ranch, and to which he requested Adams to affix his signature. In this letter Stanley said, in part: "I have others who want to buy, not exchange, but I must now have an agreement that will authorize me to sell and deliver the property, or I don't want it, for I can't afford to take buyers out to see property to fool them. * * * If you want to sell (not trade) and will give me an agreement to convey if I secure a buyer let me know. * * * " Adams refused to sign said agreement. It may here be well to notice one of the points made by appellant in connection with the foregoing letter. It is claimed that the demand therein for a written agreement, with a statement by Stanley that, unless such an agreement was executed, he did not want to handle or have anything to do with the matter of selling or exchanging Adams' ranch, amounted to an abandonment

by Stanley of any and all arrangements previously made with regard to the sale or exchange of said ranch. But, even if the letter referred to could well be so construed, still, the reply to said letter by Adams shows that there was an employment of Stanley by Adams as agent to sell or otherwise dispose of the latter's ranch—that is, either to sell it for cash or exchange it for property. Adams' said letter was as follows: "Your letter of the 20th inst. I got just as I got off the train at Cottonwood. You wrote it as if I went straight home. I did no such thing. I went down to Santa Cruz, and I met Mr. Draper as I was waiting for the night train at San Francisco. * * * I might trade with him yet (but it is not over likely). * * * Now you find me a buyer at \$10.00 per acre and I will except and you can get me a trade if you can suit me, and I will go down again, but I do not want you to come up, because I consider you would spoil any trade I could get. You are a very good hand to begin a sale or trade, but you are not in it to conclude one." Subsequently to the receipt of the foregoing by Stanley, the latter, accompanied by Draper, went to the ranch of Adams, and thereupon the exchange of the properties of Adams and Draper was consummated on these terms: Draper to receive the 1,600-acre tract of land of Adams, to assume the payment of a note for \$2,000 in favor of the Bank of Tehama County, which said note was secured by a mortgage on said tract of land, to execute to Adams two promissory notes—one for \$4,000 and the other for \$700—to be secured by mortgages on said land subordinate to the bank's mortgage, and to pay Adams the sum of \$300 in cash, and to transfer to Adams "six lots with the four houses thereon at the corner of Sixth and Gilman street, Berkeley, Alameda county, California, and one house and lot on Haskell street, about 250 feet east of San Pablo avenue."

That Adams' letters to Stanley clearly disclose his employment of Stanley as an agent to sell the former's ranch there cannot be the slightest doubt, and this is all that is required by subdivision 6 of section 1624 of the Civil Code. *Toomy v. Dunphy*, 86 Cal. 639, 25 Pac. 130; *Kennedy v. Merickle*, 8 Cal. App. 378, 97 Pac. 81; *Sanchez v. Yorba*, 8 Cal. App. 490, 97 Pac. 205. Adams' letter, last referred to herein, authorized Stanley to secure a sale or an exchange of his ranch, his only qualification being that Stanley himself should not accompany the proposed purchaser on the visit to the ranch, for reasons suggested in said letter. And whether Stanley had or had not accompanied Draper to the ranch would be immaterial, in so far as Adams' obligation to pay Stanley the commissions to which he was justly entitled under his contract with Adams might be affected thereby.

[3] It is also clear that Adams' agreement was that Stanley should be paid 5 per cent.

commission if the sale was entirely for cash, and half that amount if the bargain was effected entirely on an exchange basis. The court computed the commissions to which it found the plaintiff to be entitled upon the basis that a part of the consideration moving from Draper to Adams was in cash and a part in property. Therefore, figuring that the assumption of the mortgage debt of \$2,000 subsisting against the land and the notes executed to Adams aggregating \$4,700 counted for cash, the court allowed commissions thereon as well as on the \$300 cash payment at the rate of 5 per cent. in accordance with the terms of Adams' offer to Stanley in the event that he made a cash sale. The commissions thus computed totaled the sum of \$350. The court then obviously figured that the total value of the Berkeley property was \$10,000, upon which $2\frac{1}{2}$ per cent. commissions were allowed, amounting in the aggregate to \$250, which sum, added to the amount allowed on the cash part of the transaction, totaled the sum which the court found was due plaintiff. This finding is justified by the pleadings and the evidence.

It is clear from the evidence, as suggested, that Stanley had performed the services which he had agreed with Adams to render in the transaction by bringing the latter and Draper together in negotiations which led to the making of the bargain, upon what basis is immaterial, so far as Stanley's right to compensation is concerned. It appears from the evidence that when Stanley and Draper met Adams at the latter's home on the day on which the trade was made, and prior to any discussion of the matter, Stanley said that he would leave Draper and Adams to conduct the negotiations themselves and to make any bargain that might be the most agreeable to them. Adams, by conduct at least, acquiesced in the course thus suggested by Stanley, and he and Draper made their bargain in the absence of Stanley.

[4] As to the complaint, the first paragraph thereof sets out defendant's agreement to pay the sum of \$600 for the services rendered by Stanley in the form of a common count. The second paragraph declared upon a special contract to pay said amount. It is obvious that plaintiff relied upon his *indebitatus assumpsit* for a recovery. Indeed, he could not have relied upon the special contract, for said contract called for compensation either in the sum of \$800 or the sum of \$400, according to the nature of the bargain, whether on a cash basis or an exchange of properties.

Under the common count the proof sustains the finding and judgment of the court as to the amount. And under the circumstances it was proper—indeed, necessary—to plead the indebtedness in the form of a common count.

[5] It is a settled rule in this state that, where the terms of a special contract have been varied or modified by the agreement of the parties, the action for the amount

due for work and labor should be in the form of *indebitatus assumpsit*, and not upon the contract. "In such case the contract may be introduced in evidence by either party as an admission of the standard of value, or as proof of any other fact necessary to the recovery, and should be allowed to go to the jury whenever it can aid them in attaining a sound conclusion." *Reynolds v. Jourdan*, 6 Cal. 112; *Castagnino v. Balletta*, 82 Cal. 250, 23 Pac. 127; *Adams v. Burbank*, 103 Cal. 646, 37 Pac. 640; *Boyd v. Bargagliotti*, 12 Cal. App. 237, 107 Pac. 150.

[5] In the case at bar the terms of the agreement between Stanley and Adams were necessarily changed by the terms upon which the latter and Draper agreed to exchange properties, and this change was by the act of Adams himself with the tacit acquiescence of Stanley, who, we have seen, left the negotiations directly leading to the consummation of the bargain to the former and Draper.

But counsel for appellant declares that, if plaintiff relies upon the count in *indebitatus assumpsit*, he has failed to make out a case, since there was no proof made that the services of plaintiff's assignor were reasonably worth the sum for which judgment has been awarded. The special contract itself was evidence upon this point, and it was for the trial court to say whether from that and other evidence received the services rendered were reasonably worth \$600, and the finding of the trial court that that sum represented the reasonable value of the services performed is conclusive. It was not necessary, as counsel for appellant seems to think, that witnesses should have been produced to say that a certain sum would represent the reasonable value of the services. As stated, the contract itself was competent evidence of the standard of value and upon that evidence alone the court was authorized to fix the sum that it deemed, under all the circumstances, would amount to reasonable compensation.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

15 Cal. App. 527

STANTON et al. v. CARNAHAN. (Civ. 910.)
(District Court of Appeal, Second District, California. March 3, 1911.)

1. BROKERS (§ 75*)—PROVISION FOR COMPENSATION—CONSTRUCTION.

A contract to convey bound a purchaser to pay brokers "\$300 commission. Seller agrees to pay" brokers "\$100 commission when deal is complete." *Held*, that the \$300, as well as the \$100, was payable only on completion of the transaction.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 75.*]

2. BROKERS (§ 74*)—COMMISSION—RIGHT TO.

Under a contract to convey requiring payment of brokers' commission by the purchaser

on completion of the transaction, the purchaser is liable where failure to complete the transaction is due to want of performance on his part.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 62; Dec. Dig. § 74.*]

3. BROKERS (§ 74*)—CONTRACT BETWEEN THIRD PARTIES—RIGHT TO ENFORCE.

Provision, in a contract to convey, for payment of a commission by the purchaser, being for brokers' benefit, is enforceable by them at any time before rescission of the contract.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 62; Dec. Dig. § 74.*]

4. BROKERS (§ 74*)—CONTRACTS FOR COMPENSATION—CONSIDERATION.

Consideration for provision, in a contract to convey, that a purchaser should pay a commission to brokers, is implied from the fact that the contract is in writing.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 62; Dec. Dig. § 74.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by J. M. Stanton and another, partners as Stanton & Welch, against Alex Carnahan. Judgment for defendant, and plaintiffs appeal. Reversed.

A. M. Pence and Jones & Drake, for appellants. Anderson & Anderson, for respondent.

SHAW, J. Appeal from judgment.

[1] The action was brought to recover \$300 upon a provision of a contract entered into between defendant and one Crawford, whereby the latter agreed to sell, and the former agreed to buy, the tract of land therein described for a stipulated sum to be paid at the times and in the manner therein provided, which provision was as follows: "And the buyer (Carnahan, the defendant) agrees to pay Stanton & Welch \$300 commission. Seller (Crawford) agrees to pay Stanton & Welch \$100 commission when deal is complete." Defendant in his answer admitted the execution of the contract and admitted that it contained the provision for the payment of the commission, punctuated as hereinabove set forth, but alleged that said sum was not to be due and payable thereunder until the deal was completed, and further alleged that the deal had not been completed.

At the trial plaintiffs offered evidence tending to show that plaintiff Stanton had prepared and drawn the contract; that it was executed in his presence on September 21, 1907; and introduced the same in evidence, with proof that no part of the \$300 had been paid. Thereupon defendant moved for a nonsuit upon the ground of the want of any showing of employment of plaintiffs by the defendant, and that the contract offered in evidence was not a contract made expressly for the benefit of plaintiffs, nor was the contract made for the benefit of plaintiffs. The court then suggested that, assuming the grounds of the motion as made to be insufficient, there was an absence of any showing that the deal had been com-

pleted, and that under the terms of the contract the \$300 commission was not to be due and payable until the deal was completed. It was admitted that the title never passed from Crawford to Carnahan, nor was there any evidence of any payments being made upon the purchase price of \$15,500, other than the sum of \$100 upon the execution of the contract. Plaintiffs then offered to prove that Crawford had, pursuant to the terms of the contract, offered to perform his part thereof, but that Carnahan had refused so to do on his part and made default therein, and that the reason for not completing the deal was due to the acts of defendant, Carnahan. Whereupon the court stated that it was "quite willing to assume that those facts will all be proved," but that upon such assumption a motion for a nonsuit, if made, would, nevertheless, be granted. Thereupon defendant moved for a nonsuit upon the ground that the contract disclosed that the commission of \$300 was not to be paid until the deal was complete, and that no evidence had been offered and no allegation been made that the deal was ever completed, which motion was granted.

We agree with the learned trial judge in his interpretation of the contract. The words "when deal is complete" had reference to the performance of some future act intended to constitute the completion of the deal. This act, as conceded by appellants, was the vesting of title in the buyer and the payment of the purchase price or the delivery of evidences of obligation therefor. The provision that Carnahan should pay to Stanton & Welch \$300, and that Crawford should pay them \$100, must be regarded as constituting the contract, in so far as concerns them; and, so read and considered, it is clear that the words "when deal is complete" referred to and fixed a time contemporaneous with the performance of such act, not only when Crawford should pay the \$100, but likewise the time when Carnahan should comply with his obligation to pay the commission of \$300. The fact that the two sentences composing the contract so made for the benefit of plaintiffs are separated by a period, instead of a comma, does not affect the interpretation to be placed upon the provision. As the deal was not consummated, and inasmuch as under the terms of the contract the commission was not due until the deal was complete, the court held that plaintiffs were not entitled to recover.

[2] Upon this record, however, we must assume that evidence was introduced which tended to establish the fact that the failure to complete the deal was due to want of performance on the part of defendant, and hence the due performance or completion of the deal upon which payment was made contingent was excused. Section 1512, Civ. Code.

[3] In its determination of this case the

court is limited in its consideration thereof to the particular grounds upon which the motion for nonsuit was made. *Durfee v. Seale*, 139 Cal. 603, 73 Pac. 435.

[4] That part of the contract upon which the action is based was made expressly for the benefit of plaintiffs, and under the provisions of section 1559, Civ. Code, they were entitled to enforce the same at any time before the parties thereto rescinded it. If the parties had rescinded, then, under the provisions of said section, no recovery could be had. It may also be true that if, under the terms of the agreement, Carnahan's assent to the contract was procured by fraud, such fact might be urged as a defense. But the record discloses no evidence in support of either proposition. It appears that the contract sued upon was an existing one expressly made for the benefit of plaintiffs, a consideration being implied from the fact that it was in writing, and that in so far as it imposed obligations upon defendant he had made default, thereby preventing performance, the want of which he pleads against recovery in the action. Such position is untenable. The record is meager, incomplete, and unsatisfactory; but from what is disclosed we are of the opinion that the court erred in granting defendant's motion for a nonsuit.

The judgment is therefore reversed.

We concur: ALLEN, P. J.; JAMES, J.

15 Cal. App. 531

LARSON v. LARSON. (Civ. 806.)

(District Court of Appeal, First District, California. March 4, 1911. On Rehearing, April 3, 1911.)

1. APPEAL AND ERROR (§ 348*)—TIME TO TAKE—QUESTIONS REVIEWABLE.

An appeal taken under Code Civ. Proc. §§ 941a, 941b, within six months after judgment, notice of entry of which was not given, is taken in time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1900-1904; Dec. Dig. § 348.*]

2. TRIAL (§ 165*)—NONSUIT—EVIDENCE.

A motion for nonsuit admits the truth of the evidence for plaintiff, together with every inference or presumption legitimately deducible therefrom, and the court must disregard the contradictory evidence, and construe all the evidence most strongly against defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

3. HUSBAND AND WIFE (§ 126*)—SEPARATE PROPERTY OF WIFE—EARNINGS—EVIDENCE—"SEPARATE ESTATE."

Where a widow, suing the administrator of her deceased husband for household furniture, showed that she had conducted business in her own name without interference from her husband, and that the furniture was bought by her with funds earned in the business, there was evidence that the property was her separate estate within Civ. Code, §§ 158, 159, authorizing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

a husband to relinquish to the wife his interest in her earnings.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 459-464; Dec. Dig. § 126.*

For other definitions, see Words and Phrases, vol. 7, pp. 6413, 6414.]

On Rehearing.

4. APPEAL AND ERROR (§ 419*)—NOTICE OF APPEAL—SUFFICIENCY.

A notice of appeal from an order of nonsuit which identifies the order with reasonable certainty is sufficient within Code Civ. Proc. § 941b.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2145, 2146; Dec. Dig. § 419.*]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by Emma A. Larson against Alexander Larson, as administrator of Alfred Larson, deceased. From a judgment of nonsuit, plaintiff appeals. Reversed.

John C. Scott, for appellant. Reed, Black & Reed and Walker & Moreland, for respondent.

KERRIGAN, J. This is an appeal from a judgment of nonsuit entered in an action of claim and delivery.

Plaintiff is the widow of Alfred Larson, deceased, and brought suit against the administrator of her husband's estate to recover possession of certain personal property, consisting generally of household furniture, which she claims as her separate property.

Upon the close of plaintiff's case, defendant moved for a nonsuit, upon the ground that the evidence introduced failed to sustain the allegations of the complaint as to the separate character of the property. After due consideration this motion was on September 3, 1909, granted. Thereafter, on September 22, 1909, a judgment of nonsuit was entered in the minutes of the court, pursuant to the provisions of section 581 of the Code of Civil Procedure. Before considering the question of the correctness of the court's ruling on the motion for nonsuit, it is necessary to dispose of a motion made by respondent to dismiss the appeal. The judgment was entered by the clerk on September 22d, and the appeal therefrom was taken on November 27th following.

[1] Respondent contends that, as the appeal was perfected more than 60 days after the entry of the judgment, the evidence cannot be reviewed, and that the appeal must be dismissed. This motion would probably have to be granted if the appeal were taken under section 939 of the Code of Civil Procedure. As a matter of fact, however, the appeal is taken under sections 941a and 941b of that Code; and, as no notice of the entry of judgment was given, and the appeal was taken within six months from such entry, it was taken and perfected in season to permit a consideration and review of the evidence, or for any other purpose.

This brings us to the question, Was the court warranted in granting the motion for nonsuit? To answer this query it will be necessary to review briefly the evidence. The plaintiff, as a witness in her own behalf, testified that for a long period of time she had conducted, in her own name, the business of selling leases of lodging houses and the like; that the money thus earned was deposited in banks to her credit; that she had exclusive and undisturbed control of said business and its earnings, free from any interference or participation of her husband; that the furniture in question was purchased by her with funds thus earned; that, on account of her illness at the time of this purchase, her husband attended to the details of the transaction, but that the checks given in payment thereof were drawn by her on funds standing in her own name in the bank, and representing her own earnings in said business; and that the receipts for the several payments were taken by her husband for her and in her name. As a circumstance showing her husband's recognition of the fact that he acted merely as her agent in the matter, plaintiff testified that upon the completion of the transaction, in handing her a receipt in full from the vendor of the furniture, her husband asked if she did not think he had gotten the furniture for her cheap enough. She also testified that prior to going to Portland, where it appears that she and her husband formerly resided, their joint earnings went into a common fund; but that thereafter, and for more than five years before the commencement of the present action, there had existed a verbal understanding between them to the effect that (quoting the plaintiff's language) "I should go ahead on my own business and take care of my business for myself." In one place in her testimony she said that no agreement was made that the earnings of such business were to be hers, because she and her husband did not think such agreement necessary; but it is quite evident from the context that she supposed she was being questioned with reference to a written agreement.

[2] A motion for a nonsuit admits the truth of all evidence in favor of the plaintiff, together with every inference or presumption legitimately deducible therefrom. Contradictory evidence is to be disregarded, and upon such a motion all evidence must be construed most strongly against the defendant. *Goldstone v. Merchants' Ice, etc., Co.*, 123 Cal. 625, 56 Pac. 776; *Hanley v. Cal. Bridge Co.*, 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597; *Ferris v. Baker*, 127 Cal. 520, 59 Pac. 937. In the case of *Estate of Arnold*, 147 Cal. 583, 82 Pac. 252, the rule is thus fully stated: "Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered as facts proven. If evi-

dence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the plaintiff. All evidence must be taken as true; and, if contradictory evidence has been given, it must be disregarded. * * * If there is any substantial evidence tending to prove the facts necessary to make out a case, the plaintiff is entitled to a trial upon the merits."

[3] Tested by this rule, we think the motion for a nonsuit should have been denied. In addition to the evidence of the verbal agreement between plaintiff and her husband that she should conduct the business for herself, it was clearly shown that she, in fact, did manage and control the leasing business in every respect as her own, and without any interference at all on her husband's part except upon the single occasion and under the circumstances already described. As these facts indicate that the husband did not regard the leasing business and its earnings as community property, and that he had relinquished the same to his wife, they constituted circumstantial evidence tending to prove the allegations of plaintiff's complaint. *Kaltschmidt v. Weber*, 145 Cal. 596, 79 Pac. 272. We think the testimony fairly discloses the fact that the property was regarded by the spouses as the separate estate of the wife. The earnings of the wife during marriage and while living with her husband are community property, subject to the control and management of the husband; but the latter may relinquish to the wife his interest in them, and, when he does so, such earnings become the separate property of the wife. Sections 158, 159, Civ. Code; *Wren v. Wren*, 100 Cal. 276, 34 Pac. 775, 38 Am. St. Rep. 287.

In the case of *Von Glahn v. Brennan*, 81 Cal. 261, 22 Pac. 596, the evidence showed that the husband told his wife that "everything you make is yours." She went into business, made money, and purchased real property, and such property was held to be her separate estate. In *Kaltschmidt v. Weber*, supra, the court said: "It may well have been the case that the husband could recall no conversation between them in which such an agreement was distinctly expressed. His testimony strongly indicates this condition of memory. And yet it might also be true that the fact that there was such an agreement was perfectly well understood between them. In such a case resort may be had to circumstantial evidence. The conduct and actions of the husband, with respect to such earnings, indicating that he did not regard them as community property, or that he had relinquished to her the right to control and dispose of her receipts from that source, would be competent evidence and admissible to prove the agreement."

The plaintiff is of foreign birth, and not

very familiar with the English language, which doubtless accounts for the testimony being indefinite and obscure in some respects. Nevertheless, considering the portions favorable to her, and all reasonable inferences deducible therefrom, we feel constrained to say that if the case had been submitted on her testimony alone it would have supported a judgment in her favor.

Therefore the motion for nonsuit was improperly granted. *Goldstone v. Merchants' Ice & Cold-Storage Co.*, supra.

The judgment is reversed.

We concur: LENNON, P. J.; HALL, J.

On Rehearing.

PER CURIAM. Respondent in his petition for a rehearing calls our attention to the fact that the appellant in her notice of appeal refers to the date of the entry of the order of nonsuit as being September 22d, respondent claiming that the record shows that such entry was in fact made on September 3d. He contends, therefore, that the appeal should not have been considered. It is not as clear as it might be as to when the judgment of nonsuit was entered in the minutes of the court. We are inclined to think, however, that the first order was merely "a memorandum affording data from which a judgment * * * might be drafted," and that, therefore, the order of September 22d was the proper one from which to take the appeal. The Supreme Court so held in a similar case. *Ferris v. Baker*, 127 Cal. 520, 59 Pac. 937.

[4] The appeal was in time, even if the order of nonsuit was entered as claimed by respondent. The error complained of, even if it existed, could not possibly have misled any one, for the notice of appeal identified the order appealed from with reasonable certainty. That is all that is required. Section 941b, Code Civ. Proc. Such errors have always been disregarded. See *Weyl v. Sonoma Valley Ry. Co.*, 69 Cal. 202, 10 Pac. 510; *Anderson v. Goff*, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34; *Paul v. Crugnaz*, 25 Nev. 293, 59 Pac. 857, 60 Pac. 983, 47 L. R. A. 540; *The Latona et al. v. McAlle*, 3 Wash. T. 332, 19 Pac. 131.

The petition for a rehearing is denied.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Dorothy Smith, by her guardian ad litem, A. D. Smith, against Ada A. Dryden. Judgment for defendant, and plaintiff appeals. Affirmed.

E. B. Drake and Jones & Drake, for appellant. G. P. Adams, for respondent.

SHAW, J. Action to recover damages alleged to have been sustained by reason of the negligence of defendant. Judgment went for defendant, and plaintiff appeals therefrom upon a bill of exceptions.

It appears from the findings that one Moorehead entered into a written contract with defendant and two others jointly interested with her in the property, whereby, for the sum of \$3,270, he agreed to furnish the labor and materials required in the construction of two certain buildings, and to complete and finish the same in accordance with plans and specifications agreed upon; that Moorehead in the performance of his contract was not under the control or direction of defendant, except as to results only; that in the performance of his contract Moorehead was an independent contractor; that during the progress of the work Moorehead, for the purpose of drying the same, caused some boards to be stacked up in a manner which left a space underneath the same upon a lot adjoining that on which he was erecting the buildings; that, while plaintiff's younger brother was engaged in playing thereunder, she went after him to take him home, and that while she was under said stack of boards it fell and caused the injuries upon which the action is based; that the injuries were not due to the negligent stacking of the boards or the negligence of defendant.

[1] Counsel for appellant concedes that she is not entitled to recover from defendant if Moorehead was an independent contractor. The findings of the court clearly establish such fact. Appellant contends, however, that such finding is not supported by the evidence, for the sole reason that the written contract made between Moorehead and defendant, under which he was engaged in the construction of the buildings, was not filed with the county recorder, as required by section 1183 of the Code of Civil Procedure, which provides that, in case of failure so to file the same, such contract "shall be wholly void, and no recovery shall be had by either party thereto."

While the contract, by reason of failure to file the same, was void, so far as concerned the right of either party to maintain an action thereon, such fact did not establish the relation of master and servant between defendant and Moorehead. In such cases, persons furnishing labor and materials at the

15 Cal. App. 568

SMITH v. DRYDEN. (Civ. 923.)

(District Court of Appeal, Second District, California. March 10, 1911.)

1. MASTER AND SERVANT (§ 310*)—INJURY TO THIRD PERSONS—INDEPENDENT CONTRACTORS—LIABILITY OF OWNER.

While a building contract is void when not filed as required by Code Civ. Proc. § 1183, as concerning the right of either party to sue thereon, such condition does not change the contractor's relationship from that of an independent contractor to an employé so as to render the owner liable for his negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1243; Dec. Dig. § 316.*]

2. CONTRACTS (§ 44*)—BUILDING CONTRACTS—VALIDITY.

Notwithstanding invalidity of a building contract for failure to file it as required by Code Civ. Proc. § 1183, the authority of the contractor, the nature and extent of his employment, and the amount of his recovery thereon on performance are controlled by the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 168; Dec. Dig. § 44.*]

instance of the contractor would possess the right to recover against him personally, but the fact that the contract was void would impose no personal liability upon the owner for such labor and materials. The only remedy against the owner is the foreclosure of such liens upon the building as they may have acquired. *McMenomy v. White*, 115 Cal. 339, 47 Pac. 109. Since the relation existing between the owner and contractor under a void contract imposes no personal liability upon the owner for labor and materials, it must follow that such relation can impose no liability upon the owner for damages sustained by reason of the negligence of the contractor in the performance of such contract.

Furthermore, while as between the parties thereto the failure to file the contract renders it void to the extent that neither party can maintain an action thereon for its breach, nevertheless, it stands as showing the "understanding of the parties that such work, and only such work, as is called for by the terms of the contract shall be performed."

[2] The authority of the contractor, the nature and extent of his employment, and the amount which he is entitled to recover upon performance in an action in assumpsit are all measured and determined by the provisions of the contract. *Sullivan v. California Realty Co.*, 142 Cal. 201, 75 Pac. 767; *Laidlaw v. Marye*, 133 Cal. 176, 65 Pac. 391. Under the terms of this contract, as fully performed, Moorehead was an independent contractor as to whom, in the mode and manner of doing the work called for in the contract, defendant had no right to and exercised no control.

Our conclusion renders it unnecessary to discuss other points involved in the appeal. The judgment is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

15 Cal. App. 571

**KINNEY v. MARYLAND CASUALTY CO.
OF BALTIMORE.** (Civ. 908.)

(District Court of Appeal, Second District, California. March 10, 1911. Rehearing Denied by Supreme Court May 9, 1911.)

1. PLEADING (§ 126*)—ANSWER—NEGATIVE PREGNANT.

In an action on an insurance policy covering merchandise in certain safes, and indemnifying against loss through felonious abstraction by the use of tools or explosives, etc., the complaint alleged that certain persons to plaintiff unknown entered the safes by the use of tools, and feloniously abstracted therefrom, without plaintiff's consent, certain merchandise, etc. The answer denied that certain persons to plaintiff unknown entered by the use of tools the safes without plaintiff's consent, that certain persons by the use of tools entered the safes without plaintiff's consent, and abstracted therefrom the merchandise alleged in the complaint, and alleged that, if the safes were entered by the use of tools, it was with plaintiff's consent, and that the entry was procured, etc., by his consent, etc. *Held*, that under the rule requir-

ing a denial of every specific averment in a sworn complaint in substance and in spirit, and not merely a denial of its literal truth, and that failure to make such denial constitutes an admission of the averment, the answer presented no issue as to the manner of effecting entrance to the safes or that merchandise was abstracted therefrom, but presented an issue as to the connivance and procurement of such entry and abstraction by plaintiff.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 261-263; Dec. Dig. § 126.*]

2. WITNESSES (§ 255*)—REFRESHING MEMORY—SECONDARY EVIDENCE—BOOKS OF ACCOUNT—MEMORANDA.

Under Code Civ. Proc. § 1855, subd. 5, relating to proof of contents of writings, plaintiff was properly permitted to use for the purpose of refreshing his memory in order to establish his loss of goods under a burglary policy a memorandum prepared from his books containing invoices of goods bought and sold, where an examination of the books in court would have entailed inconvenience and loss of time.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 878; Dec. Dig. § 255.*]

3. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—EXAMINATION OF WITNESSES.

In an action on a casualty policy insuring against burglary, error, if any, in permitting plaintiff to use for the purpose of refreshing his memory in order to enumerate the goods stolen a memorandum prepared from books containing invoices of goods bought and sold, was harmless; the books being in court, and no attempt being made on cross-examination to controvert the oral statements based on the memory of the witness after refreshing his memory from such memorandum.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1048.*]

4. APPEAL AND ERROR (§ 1031*)—HARMLESS ERROR—PRESUMPTIONS OF PREJUDICE.

Where nothing in the record indicates an abuse of the court's discretion in permitting leading questions, no prejudicial error will be presumed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4038-4046; Dec. Dig. § 1031.*]

5. EVIDENCE (§ 441*)—PAROL EVIDENCE—PRIOR AGREEMENT.

In an action on a burglar insurance policy, etc., which was not ambiguous or uncertain in its terms as to any matter involved in the issues presented, evidence as to a policy of an entirely different character considered by the parties before the one in question was issued was properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2046; Dec. Dig. § 441.*]

Appeal from Superior Court, Los Angeles County; Robert M. Clark, Judge.

Action by W. M. Kinney against the Maryland Casualty Company of Baltimore. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

John Murray Marshall and Wilbur Bassett, for appellant. Hunsaker & Britt, for respondent.

ALLEN, P. J. The action was upon a policy of insurance. Findings and judgment were in favor of plaintiff, from which judgment, and an order denying a new trial, defendant appeals.

[1] The complaint alleged the issuance to plaintiff by defendant of a policy of insurance covering merchandise in certain safes and indemnifying against loss when, through felonious abstraction by the use of tools or explosives directly upon such safes, a loss ensued. It was averred that, "while said policy was in full force and effect, to wit, on the 16th day of March, 1907, certain persons to the plaintiff unknown made entry into the said safes by the use of tools directly thereupon, and feloniously took and abstracted from the same, against the will and without the consent of plaintiff, during the nighttime, * * * certain merchandise, to wit, jewelry and precious stones, which were then and there the property of plaintiff, and took and carried away the same and deprived plaintiff thereof, and by such acts of said persons unknown the said merchandise was directly and wholly lost to the plaintiff." The actual cash value of the merchandise at the date of the loss was alleged to be \$3,442.63. The answer, upon information and belief, denied "(1) that certain persons, to the plaintiff unknown, did on the 16th day of March, 1907, or thereabouts, or at any time during the continuance of said policy of indemnity, make entry into the said described safes by the use of tools directly thereupon, against the will and without the consent of plaintiff; (2) denies that * * * certain persons made entry into said safes by the use of tools directly thereupon, and feloniously took and abstracted from the same, against the will and without the consent of plaintiff, certain merchandise of plaintiff described in said complaint;" (3) denies the cash value of said merchandise as alleged; "* * * (5) alleges that, if said safes were at said time entered by the use of tools thereupon, it was with the knowledge and consent of the plaintiff, and that such entry, if so made, was procured, aided, and abetted by the negligence, connivance, or consent of the plaintiff." Construing the answer under the rule "that our system requires a denial of every specific averment in a sworn complaint, in substance and in spirit, and not merely a denial of its literal truth, and whenever the defendant fails to make such denial he admits the averment" (*Doll v. Good*, 38 Cal. 290; *Westbay v. Gray*, 116 Cal. 663, 48 Pac. 800), we are constrained to hold that paragraphs 1 and 2 of the answer presented no issue as to the manner of effecting entrance to the safes, or that merchandise was abstracted therefrom; but, on the contrary, presented an issue as to the connivance and procurement of such entry and abstraction by the plaintiff. Defendant in good conscience could have verified the answer containing the averments of the first and second paragraphs, even with full knowledge of the forcible entry by the use of tools and the abstraction of goods, if it in fact believed that the same were with the connivance and consent of plaintiff. The

construction that defendant did not intend to specifically deny the manner of entrance, or the fact of the abstraction of the goods, is accentuated by paragraph 5, which alleges facts controverting the felonious character of the entry and taking, and clearly indicates that this was the issue intended to be urged by paragraphs 1 and 2. The rule sometimes invoked, that objections to the sufficiency of a pleading are waived by failure to demur or to object to the evidence offered in support thereof, has no application when, as in this case, the answer by denial of facts controverting the felonious character of the entry and the value of the goods, tendered issues sufficient as a defense, in which case the omission to negative other material allegations will be held as an admission of their truth. The bill of exceptions discloses that the entry into the safes was by means of a key, and it is argued by appellant that a key is not a tool, and therefore the entry was not effected in such manner as to render the defendant liable. In view of what we have said as to the issues presented, neither evidence nor findings were requisite as establishing the entrance by means of tools, and it is unnecessary to determine what effect should be given the word "tool," as employed in the policy.

It is next claimed by appellant that the evidence is insufficient to establish what jewelry or precious stones were so taken. The matter for determination was as to the cash value of the goods abstracted, there being, as we have before urged, no denial of the actual abstraction of some goods and merchandise. The plaintiff was permitted to use a memorandum for the purpose of refreshing his memory when called upon to enumerate the items involved in the abstraction. His memory being so refreshed, he stated that the aggregate value was \$3,442.63. There was no evidence of any kind or character controverting this statement.

[2] We are of opinion that the use of the memorandum for the purpose stated was warranted by subdivision 5 of section 1855 of the Code of Civil Procedure. It appears by the record that the books of plaintiff containing invoices of goods bought and sold, from which the memorandum was prepared, were in court. It is in evidence that the general result shown by the memorandum could have been arrived at by an examination of such books. The inconvenience and loss of time attendant upon such examination justified the court in the exercise of its discretion in admitting parol proof of the matters therein contained. *People v. Dole*, 122 Cal. 496, 55 Pac. 581, 68 Am. St. Rep. 50.

[3] The books being in court, through the use of which upon cross-examination the accuracy of such statements could have been determined, and no attempt being made upon cross-examination to controvert such oral statements based upon the memory of the witness after refreshing his memory from

such memorandum, would indicate that no prejudicial error could be said to result from the action of the court in permitting the memorandum for the purpose for which it was used.

[4] Appellant criticises the leading character of certain questions permitted upon the trial. This is but a criticism of the action of the court in the exercise of a discretion. Nothing in the record indicates an abuse thereof, and no prejudicial error will be presumed.

[5] We see no error in the action of the court sustaining objections to questions concerning a policy of an entirely different character which was considered by the parties before application was made for the one actually issued. The policy which was issued, and which is the basis of the action, is in no sense ambiguous or uncertain in its terms as to any matter involved in the issues presented. There was therefore no reason for explanation and no uncertainty therein warranting evidence of the character proposed. The rights of the parties were to be determined by the terms of the instrument issued, and, being certain and unambiguous, all parties were by its terms concluded.

We find no prejudicial error in the record, and the judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

15 Cal. App. 576

MCCARTHY v. BOARD OF SUPRS OF
MERCED COUNTY, et al. (Civ. 791.)

(District Court of Appeal, Third District, California. March 13, 1911. Rehearing Denied by Supreme Court May 12, 1911.)

1. BRIDGES (§ 20*)—CONSTRUCTION—BOARD OF SUPERVISORS — POWERS—"CONTROL"—"SUPERVISION."

Under Pol. Code, § 4041, subd. 4, requiring county boards of supervisors when the cost of construction of any bridge, etc., exceeds \$500 to advertise for bids, but providing that, on being advised by the county surveyor that the work can be done for less than the lowest bid, the board may reject all bids and order the work done or structure built by days' work under the "supervision and control" of such surveyor, the latter to be held personally responsible under his official bond to construct such structure at a cost not exceeding the lowest bid, the board did not exceed its power in directing the surveyor on his being instructed to construct a bridge to purchase material therefor, "supervision" implying oversight, and the word "control" being used to authorize additional power, such as is contained in one of its definitions, "to exercise a restraining or governing influence over, to regulate."

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 37-47; Dec. Dig. § 20.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1549-1552; vol. 8, p. 7617; vol. 8, p. 6797.]

2. COUNTIES (§ 50*)—CONSTRUCTION—POWERS OF BOARD OF SUPERVISORS.

Such authorization was not an unwarranted delegation of authority by the supervisors; the

power of the board coming from the act of the Legislature.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 50.*]

3. BRIDGES (§ 20*)—CONSTRUCTION—POWERS OF BOARD OF SUPERVISORS—STATUTES.

There is no inconsistency between Pol. Code, § 4041, subd. 4, authorizing county boards of supervisors to order, in certain instances, bridges, etc., to be built by the county surveyor, and section 4041 [a] that the road commissioners or road overseers in their respective districts shall employ all labor required and direct the conduct of work of any kind on all public roads, or section 2645, providing that road commissioners under the direction of the board of supervisors must take charge of the highways within their respective districts and employ all men, teams, etc., and all help necessary to do the work in their respective districts when the same is not let by contract, the former section providing for an exceptional, the latter for the ordinary condition.

[Ed. Note.—For other cases, see Bridges, Dec. Dig. § 20.*]

4. BRIDGES (§ 20*)—CONSTRUCTION—STATUTES.

Pol. Code, § 4041, subd. 4, authorizing county boards of supervisors to order, in certain instances, bridges, etc., to be built by the county surveyor, is not inconsistent with section 4074, providing that no county officer shall, except for his own services, present any claim against the county, etc., there being no contractual relation in such case, as the only compensation the surveyor can receive is the fee fixed by law for his services, though an additional duty is cast on him.

[Ed. Note.—For other cases, see Bridges, Dec. Dig. § 20.*]

5. EVIDENCE (§ 83*)—PUBLIC OFFICERS—PRESUMPTIONS.

The presumption is that public officials will do their duty.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by D. J. McCarthy against the Board of Supervisors of the County of Merced and others. Judgment for defendants, and plaintiff appeals. Affirmed.

F. G. Ostrander and J. J. Griffin, for appellant. H. S. Shaffer, for respondents.

BURNETT, J. The action was brought in the superior court of the county of Merced to restrain defendants from constructing a steel bridge over the Merced river in said county. The court below sustained a demurrer to the complaint for the insufficiency of the facts to constitute a cause of action. Plaintiff declined to amend his complaint, and judgment was thereupon rendered in favor of defendants, and plaintiff has appealed.

The facts alleged in the complaint, which we deem necessary for an understanding of the case, are as follows: A petition of the taxpayers of said county was presented to the board of supervisors of said county praying for the construction of a bridge at a certain point over Merced river in Merced county. At a regular session of said board, held on the 9th of July, 1909, an order was duly made by said board directing the county

surveyor to submit plans and specifications for the construction of a steel bridge at the designated point, and to have the plans ready for the next regular meeting of said board in July. The plans and specifications were prepared by the surveyor and submitted to the board and were regularly accepted and adopted by said board on July 19, 1909. The board thereupon ordered the clerk of said board to advertise for bids for the construction of said bridge in accordance with the plans and specifications that were adopted. This was done, and certain bids were received and they were opened and inspected by said board. At the same session of the board the county surveyor advised said board that said bridge could be constructed for a sum less than the amount of the lowest bid, and thereupon the said board refused to award the construction of said bridge to the lowest responsible bidder, or to any bidder, and rejected all the bids and adjourned without taking further action as to the construction of the bridge. Thereafter, at a special session, held on October 6, 1909, called for the purpose of considering the construction of said bridge by days' work under the direction and control of said county surveyor, the board unanimously adopted a certain resolution which, after reciting the circumstance of the opening of the bids and the advice of the county surveyor, "ordered that A. E. Cowell, surveyor of Merced county, be and he is hereby authorized and directed to proceed and construct said bridge by days' work according to his plans and specifications, and to purchase all necessary material for the same. * * * The said defendant A. E. Cowell, pursuant to the order of said board, is proceeding, and threatens to continue to proceed, to construct said bridge, and to contract for labor, material, and supplies necessary for the construction of said bridge, and the said board of supervisors and the members thereof are aiding and advising the said A. E. Cowell in the construction of said bridge and in contracting, and providing funds, for said supplies, labor, and materials out of the funds of said county and road district and threaten to continue to so aid and advise said Cowell and provide for said funds." The said bridge will exceed in cost of construction the sum of \$500.

[1] Respondents claim that authority for their action is found in the language of subdivision 4 of section 4041 of the Political Code. This is a part of the enumeration of the general powers of the boards of supervisors in their respective counties, and it relates specifically to the maintenance, control, construction, etc., of public roads, turnpikes, ferries, wharves, chutes, and bridges within the county, and it provides that "when the cost of the construction of any bridge, wharf, chute, or other shipping facilities that may be built under the provisions of this subdivision exceeds the sum of five hundred dol-

lars they must cause to be prepared and must adopt plans and specifications, strain-sheets and working details, and must advertise for bids for the construction of such bridge, wharves, chutes or other shipping facilities, unless otherwise provided by law, in accordance with the plans and specifications so adopted. All bidders shall be afforded opportunity to examine such plans and specifications and said board shall award the contract to the lowest responsible bidder, * * * provided, that after the submission of the bids as herein provided, the board of supervisors being advised by the county surveyor that the work can be done for a sum less than the lowest responsible bid, it shall then be their privilege to reject all bids and to order the work done or structure built by days' work under the supervision and control of the said surveyor; provided further, that the surveyor in such cases shall be held personally responsible (under his official bond to construct said bridge or structure) according to his plans and specifications at a cost not to exceed the amount of the lowest responsible bid received." It is perfectly apparent that the board did not exceed the privilege granted by said section unless in the command and direction to the surveyor to purchase material for the said structure, but even in this particular we are of the opinion that the action of the board was entirely within the purview of said provision. The work is to be done, not simply under the "supervision," but also under the "control," of the surveyor. "Supervision" implies oversight and direction. "Control" must have been used to authorize additional power, such as is contained in one of its definitions, "to exercise a restraining or governing influence over, to regulate." How could the surveyor govern or regulate the construction of the bridge without a supervision over the employment of labor and the purchase of material? He could supervise the structure by directing its completion in accordance with the plans and specifications. He could not "control" it without a directing power as to the cost. This power manifestly could not be exercised without the privilege of employing the labor and purchasing the material. This view, that it was the intention of the Legislature in the contingency mentioned to clothe the surveyor with the ample power suggested, is strengthened and confirmed by a consideration of the purpose of this alternative plan and of the bond required of the surveyor to do the work in accordance with his advice to the board. The scheme was devised to protect the county against collusion on the part of bidders or the payment of exorbitant charges for such public improvements. To indemnify the county against loss in consequence of the award to the surveyor, he is required to give a bond to construct the bridge at a sum not to exceed the lowest bid. It must be apparent

that no surveyor, without the privilege of hiring the labor and purchasing the material, would enter into such an undertaking. By the construction contended for by appellant, the manifest purpose of the law would therefore be defeated.

[2] We can see nothing in the position of respondent that implies an unwarranted delegation of authority on the part of the supervisors. In fact, there is no delegation of authority whatever by the supervisors. The power of the board comes from the act of the Legislature. It may be admitted that, independent of the provision in question, the Legislature has empowered the board of supervisors to let the work to the lowest responsible bidder or to do it themselves. But the authority that confers power can withhold or withdraw it. It may take it away from one and confer it upon another, unless, of course, there is some constitutional barrier. As to the power of the Legislature, Judge Redfield says: "It has never been questioned that the American Legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written Constitutions. That must be conceded, I think, to be a fundamental principle in the political organization of the American states. We cannot well comprehend how, upon principle, it should be otherwise. The people must, of course, possess all legislative power originally. They have committed this, in the most general and unlimited manner, to the several state Legislatures, saving only such restrictions as are imposed by the Constitution of the United States or of the particular state in question." *Thorpe v. Rutland, etc.*, R. R. Co., 27 Vt. 142, 62 Am. Dec. 625. Indeed, there is in our Constitution (article 11, § 5) a specific command that "the Legislature by general and uniform laws shall provide for the election or appointment in the several counties of boards of supervisors, sheriffs, county clerks, district attorneys and such other county, township and municipal officers as public convenience may require, and shall prescribe their duties and fix their terms of office." In harmony with this mandate the Legislature has prescribed the duties of the supervisors and at various times has amended certain provisions of the statute, and in 1907 (Stats. 1907, p. 367) was added this clause whereby in a certain contingency it was made the duty of the county surveyor to do the work therein prescribed. It is true that the board is not deprived of all discretion in the matter. The law contemplates that the supervisors shall act, of course, for the best interest of the public. It is fitting that they should be advised by the county surveyor who is presumably particularly qualified for that duty. They may reject his advice or they may supplement it by independent investigation, but, when they

have ordered the surveyor to do the work, the Legislature has given him express authority and made it his duty to comply with said order. In brief, the case is this: The Legislature is the source of all power in the premises. In the first instance, it authorized the board of supervisors to have complete control over the work. Subsequently it modified this grant of power by authorizing, in a certain contingency, the county surveyor, when directed by the board, to perform this public duty. The matter is for the Legislature, and not for the courts.

[3] There is no inconsistency between this provision and the succeeding one providing that the road commissioners or road overseers in their respective districts "shall employ all labor required and direct the conduct of work of any kind upon any and all public roads," or section 2645 of the Political Code, providing that "road commissioners, under the direction and supervision and pursuant to orders of the board of supervisors, must: (1) Take charge of the highways within their respective districts, and shall employ all men, teams, watering carts, and all help necessary to do the work in their respective districts when the same is not let by contract." The section before us provides for an exceptional, the other sections for the ordinary, condition. The former is specific, the latter general in their operation. Manifestly the road commissioner has general supervision over the roads, including the bridges, and he must attend to repairs and to the many details required to keep the highways in proper condition. But by this later specific provision the duty of the road commissioner has been modified somewhat in a particular instance, and, reading these various sections together, it is easy to give effect to all of them without violating any principle of construction and to reach the conclusion that, in special cases requiring bids, the work may be let by the board of supervisors to the lowest responsible bidder or, to save expense, it may be done under the direction and control of the county surveyor.

[4] Nor do we see anything herein inconsistent with section 4074 of the Political Code providing that "no county officer shall, except for his own services, present any claim, account or demand for allowance against the county, or in any way except in the discharge of his official duty advocate the relief asked in the claim or demand made by any other." The contention is that the said arrangement constitutes a contract between the supervisors and the county surveyor and therefore prohibited by the above-mentioned provision. But we do not understand that there is any such contractual relation as the statute contemplates. Under the circumstances mentioned, it rather becomes the official duty of the county surveyor to perform the work. He is to derive no profit therefrom, and the only compensation he can receive is the fee fixed

by the law for his services. In other words, it seems plain that by virtue of this provision an additional duty is cast upon the county surveyor without any increase whatever of his compensation in those counties where he is paid a salary for his entire official service and in other counties with simply an allowance of the legal fee for his actual work. Herein, as we view it, there is nothing opposed to the letter or spirit of the law or in contravention of sound public policy.

[5] To the suggestion that respondents' construction of the law is likely to encourage great abuse and afford an attractive allurement for designing county surveyors, it is sufficient to say that the presumption is that public officials will do their duty, although, admittedly, under any administrative scheme or system, gross wrong will sometimes be perpetrated against the public by dishonest men in official station.

Neither is it a fair interpretation of the law to hold that it deprives the Legislature of any part of its power to prescribe the duties of the county surveyor. These duties are set forth generally in sections 4214 to 4220, inclusive, of the Political Code, but the Legislature, by the provision before us, as before mentioned, has added an additional duty to be performed when directed by the board of supervisors. Nor in the work required is there anything so foreign to the general scope of the functions of the county surveyor as to compel the inference that said duty could not have been contemplated by the Legislature. It is mostly, if not entirely, ministerial in its nature and of such a character that by training and experience the county surveyor should be specially qualified to perform it.

Even upon the theory of appellant that the board of supervisors alone has the power to purchase material for the construction of the bridge, it is doubtful whether the complaint stated a cause of action, in view of the allegation as to the board of supervisors ordering and advising the said A. E. Cowell in the construction of said bridge and in contracting therefor. If the supervisors are aiding and advising in the execution of the plan, it is not unreasonable to hold that Cowell is simply their agent in the purchase of the materials and in the employment of the labor. We would then have no more than what appellant says the Legislature intended; that is, the selection of the county surveyor "to supervise the construction of a bridge when built by days' work to the end that it should be constructed according to the plans and specifications adopted." At any rate, after a consideration of all the points made by appellant, most of which we have mentioned, we are satisfied that they are more technical than substantial and that the efforts of the officers in question to save the

county expense should not be thwarted by the courts.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

15 Cal. App. 567

PIERSON v. PIERSON. (Civ. 960.)

(District Court of Appeal, Second District, California. March 9, 1911.)

DIVORCE (§ 186*)—JUDGMENT—FINDINGS—NECESSITY.

Where parties to a divorce action have not waived findings of fact, and the record shows that no findings sufficient to support a judgment were signed or filed in the action, the judgment will be reversed.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 186.*]

Appeal from Superior Court, Los Angeles County; William D. Dehy, Judge.

Action for divorce, brought by Carrie D. Pierson against Charles J. Pierson. Plaintiff appeals. Judgment reversed, and cause remanded.

Winslow P. Hyatt, for appellant. Morton, Riddle & Hollzer and S. A. D. Gray, for respondent.

PER CURIAM. Action for divorce. The parties hereto, through their respective attorneys, having filed a stipulation that reversible error exists in the record, and upon examination of such record, it appearing that findings of fact were not waived, and that no findings sufficient to support a judgment were by the court signed or filed in the cause, it is therefore ordered that the judgment in the above-entitled cause be reversed, and the cause remanded for a new trial.

15 Cal. App. 496

LAWSON v. LAWSON. (Civ. 935.)

(District Court of Appeal, First District, California. Feb. 25, 1911. Rehearing Denied by Supreme Court April 26, 1911.)

1. EXEMPTIONS (§ 16*)—DEBTOR'S EARNINGS—"FAMILY."

Under Civ. Code, § 206, requiring a child to support an indigent parent, and though a mother not living with her son is not strictly a member of his family, where she is in poor health, destitute, is supported by him, and resides within the state, she is a member of his family, within Code Civ. Proc. § 690, exempting a debtor's earnings within 30 days preceding attachment, when necessary for the use of his "family."

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 15-19; Dec. Dig. § 16.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2673-2691; vol. 8, p. 7661.]

2. APPEAL AND ERROR (§ 1212*)—REVERSAL—NEW TRIAL.

On reversal of an order declaring a debtor's earnings exempt, and upon rehearing in the trial court, it was not an abuse of discretion to permit him to show facts relating to his moth-

er's dependent condition, though the proof was not made upon the former hearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4713; Dec. Dig. § 1212.*]

3. MOTIONS (§ 64*)—RES ADJUDICATA—SCOPE OF DETERMINATION.

The principle of res adjudicata is not strictly applicable to motions.

[Ed. Note.—For other cases, see Motions, Dec. Dig. § 64.*]

4. MOTIONS (§ 43*)—RENEWAL—JUDICIAL DISCRETION.

A granting or denial of permission to renew a motion is discretionary with the trial judge.

[Ed. Note.—For other cases, see Motions, Cent. Dig. §§ 55, 56; Dec. Dig. § 43.*]

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by Sadie Lawson against Alfred B. Lawson. From an order, plaintiff appeals. Affirmed.

See, also, 111 Pac. 354, 356; 115 Pac. 463.

H. H. McPike and Crittenden Thornton, for appellant. Leon Samuels and Jacob S. Meyer, for respondent.

KERRIGAN, J. In an action for divorce, plaintiff obtained judgment against the defendant, which provided, among other things, that defendant pay to plaintiff the sum of \$100 per month for her support and maintenance. The defendant having failed to comply with this provision of the judgment, the plaintiff took proceedings under section 710, Code of Civil Procedure, and filed with the auditor of the city and county of San Francisco (defendant being at that time a justice of the peace of said city and county receiving a monthly salary of \$300) a duly authenticated copy of the judgment, whereupon said auditor paid into court the sum of \$1,200, the amount of salary at that time due defendant. In due time plaintiff moved the court for an order that the whole of this sum be paid to her in part satisfaction of said judgment. After hearing had, the court ordered that of the sum of \$600, representing defendant's salary for two months, the plaintiff be paid \$400, and that \$200 was exempt from execution and should be paid to defendant. Plaintiff appeals from this order, and asks for its reversal upon the ground, among others, that the defendant was not entitled to any exemption whatever; and this is the principal question to be determined.

Section 690 of the Code of Civil Procedure provides as follows: "The following property is exempt from execution or attachment, except as herein otherwise specially provided: * * * (10) The earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or attachment, when it appears by the debtor's affidavit or otherwise that such earnings are

necessary for the use of his family, residing in this state, supported in whole or in part by his labors. * * *" Defendant claimed the exemption upon the ground that the fund attached constituted his earnings, and that the said earnings were necessary for the support of his family residing within this state. In substantiation of this claim, defendant introduced evidence tending to show that he contributed to the support of his mother. The evidence on this point discloses that, while the defendant and his mother do not dwell under the same roof, she is nevertheless a resident of this state; that she is old, in poor health, and unable to maintain herself, and looks to defendant for her sole means of support. Upon this evidence the court concluded that defendant's mother was a member of his family, within the meaning of the section quoted; and after careful consideration we are of the opinion that this conclusion is sound and correct.

[1] Section 206 of the Civil Code imposes upon a child the legal obligation to support an indigent parent to the extent of his ability. While in a strict sense, or perhaps we should say in a narrow sense, a mother not living in the same household as her son is not a member of his family, yet where, as here, she is in poor health, destitute of property or the means of subsistence, is supported by him and resides within the state, we think she is a member of his family within the meaning of the language employed in the section. Any other construction would make the provisions of the law inconsistent; for, on the one hand, it would require a son to support his parent by reason of the family tie, and yet deprive him of an exemption specially created for the purpose of enabling him to discharge his obligations to his family. Furthermore, the question of whether the parent occupies the same abode as the judgment debtor should not be the exclusive test; for it is apparent that the debtor's wife or children might not be living with him, and yet it would not be seriously contended that they did not form part of his family. In *Lawson v. Lawson*, 111 Pac. 354, the Supreme Court, after stating that the language of subdivision 10 of section 690, Code of Civil Procedure, "for the use of his family residing in this state" clearly implies that one may be a member of a debtor's family although residing apart from him, proceeded to say (speaking through Mr. Justice Angellotti): "But it seems clear that they are the only relatives who can properly be held to be members of 'his family' within the meaning of the statute, with the possible exception of such other relatives as to whom exists on his part the legal obligation of support and maintenance." In discussing this question the Supreme Court of Alabama, in *Sallee v. Waters*, 17 Ala. 482, said: "To constitute a family within the meaning of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

act (the exemption act), the relation of parent and child or husband and wife must exist. There must be a condition of dependence of the one or the other of these relations, but it is not necessary that all the dependents should live under the same roof or that the family should live together. It is the relation and dependence of the relation, not the aggregation of the individuals, that constitutes a family." See, also, *State v. Finn*, 8 Mo. App. 261, 264; 12 Am. & Eng. Ency. of Law, 93.

[2] Appellant also makes the point that the order in this case should be reversed, for the reason that the matter of the defendant's right to claim the exemption of this fund is res adjudicata, and that the trial court, therefore, erred in receiving evidence in support of defendant's said claim. It appears that the defendant had previously made a motion in the trial court for an order that all money so paid by the auditor into court under the said proceedings initiated by the plaintiff was exempt from execution and should be paid to defendant. The court duly made its order, declaring part of said money exempt and that it be paid to defendant. Upon appeal by the plaintiff to the Supreme Court this order was reversed. *Lawson v. Lawson*, supra. Upon the hearing of plaintiff's motion, when the defendant offered testimony in support of his claim of exemption, the plaintiff objected, upon the ground that the question was res adjudicata. The court overruled the objection, and permitted the defendant to prove the facts relating to his mother's dependent condition, which proof had not been made upon the hearing of defendant's said motion. The court committed no error in so doing. The permission to defendant to prove such facts was no more, in effect, than allowing him to renew his motion for an order of exemption.

[3, 4] The principle of res adjudicata is not in a strict sense applicable to motions. In this state the granting or denying of permission to renew a motion is a matter of discretion with the trial judge. *Kenney v. Kelleher*, 63 Cal. 442; *Bowers v. Cherokee Bob*, 46 Cal. 279; *Ventura County v. Clay*, 119 Cal. 213, 51 Pac. 189. And while in this matter we think that the defendant, having had the benefit of a hearing in the trial court, and of an appeal to the Supreme Court from the trial court's order, the permission accorded him by the latter court to make the proof in question was a very liberal exercise of judicial discretion, yet we are not prepared to say that such discretion was abused. The order is affirmed.

We concur: LENNON, P. J.; HALL, J.

15 Cal. App. 501

LAWSON v. LAWSON. (Civ. 932.)

(District Court of Appeal, First District, California. Feb. 25, 1911. Rehearing Denied by Supreme Court April 26, 1911.)

EXEMPTIONS (§ 16*)—DEBTOR'S EARNINGS.

A debtor's earnings within 30 days of attachment are exempt, where it appears that he not only contributes to the support of his dependent mother residing within the state, but that he is married and living with his wife.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 15-19; Dec. Dig. § 16.*]

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by Sadie Lawson against Alfred B. Lawson. From an order in favor of defendant, plaintiff appeals. Affirmed.

See, also, 111 Pac. 354, 356; 115 Pac. 461.

H. H. McPike and Crittenden Thornton, for appellant. Leon Samuels and Jacob S. Meyer, for respondent.

KERRIGAN, J. This is an appeal from an order declaring exempt from execution a proportion of a certain fund, consisting of salary of the defendant as justice of the peace, earned within 30 days prior to attachment. The order also directed that the said proportion of said fund be paid over to the defendant. The appeal is taken by the plaintiff.

Though coming here upon a separate transcript, the appeal was argued with and submitted upon the same briefs as case numbered 935 in this court, bearing the same title, and in which we have this day affirmed the order of the trial court. 115 Pac. 461.

The fund, with reference to which the order appealed from in this case was made, is in the same situation as in said case numbered 935, and the order was made under the same circumstances, except that this is the first order made in regard to the fund involved in this appeal, and that the evidence produced in support of defendant's claim of exemption showed, not only that he contributed to the support of his dependent mother residing in this state, but that he had again married and was living with such wife, thus showing that he undoubtedly came within the exemption of the statute.

The principles of law are the same in both cases; and for the reasons stated in the opinion of this court affirming the order in said cause numbered 935, the order in this case is also affirmed.

We concur: LENNON, P. J.; HALL, J.

15 Cal. App. 496

LAWSON v. LAWSON (two cases).
(S. F. 5,777, 5,784.)

(Supreme Court of California. April 27, 1911.)

In Bank. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

On motions for rehearing. Motions overruled.

For original opinions, see 115 Pac. 461, 463.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the orders denying a rehearing of these causes. Each was regularly and properly appealed to this court, and afterwards transferred to the District Court of Appeal for hearing and decision. In each was involved a question of vital importance to which no reference is made in the opinion of the District Court of Appeal, notwithstanding it was fully argued by the appellant—the question, that is to say, whether the statutory exemptions from execution have any application to an award of alimony. This, in my opinion, is a question of too serious import to be passed over in silence. It may be that in view of the terms of our statutes the apparent conclusion of the appellate court could not be set aside; but, if so, I am convinced that the policy of the statute is indefensible—a view sufficiently illustrated by the result of this litigation. In such cases an explicit declaration by the courts of the grounds of their decision would serve the useful purpose of calling the attention of the Legislature to the propriety of amending the statute.

159 Cal. 700

WELDON v. ROGERS. (L. A. 2,566.)

(Supreme Court of California. April 21, 1911.)

1. EXECUTION (§ 73*)—ORDER OF COURT—SECOND ORDER.

Under Code Civ. Proc. § 685, providing that "in all cases" the judgment may be enforced or carried into execution after the lapse of five years from its entry, by leave of the court, the court does not exhaust its jurisdiction by ordering execution, under which the judgment is partly satisfied, but may thereafter make such an order for the satisfaction of the rest of the judgment.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 161; Dec. Dig. § 73.*]

2. EXECUTION (§ 73*)—ORDER OF COURT—DISCRETION.

The court, in the exercise of its discretion, under Code Civ. Proc. § 685, to order execution on a judgment more than five years after its entry, cannot consider any matters leading up to the judgment, but only circumstances arising after entry of judgment.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 161; Dec. Dig. § 73.*]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Sophie B. Weldon, executrix of

T. J. Weldon, deceased, against Ralph Rogers. From an order, defendant appeals. Affirmed.

McNutt, McNutt & Hannon, for appellant.
J. W. McKinley and Louis Luckel, for respondent.

MELVIN, J. This is an appeal by defendant from an order made under the provisions of section 685 of the Code of Civil Procedure, to enforce a judgment by the issuance of an execution for a deficiency remaining after sale under a previous execution similarly obtained. A brief history of the many phases of this protracted litigation may be found in the opinion in *Weldon v. Rogers*, 157 Cal. 410, 108 Pac. 266. On that appeal this department sustained the issuance by the superior court of an order in the nature of a writ of venditioni exponas. Acting under the authority of that order, the sheriff sold the property which he held under the previous levy, and partially satisfied the judgment. The order now brought here for review is similar to the one granted in 1905, by authority of which execution issued on April 10th of that year, after the judgment was about 14 years old.

[1] Appellant contends that the court exhausted its jurisdiction to order execution under the authority conferred by section 685 of the Code of Civil Procedure when it acted in 1905, granting respondent's previous motion; and that, even conceding the court's right to make another order like the one now before us, there was an abuse of discretion in the present instance. Upon the first point of controversy, we think that the statute itself is a complete answer to appellant's objection. The authority granted is very broad. Under it the court may even grant the prayer for a writ of execution, when an independent action on the judgment itself would be barred by the statute of limitations. *Doehla v. Phillips*, 151 Cal. 494, 91 Pac. 330. Section 685 of the Code of Civil Procedure provides that "in all cases the judgment may be enforced" as there set forth, and clearly the quoted language would apply as aptly to partially satisfied judgments as to those entirely unsatisfied.

[2] Appellant's other point raises this question, Has the court, in the exercise of its discretion to grant or to refuse the order contemplated by section 685 of the Code of Civil Procedure, the right to consider the facts appearing at the trial of the case, or any of the circumstances leading up to the judgment? We think this question must be answered in the negative. Any other answer would give to a superior court a power to review and to determine the correctness or propriety of one of its own judgments of long standing, which no appellate tribunal possesses. We think it clear that the court's "discretion" mentioned in such cases as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Wheeler v. Eldred, 121 Cal. 30, 53 Pac. 431, 66 Am. St. Rep. 20, must be guided by the circumstances arising after the entry of judgment. Appellant insists that, unless the judge who hears the motion may look into the whole matter and determine whether or not a judgment is one which in good conscience ought to be enforced, there will be nothing upon which his discretion may operate. But we think there may be many matters arising after judgment which might properly appeal to the court's discretion in granting or refusing the order. Such things, for example, as the petitioner's laches, or his manifest intention to annoy the judgment debtor by execution upon a judgment which had been satisfied to within a few cents of the whole amount involved, might properly cause a denial of the motion by the court; while conduct by the judgment debtor, such as frivolous and ill-founded proceedings,

taken for the manifest purpose of delaying the judgment creditor in the enforcement of his rights, might well influence the court in permitting the execution of the dormant judgment. No abuse of discretion by the court appears from the record before us.

Therefore the order from which this appeal is taken is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

In Bank. Petition by George Edwards and others for writ of prohibition, to be directed against the Superior Court of the State of California in and for the County of Alameda and the Honorable John Ellsworth, Judge thereof. Writ denied.

A. F. St. Sure and J. Leonard Rose, for petitioner.

BEATTY, C. J. The petitioners recovered a money judgment in a justice's court for \$82.70. Defendant therein gave notice of appeal to the superior court, and in due time filed the following undertaking:

"In the Justice's Court of Oakland Township, County of Alameda, State of California. George Edwards, Noel Stone, and John Kleis, Plaintiffs, vs. F. E. Miller, Defendant. Know all men by these presents that we, F. E. Miller, principal, and J. Russo and B. Cianciarulo, sureties, are held and firmly bound unto George Edwards, Noel Stone and John Kleis, in the sum of one hundred & sixty-five & 40/100 dollars, lawful money of the United States of America, being double the amount of the judgment and cost mentioned herein, to be paid to the said George Edwards, Noel Stone and John Kleis, their executors, administrators, or assigns, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Signed with our hands, sealed and dated this 2nd day of November, 1909. The condition of the above undertaking is such, that whereas the said Edwards, Noel Stone and John Kleis obtained a judgment against the said F. E. Miller, before James G. Quinn, justice of the peace of Oakland township, in and for the county of Alameda, state of California, on the 25th day of October, 1909, for \$73.20, principal sum, and for \$9.50/100 dollars costs; and whereas the above bounden F. E. Miller is desirous of appealing from the decision of said justice to the superior court in and for the county of Alameda, and a stay of proceedings is claimed: Now, if the above-bounden shall well and truly pay or cause to be paid, the amount of the said judgment and all costs, and obey any order the said superior court may make therein, if the said appeal be withdrawn or dismissed, or pay the amount of any judgment and all the costs that may be recovered against the said appellant in the said superior court, and obey any order the said court may make therein, then this obligation to be null and void; otherwise to remain in full force and virtue. F. E. Miller. J. Russo. B. Cianciarulo."

The petitioners moved to dismiss the appeal upon the ground that this undertaking was insufficient to comply with the requirements of section 978, Code of Civil Proce-

(159 Cal. 710)

EDWARDS et al. v. SUPERIOR COURT,
ALAMEDA COUNTY et al. (S. F. 5,858.)

(Supreme Court of California. April
28, 29, 1911.)

JUSTICES OF THE PEACE (§ 159*)—SUPERSEDEAS BOND—SUFFICIENCY—STATUTES.

Under Code Civ. Proc. § 978, providing that, for an appeal from a justice's court to be effective, an undertaking, with two or more sureties in the sum of \$100 for the payment of the costs of the appeal, must be filed, or, if a stay of proceedings be claimed, the bond must be in a sum equal to twice the amount of the judgment, including costs, an appeal bond executed by the proper number of sureties in more than the sum of \$100, and conditioned for the payment of the costs of appeal, is sufficient to make the appeal effective, although it also purports to operate as a supersedeas bond, for its validity as an appeal bond is not destroyed by the mere fact that it also purports to be given to stay execution.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 550-578; Dec. Dig. § 159.*]

dure, as construed in *McConky v. Superior Court*, 56 Cal. 83. The motion to dismiss was granted, but subsequently, on motion of the appellant, that order was vacated, and the appeal placed upon the calendar of the superior court, wherein it will be heard and determined, unless a writ of prohibition is granted.

Petitioners base their application for the writ upon two grounds: First. That the order of dismissal was a final disposition of the cause, divesting the superior court of any power to revive it or resume any jurisdiction over it, and this, notwithstanding its jurisdiction at the time of the order of dismissal may have been clear and indisputable. Second. That by reason of the defects of the undertaking the superior court never acquired jurisdiction of the appeal.

As to the first objection, it need only be said that when, according to the uncontroverted facts, it appears that an appeal to the superior court has been duly perfected and diligently prosecuted, a dismissal of such appeal is in effect nothing more nor less than an attempted abdication of a jurisdiction which the court is bound in every proper case to exercise. It is, in other words, a refusal to decide a cause which it is the plain statutory duty of the court to decide, the remedy for which dereliction is the writ of mandate. But if in such a case the superior court discovers its mistake, it is not bound to wait for a peremptory writ of mandate, commanding it to do what it is its duty to do; what, indeed, it could not otherwise be commanded to do. Evidently in this case the judge of the superior court concluded that he had refused to exercise his jurisdiction in a proper case, and that the order of dismissal was a nullity. If he was right on the first point, we have no doubt of the correctness of his conclusion as to the nullity of the order, and the only question left for consideration is the sufficiency of the undertaking to give the superior court jurisdiction of the appeal.

The latest decision of this court upon that point (*Jones v. Superior Court*, 151 Cal. 589, 91 Pac. 505) is a conclusive affirmation of the sufficiency of the undertaking under section 978, Code of Civil Procedure. It may be doubted whether the decision in that case successfully distinguishes the case of *McConky v. Superior Court*, 56 Cal. 83, in which section 978 appears to have been differently construed; but if that case was not distinguishable it was certainly overruled—and, I have no doubt, properly overruled—for the construction there given to section 978 was only reached by disregarding the express terms of the statute, i. e., by the substitution of the word "or" for "and" with the effect of requiring two undertakings, each containing the same condition, where one was amply sufficient for every conceivable purpose, and that in a class of actions where simplicity

of procedure and economy are a most important desideratum.

The decisions in *Duffy v. Greenebaum*, 72 Cal. 157, 12 Pac. 74, 13 Pac. 323, and *Duncan v. Times-Mirror Co.*, 109 Cal. 602, 42 Pac. 147, and in other cases involving the sufficiency of undertakings on appeal to this court, are not in point. The sufficiency of such undertakings depended upon compliance with the provisions of sections 940 et seq., Code of Civil Procedure, which in express terms required, at the date of those decisions, a separate undertaking on appeal, and they simply followed the law as it was written; whereas, in *McConky v. Superior Court*, section 978, Code Civ. Proc., which by its terms required but one bond, was held, if such was the decision, to require two—an unnecessary, and in its results a mischievous, construction. By the more recent decisions of this court (*Jones v. Superior Court*, supra; *Laws v. Troutt*, 147 Cal. 172, 81 Pac. 401; and *Swem v. Monroe*, 148 Cal. 741, 83 Pac. 1074), it is settled that an undertaking in not less than \$100, or a deposit of that amount, will support an appeal from a justice's court to the superior court, and that when a judgment for money equals or exceeds the sum of \$50, an undertaking in double the amount of the judgment will equally support the appeal, notwithstanding a recital that a stay of proceedings is desired. Whether it will also operate as a stay bond in that case has not been expressly held; but that seems to be the logical result of what has been decided.

The writ of prohibition is denied.

SLOSS, LORIGAN, ANGELLOTTI, SHAW, MELVIN, and HENSHAW, JJ. (specially concurring). We concur in the order denying a writ, on the ground that the bond is sufficient to confer jurisdiction on the superior court. The undertaking is in more than the sum of \$100, and is conditioned for the payment of the costs on the appeal. It thus contains all that is required by the Code of Civil Procedure, § 978, to make the appeal effectual. Its validity as an appeal bond is not destroyed by the fact that it also purports to be given to stay execution. *Ward v. Superior Court*, 58 Cal. 519; *Jones v. Superior Court*, 151 Cal. 589, 91 Pac. 505. Whether or not it is effectual to operate as a stay bond is not here involved. We express no opinion on this point, nor do we think it necessary for the decision of this case, to question the correctness of *McConky v. Superior Court*, 56 Cal. 83.

BEATTY, C. J. In view of what is said in the concurring opinion of my Associates, I desire to say with respect to the case of *Ward v. Superior Court*, 58 Cal. 519, that it is a very doubtful inference from the report that the undertaking in that case was, or purported to be, intended to stay execu-

tion; while in the McConky Case the implication is very clear that the undertaking was intended to stay execution, and was held insufficient to support the appeal for that reason. But, whether this is so or not, one thing at least is clear that it was held in the McConky Case that where a stay of execution was desired there must be two distinct undertakings, one for the stay and another to perfect the appeal, and that this construction of the statute required the word "or" to be read "and"—a view plainly necessary to sustain that conclusion. Now, if section 978, Code of Civil Procedure, is to be so read, the law governing appeals to the superior court cannot be distinguished from the law governing appeals to this court (sections 940, 941, 942, Code Civ. Proc.), and if the law is the same in both cases I confess my inability to reconcile the decision in *Jones v. Superior Court*, 151 Cal. 589, 91 Pac. 505 (upon the authority of which this case is decided) with the decisions in *Duffy v. Greenebaum*, 72 Cal. 157, 12 Pac. 74, 13 Pac. 323, and *Duncan v. Times-Mirror Co.*, 109 Cal. 602, 42 Pac. 147, in which it was plainly decided that the insertion in a stay bond of the condition required in an appeal bond is ineffectual to support the appeal. If the views here expressed are correct, it must follow, either that the McConky Case was overruled by the decision in *Jones v. Superior Court*, or else that under the same statutory provisions we will (the undertakings being the same) dismiss an appeal to this court, and sustain an appeal to the superior court.

I think I am safe in adding that ever since the decision in *Duffy v. Greenebaum* the superior courts throughout the state had understood the law to be that they were without jurisdiction to hear an appeal from a justice's court, unless there was a separate undertaking, distinct from the stay bond, to pay costs, and that numerous appeals have been dismissed in which parties have filed undertakings, such as that which was held sufficient to support the appeal in *Jones v. Superior Court*. And I have no doubt that the first order of the superior court, dismissing the appeal in this case, was made in obedience to those earlier decisions, and set aside when attention was called to the latter.

159 Cal. 702

JOHN RAPP & SON et al. v. KIEL et al.,
Police Com'rs. (S. F. 5389.)

(Supreme Court of California. April 25, 1911.)

1. INTOXICATING LIQUORS (§ 45*)—ORDINANCE IMPOSING LICENSE FEE—"TAX"—"LICENSE TAX."

An ordinance enacted by the board of supervisors of the city and county of San Francisco is entitled "An ordinance imposing a license for the purpose of regulation upon persons * * * selling * * * malt or fermented liquors * * * in quantities of one

quart or more, less than five gallons, when the same is contained in sealed packages, and not to be drunk on the premises where sold, * * * requiring a permit therefor." The ordinance makes it unlawful to sell such liquors "without first having obtained a permit therefor from the board of police commissioners, and paying the license fee herein provided"; requires any person doing such act to procure a license, paying therefor "a license fee of \$150 per annum"; requires application for renewals to be passed upon by the board of police commissioners, and declares that the ordinance and "the license herein imposed" are enacted to regulate the business described. The charter of the city and county of San Francisco (article 2, c. 2, § 1) authorizes the board of supervisors to make all necessary police regulations; and subdivision 15 authorizes it to impose "license taxes," but provides that no license taxes shall be imposed upon one who, at any fixed place of business, sells goods, etc., except such as require permits from the board of police commissioners, as provided in this charter. *Held*, that the ordinance was enacted solely for regulation, and not for revenue, and the license imposed was a "license tax" within subdivision 15, so that the board had no power to impose it, since, while a "tax," technically, only includes charges imposed for producing revenue, and not for purposes of regulation under the police power, the term "license tax," as used in the statutes and by the courts, includes license charges of every character, whether imposed for revenue or police regulations, or both.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 47; Dec. Dig. § 45.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4142, 4143; vol. 8, pp. 6867-6886, 7813.]

2. LICENSES (§ 5½*)—LICENSE FEES—REGULATION.

The power of a municipality to regulate a business may be exercised by imposing a license fee, or charge, in such an amount as is reasonably necessary to regulate the business.

[Ed. Note.—For other cases, see *Licenses*, Dec. Dig. § 5½.*]

3. MUNICIPAL CORPORATIONS (§ 58*)—POWERS OF CITY—LIMITATION.

The legislative body of a city having a freeholders' charter may be limited by the charter, in the exercise of the police power given the city by the state Constitution.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 58.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by John Rapp & Son and others against Hugo Kiel and others, Police Commissioners, to enjoin the enforcement of an ordinance. From an order enjoining its enforcement, defendants appeal. Affirmed.

W. H. Langdon and R. W. Harrison, for appellants. Hiram W. Johnson, for respondents.

ANGELLOTTI, J. This case presents the question of the validity of an ordinance adopted by the board of supervisors of the city and county of San Francisco on May 25, 1908, entitled an ordinance "Imposing a license for the purpose of regulation upon persons, firms or corporations selling, giving away or serving malt or fermented liquors

or wines, or any admixture thereof, in quantities of one quart or more, less than five gallons, when the same is contained in sealed packages, and not to be drunk on the premises where sold, given away or served, requiring a permit therefor, and regulations relating thereto." This title fairly states the nature of the ordinance, which makes it unlawful for any person to do any of the prescribed acts "without first having obtained a permit therefor from the board of police commissioners, and paying the license fee herein provided"; provides that before doing any such act every person shall procure a permit from the board of police commissioners and a license from the tax collector, paying therefor "a license fee of one hundred and fifty (\$150.00) dollars per annum," payable in quarterly installments of \$37.50 in advance; provides that the tax collector shall not issue any license or renewal, until the applicant has obtained the requisite permit and paid the license fee; provides that every license shall expire at the end of the quarter for which it is issued, and that application for renewals shall be passed upon by the board of police commissioners after certain notice given to the public; provides that such board shall have full power to grant or withhold a permit, or revoke any permit already granted; declares that the ordinance and the "license herein imposed" are for the purposes of regulating the business therein described, and makes a violation of any provision of the ordinance a misdemeanor. The trial court concluded that this ordinance is invalid, and made an order enjoining its enforcement. This appeal is from such order, and the sole question presented is that of the validity of the ordinance.

The theory of respondents, adopted by the trial court, is that, by reason of certain provisions of the freeholders' charter of the city and county of San Francisco, the board of supervisors was without power to impose any license fee or charge upon persons who, at any fixed place of business in the city and county, do any of the acts prescribed in the ordinance, and that the provisions of the ordinance requiring the payment of such fee or charge are so inseparably blended with the other provisions as to make the whole ordinance void. It is not disputed by appellants that if the provisions for a license fee or charge are invalid the whole ordinance is void.

The charter provisions material to the question presented are as follows:

By section 1 of chapter 2 of article 2, a chapter entitled "Powers of the supervisors," it is provided:

"Section 1. Subject to the provisions, limitations and restrictions in this charter contained, the board of supervisors shall have power:

"1. To ordain, make and enforce within the limits of the city and county all necessary local, police, sanitary and other laws and regulations. * * *

"15. To impose license taxes and to provide for the collection thereof; but no license taxes shall be imposed upon any person who, at any fixed place of business in the city and county, sells or manufactures goods, wares or merchandise, except such as require permits from the board of police commissioners as provided in this charter."

The only provisions in the charter that require a permit from the police commissioners for the sale, etc., of liquor, are those contained in chapter 3 of article 8, and such provisions are confined to those persons who sell liquor "*in less quantity than one quart,*" and to those who sell liquor "*to be drunk on the premises.*"

It is to be borne in mind that the ordinance before us deals solely with those who dispose of malt or fermented liquors or wines, *in quantities of one quart or more, less than five gallons*, when the same is contained in sealed packages, *and not to be drunk on the premises where sold*, including all who sell in this way at fixed places of business in the city and county of San Francisco. It is manifest that such persons are within the exemption provision of subdivision 15 of section 1, c. 2, art. 2, of the charter, and that by reason of that fact, no charge or burden within the meaning of the term "license taxes," as used in such subdivision, can be imposed upon them by the supervisors of the city and county. It is apparent, therefore, that the question presented is simply whether or not such a charge or fee as is imposed by the ordinance before us is a "license tax" within the meaning of that term in the charter provision.

The claim of appellants is, of course, that the ordinance is one enacted solely in the exercise of the police power of regulating the business therein specified, and that the charter provision invoked, fairly construed, has no application to a license fee or charge imposed solely for purposes of regulation, but has to do only with license taxes imposed for revenue purposes.

[1] We are of the opinion that a court would not be warranted in holding otherwise than that the ordinance and the license thereby imposed were, as the ordinance expressly declares, solely for the purpose of regulating the business therein specified. Every provision therein, other than those relating to the license fee, is obviously purely regulatory in character.

[2] As to the license fee provisions, "it is * * * well settled that the power to regulate a business may be exercised by means of a license fee, or charge," in such amount as "is reasonably necessary for the purpose sought, i. e., the regulation of the business" (County of Plumas v. Wheeler, 149 Cal. 763, 87 Pac. 909), and it certainly cannot be contended with any show of reason that the imposition of a license fee of \$150 per annum demonstrates "that the purpose of the imposition was to realize a revenue under the guise of regulating the business."

County of Plumas v. Wheeler, supra. See Ex parte McNally, 73 Cal. 632, 15 Pac. 368. The provisions of the ordinance are not such as to warrant the courts in concluding that the board of supervisors did not therein truthfully state its purpose.

Is a license fee or charge imposed by a purely regulatory ordinance a "license tax," within the meaning of that term as used in the charter provision?

A "tax," under a strict and technical construction of the term, probably includes only charges imposed for the purpose of producing revenue, as distinguished from charges imposed for purposes of regulation in the exercise of the police power. It has been said by some authorities in other states that a license fee, or charge, imposed solely for regulatory purposes, is in no proper sense a tax, and we may concede that this holding is technically correct. But the term "license tax" has often been used in this state, by both the Legislature and by this court, as including license charges imposed for regulatory purposes, and we have no doubt that, in its popular meaning, it includes any charge imposed for a license, whether the object be regulation or revenue, or both regulation and revenue. In our original general municipal corporation act of 1883 (St. 1883, c. 49), we find that the board of trustees of a city or town of the sixth class was invested with power "to license, for purposes of regulation and revenue, all and every kind of business, * * * to fix the rates of *license tax upon the same* and to provide for the collection of the same by suit or otherwise." Section 862. Here clearly the term "license tax" was used to include both regulatory and revenue charges. A similar provision was incorporated as to cities of the fifth class, except that the words "including the sale of intoxicating liquors" were inserted after the word "business." Section 764. When, by an act approved March 23, 1901 (Stats. 1901, p. 635), the Legislature sought to prohibit the imposition of any license charge for revenue purposes, and to allow such licensing only for purposes of regulation, it entitled its act as being one to add a new section to the Political Code (3366), "relating to the powers of boards of supervisors, city councils, and town trustees in their respective counties, cities, and towns, and to impose a *license tax*." In the body of the act, such legislative bodies were authorized, "in the exercise of their police powers, and for the purpose of regulation, as herein provided, and not otherwise, * * * to license all and every kind of business, * * * to fix the rates of *license tax upon the same*, and to provide for the collection of the same by suit or otherwise." This court held, as was obvious, that the words "license tax" were used as synonymous with "license fee or charge," saying, also, that "the words 'license tax' do not necessarily and always mean a license tax assessed and collected for purposes of

revenue." In Ex parte Ah Toy, 57 Cal. 92, this court said: "Our attention has not been called to any general statute, which in terms or by implication, prohibits the imposition of a license tax as a police regulation." In Ex parte Lemon, 143 Cal. 559, 77 Pac. 455, 65 L. R. A. 946, and in County of Plumas v. Wheeler, 149 Cal. 767, 87 Pac. 909, the words "license tax" were used by this court as synonymous with a "license fee or charge" imposed solely in the exercise of police power. The instances thus cited (undoubtedly only a few of very many that can be found in statutes and opinions of this court) are sufficient to show that the words "license tax" have been freely used as including regulatory license charges, as well as charges imposed for revenue purposes, and that the connection in which the term is used in a particular case may properly be looked to for the purpose of determining its intended scope.

There is nothing to indicate that the words "license tax" were used in the charter provision in the narrow technical sense contended for by appellants. In view of the fact that the term has been so frequently used by the Legislature and the courts in the broad sense of including license charges of every kind, it might be argued with some force that, if the charter framers had intended to confine the application of their prohibition to license taxes imposed solely for revenue purposes, they would have so stated, just as the Legislature did in limiting legislative bodies to license charges for regulation only, by the act of March 23, 1901, hereinafter referred to.

Instead of doing this, they have so expressed themselves as to leave no serious doubt in our minds of their intention to exempt from license charge of every description, whether for revenue or regulation, the persons as to whom they provide that no "license taxes" shall be imposed. The language of the exception contained in the prohibitory portion of the charter provision is such as to make the meaning very clear. The board of supervisors is empowered "to impose license taxes," etc.; "but no license taxes shall be imposed upon any person who, at any fixed place of business in the city and county, sells or manufactures goods, wares, or merchandise, *except such as require permits from the board of police commissioners, as provided in this charter.*" This clearly shows simply the desire and intent to reserve to the board of supervisors the power to impose license charges for purposes of regulation in certain cases. Limited as it is in its application to businesses for the doing of which the obtaining of a permit from the board of police commissioners is made by the charter a prerequisite, no other conclusion is reasonable. But, if appellants' construction of the words "license tax" as used in this provision be correct, such a reservation would be entirely superfluous and with-

out point, for any business included in the exception would necessarily be one that could be regulated in the exercise of the police power, and, in the absence of express prohibition, a license charge could be imposed thereon by the board of supervisors as a part or the whole of such regulation, in such amount as might reasonably be deemed necessary for the purposes of regulation. The very specification of those excepted from the exemption provision indicates with clearness the conception of the charter framers of the meaning of the words "license taxes" as used in the exemption provision. It is as though they had in terms provided that "license taxes" may be imposed on those referred to in the exception clause, and on no other persons engaged in selling or manufacturing at a fixed place of business in the city and county.

Taking the words "license tax" as meaning any license fee or charge imposed as a condition to the doing of business, each of the parts of the provision has its office to perform, and all the parts taken together make a consistent whole. It was evidently desired by the charter framers to make it very clear that no license charge, fee, or tax of any kind should be imposed on any person selling or manufacturing goods, wares, or merchandise at a fixed place of business in the city and county, unless the business to be conducted by such person was one which they considered it necessary to regulate by charter provision requiring the consent of the police commissioners as a condition precedent to the doing of business. This we believe to be the plain effect of the charter provision relied on by respondents. It is stated in their brief, and not denied by counsel for appellants, that such was the effect of an opinion rendered by City and County Attorney Lane, of San Francisco, just prior to the taking effect of the charter (January, 1900), and that the construction so given by him was acquiesced in until the adoption of the ordinance under consideration.

[3] It cannot now be doubted that the legislative body of a city having a freeholders' charter may be limited by charter provision, in the exercise of the police power conferred upon the city by the Constitution of the state. In this connection it is only necessary to refer to the opinion in the case of *In re Pfahler*, 150 Cal. 71, 81, 88 Pac. 270, 11 L. R. A. (N. S.) 1092, which we think answers every point made in this behalf by learned counsel for appellants. See, also, *People ex rel. Wilshire v. Newman*, 96 Cal. 605, 31 Pac. 564.

The result of our views is that, by reason of provisions contained in the charter of the city and county of San Francisco, the board of supervisors of that city and county is without power to impose a license charge, fee, or tax of any kind, either for purposes

of regulation or revenue, upon any person who, at a fixed place of business in the city and county, sells malt or fermented liquors or wines, except such as sell such liquor or wine in less quantity than one quart, or who sell the same to be drunk on the premises. The board has no such power as to those covered by the ordinance before us, viz., persons who sell in quantities of one quart or more, less than five gallons, when the same is contained in sealed packages, and not to be drunk on the premises where sold. If it be desired to change the law in this regard, such change can be made only by amendment of the charter.

The order appealed from is affirmed.

We concur: SLOSS, J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.; SHAW, J.

15 Cal. App. 676

CITY OF LOS ANGELES v. KERCKHOFF
CUZNER MILL & LUMBER CO.
et al. (Civ. 915.)

(District Court of Appeal, Second District, California. March 23, 1911.)

1. EMINENT DOMAIN (§ 134*)—DAMAGES—USE OF PROPERTY—SCHEME OF IMPROVEMENT.

A landowner in condemnation proceedings is not entitled to show enhanced damages which it would suffer by reason of being prevented from carrying out a particular scheme of improvement existing in contemplation only at the time of the trial.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 356; Dec. Dig. § 134.*]

2. EMINENT DOMAIN (§ 202*)—USE OF LAND—EVIDENCE—DIAGRAM—CONTEMPLATED IMPROVEMENTS.

Where, in condemnation proceedings, the landowner was permitted to prove the particular use to which the property was being put and also its worth, considering the most valuable use to which it was adapted, a diagram of the ground, showing proposed improvements existing only in contemplation, and not limited to proof of the complete use for which the property was adapted, considering the use then being made of it, was inadmissible.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 202.*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by the City of Los Angeles against the Kerckhoff-Cuzner Mill & Lumber Company and others. From an award of damages for the condemnation of land belonging to R. H. Herron Company, it appeals. Affirmed.

O'Melveny, Stevens & Millikin, for appellant. Leslie R. Hewitt, Charles E. Haas, and Edward G. Kuster, for respondents.

JAMES, J. Action brought to secure, by condemnation, a strip of land for street purposes. Defendant R. H. Herron Company was dissatisfied with the award of damages made by the trial court, and appeals from the judgment.

Appellant in the course of the trial in the superior court offered in evidence a diagram

showing the tract of land owned by it, and which would be divided into two parts by the opening of the street proposed to be extended through the same. John M. Sands, a witness familiar with the ground and the diagram, testified as follows: "It is a diagram showing the tract in question and the locations of the shops and improvements of various kinds already constructed by us on that tract, and the locations as planned for the additional improvements to be constructed hereafter; also location of existing switch tracks and proposed additional switch track." The court refused to admit the diagram in evidence, and this ruling is the only error claimed. From the bill of exceptions it appears that appellant was allowed, unhindered by the court or objection of counsel, to prove the particular use to which the property was being put, and also its worth, considering the most valuable use to which it was adapted. There was ample testimony before the court fully covering these matters, and the only additional subject to be illustrated by the offered diagram was the location of proposed improvements to be thereafter made and erected thereon. At best this evidence could only be received for the purpose of showing the complete use for which the property was adapted, considering the use then being made of it.

[1] Appellant could not be allowed to show enhanced damage which it would suffer by reason of being prevented from carrying out a particular scheme of improvement, existing only in contemplation at the time of the trial.

[2] The trial court did not by its ruling limit the parties from showing by proof all available uses to which the property might be put; it simply declined to allow appellant to show the location and size of its proposed improvements, and by this ruling we think no error was committed. The range allowed at the trial in the admission of evidence was broad enough to cover all matters suggested as proper to be considered, by the Supreme Court in the case of *Muller v. Railway Co.*, 83 Cal. 245, 23 Pac. 267, where it is said: "In arriving at the value of the land, all its capabilities, or the uses to which it is adapted, should be taken into consideration." We also quote from the case of *City of Santa Ana v. Harlin*, 99 Cal. 543, 34 Pac. 226: "The rule as enunciated by Lewis on Eminent Domain, at section 479, is as follows: '* * * The condition of the property and all its surroundings may be shown, and its availability for any particular use. If it has a peculiar adaptation for certain uses, this may be shown; and, if such peculiar adaptation adds to its value, the owner is entitled to the benefit of it. But, when all the facts and circumstances have been shown, the question at last is: What is it worth in the market?' * * * Such proof should be limited to showing the present condition of the

property and the uses to which it is adapted, and may not be extended to speculative inquiries as to possible future uses under altered circumstances, which may or may not arise." In our examination of the authorities, we find one case where testimony like that proposed to be introduced in this case was allowed to go before the jury. The case to which we refer is that of *Chicago & E. R. Co. v. Blake*, 116 Ill. 163, 4 N. E. 488. It was therein held by the Illinois court that, where evidence of the variety mentioned was allowed to be introduced for the limited purpose of showing the adaptability of the property to the use which it was intended to put it to, no error was committed; but it was said that the use of such testimony, even for that purpose, should not be encouraged. The language used by the court in considering the objection offered was as follows: "It is also urged that the court erred in permitting the respondent to exhibit before the jury the plans of a certain structure he had contemplated for a number of years past erecting on the premises. Whether evidence of this kind is proper or improper depends entirely upon the purpose for which it is offered and to which it is limited by the court. If the object of such evidence is to enhance the damages by showing such a structure would be a profitable investment, the testimony would clearly be inadmissible. If, on the other hand, it is offered merely as an illustration of one of the uses to which the property is adapted; or, in other words, by way of showing the capabilities of the property, and it is expressly limited by the court to such object, as was the case here, there will be no error in admitting it. The practice, however, of introducing such evidence, should not be encouraged, as there is generally more or less danger of its being misunderstood by the jury. But the purpose of the testimony in this case was so clearly and repeatedly stated by the court that it is almost impossible there could have been any misapprehension in respect to it, and consequently there was no error in admitting it."

For the reasons given, the judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

15 Cal. App. 584

TREFTS v. McDOUGALD. (Civ. 810.)

(District Court of Appeal, First District, California. March 14, 1911.)

1. Courts (§ 57*)—STENOGRAPHERS—COMPENSATION AND FEES—STATUTORY PROVISIONS. St. 1909, p. 1077, amending Pen. Code, § 870, provides that after a defendant has been held to answer a copy of the depositions taken at a preliminary examination shall be furnished him on request, and that the compensation of the reporter therefor shall be paid by the county in the manner prescribed by section 869, subd. 6. Charter of the city and county of San Fran-

cisco (Misc. art. 16, § 34) provides that the salaries provided in the charter shall be a full compensation for all services rendered; and article 5, c. 8, § 11, provides that such reporters shall be paid for all services, including stationery and transcription, an annual salary of \$2,400. *Held*, that since the adoption of the charter, the provisions of section 870 have no application to the appointment and compensation of reporters in preliminary examinations before police judges in said city and county, and, in so far as the amendment to section 870 encroaches on the powers of the municipality, to that extent it is inoperative.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 57.*]

2. COURTS (§ 57*)—POLICE COURT—STENOGRAPHERS—CONTROL OF LEGISLATURE.

The Legislature has the power to prescribe the duties of the judges of police courts and their attaches, of the city and county of San Francisco, while engaged in the examination of felony cases, and a reporter of the police courts therein is an officer of the municipality, and work done by him in a preliminary examination is official in character, and the compensation therefor is fixed by the charter.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 57.*]

3. COURTS (§ 57*)—STENOGRAPHERS—COMPENSATION.

The compensation of a municipal officer is purely a municipal affair, and the charter provisions upon that subject are exclusive and conclusive, irrespective of whether the duties of the office are exacted by the charter or imposed by the general law of the state; and the fact that, subsequent to the adoption of the charter provisions defining the duties and determining the compensation of police court reporters the Legislature, by a general law, demanded additional duties of him, when serving in his official capacity at preliminary examinations, does not give the Legislature the power to provide the means and measure of his compensation therefor, but as to such compensation the charter provisions will be still paramount, under Const. art. 11, §§ 6 and 8½.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 57.*]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Mandamus by the People, on the relation of Walter E. Trefts, against John E. McDougald, to compel respondent, as Treasurer of the City and County of San Francisco, to pay relator for furnishing a copy of depositions taken in a preliminary examination in the police court on the order of the police court judge, and under Penal Code, § 870. From an order of the police court requiring respondent to pay the relator for said copy, and a refusal by respondent, a mandate was issued by the superior court on the relator's petition. From an order overruling a demurrer to the petition, and from a judgment issuing the writ, the respondent appeals. Reversed, with directions.

Percy V. Long and John F. English, for appellant. John S. Partridge and Nathan C. Coghlan, for respondent.

LENNON, P. J. The plaintiff and respondent is one of the official stenographers of the

police court of the city and county of San Francisco, duly appointed as such under the provisions of the charter governing said city and county.

On July 7, 1909, there was pending before the Honorable E. P. Shortall, one of the judges of said court, the preliminary hearing of one Laura McDonald upon a charge of murder. The plaintiff, by direction of the judge presiding at the hearing, and at the request of the attorney for the defendant therein, was required to take in shorthand the depositions of the witnesses and notes of the proceedings.

At the conclusion of her preliminary examination, the said Laura McDonald was held to answer before the superior court of the city and county of San Francisco. Thereupon respondent, by the further direction of the judge of said police court, and the requirements of section 870 of the Penal Code, transcribed and delivered to counsel for said Laura McDonald a copy of the depositions taken upon her preliminary hearing. Thereafter the said judge of the police court ordered defendant and appellant, as treasurer of the city and county of San Francisco, to pay respondent the sum of \$9 out of the municipal treasury, as compensation for furnishing the said copy of the depositions. Upon the refusal of the appellant to comply with the police judge's order, respondent petitioned the superior court of the said city and county for a writ of mandate, commanding appellant as said treasurer, to honor the order. To the petition for a writ of mandate appellant interposed a general demurrer, grounded upon the insufficiency of the facts stated therein to constitute a cause of action. This demurrer was overruled. Appellant, as the defendant below, declined to answer the petition within the time allowed him, and judgment for the issuance of the writ prayed for followed. The appeal is from this judgment.

[1] The order of the magistrate, requiring the services of the reporter and providing for his compensation, as well as the subsequent judgment in mandamus, are based upon the provisions of section 870 of the Penal Code. This section as amended (Stats. 1909, p. 1077) requires, after a defendant has been held to answer, that a copy of the depositions taken at a preliminary examination be furnished, upon request, to the defendant therein, or to his counsel, and that the compensation of the reporter so furnishing such depositions shall be paid by the county wherein the examination has been held, in the manner prescribed by subdivision 6 of section 869 of the same Code.

On the other hand, the charter of the city and county of San Francisco provides for the appointment of two salaried reporters to attend upon the police courts of said city and county. Their duties under the charter, with

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the single exception of providing a defendant or his counsel with an extra copy of the proceedings had at a preliminary examination, are identical in effect with the service required of such reporters under the general law of the state, as declared in section 870 of the Penal Code.

The salary of respondent, as one of the official reporters of the said police courts, is fixed by the charter under which he was appointed at \$2,400 per annum; and this sum, the charter expressly declares, shall be "in full compensation for all services rendered * * * including transcription and stationery. * * *" Charter, Miscellaneous, § 34, art. 16; section 11, art. 5, c. 8. The charter provisions designating the duties of police court reporters do not limit the service which may be required of them at preliminary examinations.

The jurisdiction of the judges of the police courts in the city and county of San Francisco to hold preliminary examinations is conferred upon them, as magistrates, by the general law of the state.

[2] The exercise of that jurisdiction is necessarily a state affair, and the Legislature has the undoubted power to prescribe the duties of the judges of these courts, and their attachés, when engaged in the examination of felony offenses against the laws of the state.

Respondent, as one of the reporters of the police courts of the city and county of San Francisco, is an officer of the municipality, and all service rendered by him in the conduct of a preliminary examination is work done in the performance of an official duty required of him in his capacity as a municipal officer. This compensation in full for all services rendered as such municipal officer is fixed by the charter.

[3] The compensation of a municipal officer is purely a municipal affair (Graham v. Mayor, 151 Cal. 465, 91 Pac. 147; Popper v. Broderick, 123 Cal. 456, 56 Pac. 53; Fragley v. Phelan, 126 Cal. 386, 58 Pac. 923), and the charter provisions upon that subject are exclusive and conclusive. Elder v. McDougald, 145 Cal. 740, 79 Pac. 429. This is so, irrespective of whether the duties of the office are exacted by the charter, or imposed by the general law of the state. Matter of Dodge, 135 Cal. 512, 67 Pac. 973.

The fact that, *subsequent* to the adoption of the charter provisions defining the duties and determining the compensation of respondent, the Legislature, by a general law, demanded additional duties of him, when serving in his official capacity at preliminary examinations, does not give the Legislature the power to provide the means and measure of his compensation therefor. In the matter of such compensation the charter provisions are paramount (Const. art. 11, §§ 6 and 8½; People v. Williamson, 135 Cal. 415, 67 Pac. 504),

and prevail over any general law in conflict therewith existing at the time of the adoption of the charter (Burke v. Board of Trustees, 4 Cal. App. 235, 87 Pac. 421), or subsequently enacted by the Legislature. Graham v. Mayor, etc., supra.

It is our opinion that, since the adoption of the charter of the city and county of San Francisco, the provisions of section 870 of the Penal Code with reference to the appointment of reporters, and their compensation for the service therein required of them, have no longer any application to the appointment and compensation of reporters in preliminary examinations pending before the police judges of said city and county.

If, however, it was intended by the Legislature that the amendment to section 870 of the Penal Code should control in the matter of the compensation of police court reporters in the city and county of San Francisco, then, in so far as it conflicts with the charter provisions, it must be considered and construed as an encroachment upon the powers of the municipality, and to that extent inoperative as to such municipality.

[4] It may be true, as suggested by counsel for the respondent, that in this view of the law the city and county of San Francisco is exempted from a burden that is imposed generally upon other counties of the state; but "if this be an inequality the people themselves have created it, and if a remedy is needed they only can provide it." People v. Williamson, supra.

The judgment appealed from is reversed, and the lower court is directed to sustain appellant's demurrer to the petition for a writ of mandamus, without leave to amend.

We concur: KERRIGAN, J.; HALL, J.

15 Cal. App. 670

CORDANO et al. v. FERRETTI et al.
(Civ. 765.)

(District Court of Appeal, Third District,
California. March 23, 1911.)

1. FRAUDS, STATUTE OF (§ 129*)—CONTRACTS—
PART PERFORMANCE.

The payment of the price or rendition of services is not, as a general rule, such part performance of a parol agreement to convey land for a price or services as will take it out of the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287-292; Dec. Dig. § 129.*]

2. FRAUDS, STATUTE OF (§ 129*)—PART PER-
FORMANCE—SUFFICIENCY.

To make a parol contract for the conveyance of real estate in consideration of personal services enforceable, the services must be of such a peculiar character that it is impossible to estimate their value by any pecuniary standard, and it must appear that the parties did not intend to measure them by any such standard, and that after the performance of the services the party performing them cannot be restored to

the situation in which he was before their rendition.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 287-292; Dec. Dig. § 129.*]

3. SPECIFIC PERFORMANCE (§ 8*)—PAROL CONTRACTS—DISCRETION OF COURT.

Whether a parol contract to convey real estate in consideration of personal services shall be specifically enforced is addressed to the conscience of the chancellor.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 17, 18; Dec. Dig. § 8.*]

4. SPECIFIC PERFORMANCE (§ 45*)—PAROL CONTRACTS—PERSONAL SERVICES.

A parol contract to convey an interest in real estate in consideration of personal services, consisting of nursing an aged parent, will not be specifically enforced, where it does not appear that the services cannot be measured by a pecuniary standard, or that the child cannot be restored to his former position, and the mere fact that the parent was helpless and in need of most attention and that some sacrifice was demanded from the child does not justify relief.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 127; Dec. Dig. § 45.*]

5. APPEAL AND ERROR (§ 616*)—RECORD.

A paper printed in the back of the transcript on appeal, which purports to be a notice of judgment, but which is not authenticated by the certificate of the clerk or the judge, cannot be considered on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2714-2718; Dec. Dig. § 616.*]

6. APPEAL AND ERROR (§ 612*)—RECORD—AUTHENTICATION.

A stipulation in the transcript on appeal signed by the attorneys, stipulating that the papers contained in the transcript are true and correct copies of the original on file in the action, is a sufficient authentication.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2694-2701; Dec. Dig. § 612.*]

7. SPECIFIC PERFORMANCE (§ 128*)—JURISDICTION—AWARD OF DAMAGES.

The rule that, where equity has taken jurisdiction of a case, it will do complete justice between the parties and award the relief the evidence justifies, if within the issues, though not specifically prayed for, does not justify the court, in a suit for the specific performance of a parol contract to convey real estate in consideration of personal services to be rendered, to give judgment for the value of the services, in the absence of any issue as to their value.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 412-419; Dec. Dig. § 128.*]

Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by G. Cordano and others against G. B. Ferretti and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

T. J. Butts, for appellants. J. M. Thompson and R. L. Thompson, for respondents.

BURNETT, J. The action was brought for the specific performance of a parol contract to convey real estate and personal property. The complaint alleges: "That on or about the said 15th day of December, 1907, the

said defendant G. B. Ferretti entered into contract and agreement with plaintiffs at and in Sonoma county, wherein and whereby the said G. B. Ferretti agreed to pay, transfer, and assign to plaintiffs upon the death of said Victoria Ferretti one-half of all the community property of the said G. B. Ferretti and Victoria Ferretti, if the said plaintiffs would take the said Victoria Ferretti into their charge and keeping and provide her with all the necessities of life and medical attendance, and give to her the care and attention that she needed in her helpless condition during the time of her natural life, and the said plaintiffs then and there agreed to and with the said G. B. Ferretti that in consideration of his paying, transferring, and assigning to them the one-half of the said community property, that they would take the said Victoria Ferretti into their home and care for her and furnish to her all the necessities of life and would give to her such care as her condition demanded. That the said plaintiffs did then and there take the said Victoria Ferretti into their house and did care for her and did furnish to her all the necessities of life and did give to her such care and attention as was needed by her up to the time of her death, and that the said Victoria Ferretti died on the 22d day of June, 1908."

There is no dispute as to the facts included in the first three findings of the court to the effect that the said Victoria Ferretti, during the time mentioned in the complaint, resided with her husband, the said G. B. Ferretti, on the premises of plaintiffs in Sonoma county; that she was the mother of plaintiff Kate Cordano, and was afflicted with paralysis and unable to care for herself; that in July, 1905, the said G. B. Ferretti and his wife, the said Victoria Ferretti, at the invitation of plaintiffs, came to said premises from their home in Alameda county, and thenceforth, until about November 1, 1907, resided in a house built by defendant G. B. Ferretti, on the premises and near the dwelling house of plaintiffs; that thereupon the plaintiff Kate Cordano voluntarily took her mother, the said Victoria Ferretti, into plaintiffs' dwelling house and assisted in nursing and caring for the said Victoria Ferretti until the latter's death as aforesaid. The court further finds that on December 15, 1907, the defendant G. B. Ferretti made the oral agreement set out in plaintiffs' complaint. Appellants, of course, do not, and respondents cannot, assail this finding.

The whole controversy hinges upon the following findings: "(5) That, during all of said time up to the death of his wife, G. B. Ferretti assisted in the care of his said wife and furnished and paid for part of the drugs and medical attention and provisions consumed by her. (6) That the said services so

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

performed by plaintiff Cordano were the ordinary services of nursing and attending to a sick person in a condition such as that of the said Victoria Ferretti. But that in the performance of said services there was no change of residence, circumstances, conditions, or domestic life on the part of plaintiffs, and the position of plaintiffs was not changed, and that said services were not impossible nor difficult to estimate the value of in money, but could be and were readily computed and estimated in money value." Both of these findings, in our opinion, are amply supported by the evidence, and they in turn warrant the judgment of the court in favor of defendants.

The foundation of the claim of appellants necessarily rests in a compliance upon their part with all the terms of the contract, and a failure in that respect in any important particular is sufficient to defeat the action. However, following the lead of counsel, the view by the trial court of the contract, as embodied in said finding 6, may be considered of paramount importance and entitled to more extended consideration. The principles applicable to the situation are simple and easily ascertainable. They have been under review in many decisions of the courts. We, probably, though, need not go beyond the case of *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369. Therein the contract related to a testamentary disposition of property; but, admittedly, the character of such a contract is substantially the same as the one before us, and there is no material difference between the conditions prerequisite to the specific enforcement of the one and of the other.

[1] In that case, as in this, the contract, being in parol, was within the statute of frauds, and the court, after a comprehensive review of the authorities, declares that "it is the generally accepted rule that the payment of the purchase price or the rendition of services is not such a part performance of a parol agreement as will relieve the contract from the operation of the statute."

[2] To make the contract enforceable, it is further held that the services must be of such a peculiar character that it is impossible to estimate their value by any pecuniary standard, it must also be evident that the parties did not intend to measure them by any such standard, and it must appear after the performance of the services that plaintiff cannot be restored to the situation in which he was before the rendition of the services.

[3] It is further declared that "the question whether relief should be granted or denied in a particular case addresses itself peculiarly to the conscience of the chancellor, and before a plaintiff entitles himself to it many considerations enter and are to be weighed."

[4] We can see none of those peculiar and extraordinary circumstances present in the case at bar that would leave no discretion

in the trial court but to decree specific performance. It may be admitted that the care of the deceased was quite burdensome. She was helpless and in need of much attention, but any competent nurse could have performed the services that were required. It may have been a hardship for the plaintiffs to have the old lady in their home. Some sacrifice was doubtless demanded of the daughter, but it is perhaps needless to say that such inconvenience and discomfort are a common incident of age and infirmity, and the task should have been, and no doubt was, alleviated by filial affection and devotion. At any rate, we cannot say that the services cannot be measured by a pecuniary standard, or that plaintiffs cannot be restored to the position in which they were before the services were performed.

The cases cited have invited and received examination, but further specific consideration of them is not deemed necessary, nor do we feel called upon to quote the testimony found in the record. Indeed, we probably would have been justified in declining to examine the testimony to ascertain whether it is sufficient to support the findings for the reason that the appeal was not taken within 60 days after the entry of the judgment. The judgment was filed and entered October 7, 1909. The notice of such filing and entry was served October 8, 1909. Notice of appeal was served and filed by appellants December 8, 1909, 61 days after the service of said notice of filing and entry of judgment and 62 days after the entry of judgment. Section 939, subd. 1, of the Code of Civil Procedure, provides that: "An exception to the decision, or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the entry of the judgment."

[5] The only answer by appellants to this point is: "That there is nothing in the bill of exceptions or judgment roll that shows that the appeal was taken more than 60 days after notice. There is a paper printed in the back of the transcript which purports to be a notice of judgment, but it is not authenticated by the certificate of the clerk or of the judge and cannot be considered on this appeal."

[6] There is, however, a stipulation signed by the attorneys that the papers contained in the transcript "are true and correct copies of the original papers on file in said action." This ought to be sufficient authentication. But, regardless of this contention, we are satisfied that the decision must be upheld upon the merits of the case.

[7] For the first time, in their closing brief, appellants claim that, if the court was right in finding that the case is one in which compensation could be made in money, then the court should have found the amount that would compensate them and award them that sum and not turn them out of court

destitute of any relief. In support thereof appellants cite *Miller v. Edison Electric Illuminating Company*, 184 N. Y. 17, 76 N. E. 734, 3 L. R. A. (N. S.) 1060, *Hurlbutt v. N. W. S. Law Co.*, 93 Cal. 55, 28 Pac. 795, and *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786. These are all to the effect that, when equity has taken jurisdiction of a case, it will endeavor to do complete justice between the parties and award whatever relief the evidence justifies, if within the issues, though not specifically prayed for. To save expense and avoid unnecessary litigation, the rule, of course, should be observed. The difficulty here is, however, that there is no issue as to the value of the services actually performed by plaintiffs. It is true that there is an allegation in the answer that "the reasonable value of said services, including all care and attention, necessities furnished and medical attendance, would not exceed the sum of \$300"; but this includes services rendered and paid for by defendant G. B. Ferretti, as found by the court. Besides it may be that the trial judge believed that the plaintiffs had been compensated for their services. There is some evidence to that effect in the transcript. At any rate, no doubt, the court below would have been disposed to award whatever compensation it deemed plaintiffs entitled to if the matter had been properly presented.

As it stands here, seeing no prejudicial error in the record, we think there is no course open to us but to affirm the judgment, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

15 Cal. App. 654

PURITAS LAUNDRY CO. v. GREEN.
(Civ. 790.)

(District Court of Appeal, Second District,
California. March 21, 1911.)

1. CONTRACTS (§ 177*)—CONSTRUCTION.

Defendant contracted with plaintiff to collect laundry work for plaintiff's laundry, and pay plaintiff an established schedule of prices, by paying on certain named days each week all moneys collected, and making a settlement on the 15th of each month for the previous month, defendant agreeing to promptly collect and to guarantee all accounts, and that, if he ceased to do business with plaintiff, he should settle in full within two weeks. Plaintiff agreed to pay defendant \$5 a week, and on the 15th of each month a sufficient sum to make the total compensation for the previous month amount to 30 per cent. of plaintiff's gross charges for the work furnished by defendant during such month. The contract permitted defendant to collect laundry from local agents and pay them a commission on work furnished by them, and also permitted him to sell his laundry route and assign the contract, if the purchaser was satisfactory to plaintiff. *Held*, that the contract contemplated that plaintiff should look only to defendant for payment for laundry work delivered

to it by him; there being no privity between it and defendant's customers.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 177.*]

2. CONTRACTS (§ 303*)—PERFORMANCE—EXCUSE FOR NONPERFORMANCE.

Under Civ. Code, § 1511, providing that the want of performance of an obligation is excused where performance is prevented or delayed by the act of the creditor, plaintiff's prevention of defendant's performance of a contract by which he was to secure laundry work to be done by plaintiff would be a defense to plaintiff's recovery of the balance due on a contract for work done.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1409-1443; Dec. Dig. § 303.*]

3. CONTRACTS (§ 322*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action to recover a balance due under a contract by which defendant agreed to procure business for plaintiff's laundry, evidence held to show that defendant refused to renew his bond, tried to induce plaintiff's employes to go with a rival concern organized by defendant, and claimed that he was not bound to make collections of work, all contrary to the contract.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 322.*]

4. MASTER AND SERVANT (§ 30*)—RELATIONSHIP—TERMINATION—GROUNDS.

In view of Civ. Code, § 2000, permitting an employer to at any time terminate an employment for willful breach or habitual neglect of duty by an employe, an employer may terminate a contract of employment where an employe engages in a business which necessarily makes him a competitor to some extent of his employer.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 30.*]

5. CUSTOMS AND USAGES (§ 15*)—PAROL EVIDENCE—EXPLAINING CONTRACT.

Where the contract by which defendant agreed to procure work for plaintiff laundry for a stipulated compensation provided that plaintiff should recompense defendant for all claims duly made by customers for loss or damage, but did not state how such claims should be established, in an action to recover a balance due for laundry charges under the contract, plaintiff could show a custom between laundries and agents as to the manner of investigation and allowance of claims for loss and damage; it being presumed that the parties contracted with reference to the established usage in the absence of a specific provision.

[Ed. Note.—For other cases, see *Customs and Usages*, Cent. Dig. §§ 30-33; Dec. Dig. § 15.*]

6. CONTRACTS (§ 238*)—PAROL EVIDENCE—MODIFYING CONTRACTS.

Where the contract between plaintiff laundry and defendant provided that defendant should be allowed 30 per cent. of the gross charges for laundry work procured by him and done by plaintiff, evidence was not admissible in an action for a balance due under the contract that by an oral agreement defendant was to be allowed an additional per cent. where work was brought by him from branch agencies in a certain amount; Civ. Code, § 1698, providing that a written contract may be altered by a contract in writing or by an executed oral agreement, and not otherwise.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 238.*]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by the Puritas Laundry Company against Charles E. Green. From a judgment

for defendant and an order denying a motion for a new trial, plaintiff appeals. Reversed.

Ward Chapman and L. M. Chapman, for appellant. Isadore B. Dockweiler, for respondent.

SHAW, J. Action to recover a balance of \$431.70 alleged to be due upon a contract. Judgment went for defendant, from which and an order denying its motion for a new trial plaintiff appeals.

Plaintiff was engaged in the laundry business, and defendant was the recognized owner of what is known as a "driver's route," throughout which, with a horse and buggy owned by him, he engaged in collecting and delivering articles for laundering, and, when the work was done, returned and redelivered the same to the owners thereof. On February 21, 1906, the parties entered into a contract, which was to continue in force for two years from and after the 14th day of May, 1906, and which contract contained provisions as follows:

"(1) Said party of the first part (the plaintiff) agrees to wash and launder in a first-class manner and to redeliver to said second party (the defendant) at the time and in the order and manner that all laundry work is generally handled, within three (3) days or less (Sundays excluded) after receiving the same, all articles delivered to said laundry by said second party during the life of this contract, at the regular schedule of prices for laundry work in this city. Said party of the first part agrees to pay said party of the second part the sum of \$5 per week, on each Tuesday, and on the 15th of each month a further sum sufficient to make the total compensation for the previous month amount to 30 per cent. of the gross charges made by the party of the first part for the laundry work furnished by the party of the second part during the previous month.

"(2) Said first party agrees to recompense said second party for all claims duly made and established by patrons, on account of losses of or damage to articles delivered to be laundered, which occur while said articles are in the possession of said first party. * * *

"(5) It is agreed that in case said second party ceases to do business with said first party, he shall settle in full within two weeks thereafter."

The said second party agrees: "(1) To deliver to said party of the first part at its laundry, to be laundered, all articles collected by him from his route, and to pay said first party for doing said laundry work the regular established schedule of prices in this city, in the manner provided herein. (2) To take said laundered articles and return the same to the owners thereof at regular times and promptly, after the same have been laundered. (3) To collect charges for said laun-

dry work and pay over to said first party all money collected three times per week, on each Tuesday, Thursday, and Saturday; and also make regular accounting and settlement on the 15th of each month for all work done during the previous month, in the manner already provided herein. Said second party agrees to guarantee all accounts and to make all collections promptly. (4) To conform to the regular schedule of prices established by said first party, for articles collected to be laundered, and in no way to deduct from or 'cut' said schedule of prices without the consent of said first party. But this shall not prohibit said second party from collecting laundry from local agents and paying them a commission upon the work which said agents deliver to said second party. (5) The aforesaid sum of five dollars per week and a further amount equal to 30 per cent. of the net amount of work delivered by said second party shall be received and accepted by him as full compensation and profits for performing his part of the contract. * * *

(6) Upon beginning operations under this agreement said second party will cause to be executed and delivered to said first party, a bond in the sum of five hundred dollars (\$500) conditioned for the faithful performance of the terms and conditions of this contract on the part of said second party."

It was further provided that operations should begin under the contract on May 14, 1906, and continue for a term of two years thereafter; and that said second party might sell and transfer his route and assign his contract, upon the condition that such purchaser and transferee should be satisfactory to the party of the first part.

The complaint alleged that defendant entered upon the performance of his contract and continued in the performance thereof until about the 4th day of August, 1907, when he was discharged for cause, and said contract terminated for good cause by plaintiff, at which time defendant was indebted to plaintiff in the sum of \$431.70, which, upon demand, he refused to pay. In his answer defendant admits the execution of the contract; denies that there is due from him to plaintiff thereunder any sum whatsoever; denies that said contract was terminated upon good cause; alleges that he is entitled to the sum of \$28.70 on account of extra commissions orally agreed upon between plaintiff and defendant after he entered the employ of said plaintiff under the provisions of said contract, which commissions it is alleged were to be payable for work collected by defendant from subagencies where the amount of such collections equaled the sum of \$20 or more per week; alleges that he is entitled to the sum of \$75.75 on account of moneys paid out by defendant in settlement of claims of patrons for losses or damages to articles delivered to said plaintiff to be laundered, and which losses and damages occur-

red while said articles were in the possession of plaintiff; admits that he is charged with \$431.70 upon the books of plaintiff, but that \$218.55 of said sum is made up of amounts due but uncollected by him, the collection of which has been interfered with by plaintiff by reason of the termination of said contract.

The court found that defendant entered upon the performance of the contract herein set out, and continued in the performance thereof until about July 27, 1907, at which time he was discharged and said contract terminated without good, sufficient, or legal cause, and at which time there was a balance unpaid to plaintiff, on account of laundry work done by it, of \$431.70; that at said time there was due to defendant the sum of \$28.70, additional commissions earned by him under an oral agreement made with the plaintiff providing for the payment of additional commissions, as set forth in his answer; that defendant has paid out in settlement of losses, as set forth in his answer, the sum of \$75.75, for which he is entitled to credit; that there are outstanding accounts, other than those collected by defendant and upon which he is entitled to credit, in the sum of \$206.70, which sum defendant has been unable to collect by reason of his discharge by plaintiff, and which sum the court found plaintiff did not use due diligence to collect.

[1] As we construe the contract, it imposed upon defendant Green the primary obligation of paying plaintiff for the laundry work done, recovery for which could only be defeated by some affirmative defense. By its terms defendant agreed "to pay said first party for doing said laundry work the regular established schedule of prices in this city, in the manner provided herein"; that is, to pay over to plaintiff on each Tuesday, Thursday, and Saturday all moneys collected at such times, and "also make regular accounting and settlement on the 15th of each month for all work done during the previous month," and to make all collections promptly and guarantee all accounts. It was further provided in express terms "that, in case said second party ceases to do business with said first party, he shall settle in full within two weeks thereafter." Considering the contract as a whole, we are clearly of the opinion that there was no privity between the laundry company and those who intrusted their laundry to defendant for the purpose of having the same laundered, but that the intent of the parties was that plaintiff should look solely and alone to defendant for all charges for all laundry work done by it on laundry delivered by defendant, and that defendant should pay therefor the prevailing schedule rates, and on the 15th of each month he should make settlement in full for all work done during the preceding month. The fact that plain-

tiff was required to pay defendant 30 per cent. of this gross amount in no wise affects the interpretation that should be placed upon the latter's promise.

[2] If performance was prevented by the acts of plaintiff, such fact would constitute a sufficient defense to recovery. Section 1511, Civ. Code. While such defense was not pleaded, the court found that plaintiff terminated the contract without good, sufficient, or legal cause therefor, and that by reason thereof defendant had not been able to collect the balance of \$206.70, due and unpaid from those for whom laundry work had been done.

[3] In our opinion, neither fact so found is supported by the evidence. The contract imposed upon defendant the duty of giving to plaintiff an indemnity bond in the sum of \$500, conditioned for the faithful performance of the contract. He gave a bond which expired August 1, 1907, but some days before the expiration thereof refused to renew the same, or give any bond as required, by the terms of the contract. Upon this point defendant testifies that, when told the bond was about to expire and the company wanted a cash bond, "I told him the bond was good enough, and that he could have it renewed. When he told me the bond was about to expire and that I would have to get a new one, I told him that was all he would get. I told him to renew that bond. I declined to do it myself. The company had done so before." The contract did not require plaintiff to furnish the bond. It also appears from defendant's own testimony that some time prior to the termination of the contract defendant had actively engaged in organizing and launching a rival laundry company, known as the "Electric Laundry"; that defendant had access to the books of plaintiff and an acquaintance with plaintiff's employes; that he did solicit some of said employes to leave the employ of plaintiff and go to the Electric Laundry Company, in which defendant was one of the stockholders; that he intended to go there himself, hiring another man to drive his wagon, and that it was his intention to take his own work to said Electric Laundry; that he talked with a number of said employes, and did "ask Mr. Wonderly (one of the drivers) to quit the employ of plaintiff and take his work to the Electric before he was discharged and while his contract was still in force"; that he discussed with many of the employes the advisability of leaving the employ of plaintiff. The evidence clearly shows that defendant had not only placed himself in an attitude hostile to plaintiff's interest, but that he had violated the implied obligations of the contract, in that he was actively engaged in efforts to induce the employes of plaintiff to leave and unite their interests with that of a rival company engaged in the same business,

which defendant had been instrumental in organizing and wherein he had invested his own capital.

[4] "Manifestly, when a servant becomes engaged in a business which necessarily renders him a competitor, a rival of his master, no matter how much or how little time he devotes to it, he has an interest against his duty. It would be monstrous to hold that the master was bound to retain the servant in his employment after he has thus voluntarily put himself in an attitude hostile to his master's interests." *Dieringer v. Meyer*, 42 Wis. 311, 24 Am. Rep. 415. See, also, section 2000, Civ. Code. The evidence discloses that defendant made little or no effort to collect the outstanding amounts due from his patrons. He says he did not dun them or ask them for the money. "What money I collected I simply took it voluntarily, or, whenever they asked me how much was the balance on the account, I told them, and at the first of the month I issued each one of them a statement of just exactly what was outstanding." It clearly appears from his own testimony that he insisted that the duty of making the collections did not devolve upon him, but upon plaintiff. Not only did defendant make no genuine effort to collect the accounts, but there is nothing in the record tending to prove that by reason of any act of plaintiff he was prevented from making such collections.

[5] The contract contains a provision to the effect that the laundry company agrees to recompense said second party for all claims duly made and established by patrons on account of losses or damage to articles delivered to be laundered which occur while said articles are in the possession of said first party. The court found that defendant had paid in settlement of losses under this provision the sum of \$75.75. It does not appear that such claims were duly made and established, or made and established at all, by patrons. Defendant testified that he made settlements with customers for such losses. The contract is silent as to how such claims should be established, and it was sought by plaintiff to show the prevailing custom with respect to investigation and allowance of claims for lost articles and damaged goods under such circumstances. The court sustained an objection to such inquiry. This was error. Specific stipulations as to the manner of the establishment of claims being omitted in the contract, it will be presumed that the parties contracted with reference to the established usage in relation to such subject.

[6] Over plaintiff's objection, defendant was allowed to show that the written contract was modified by an oral agreement wherein it is claimed that, instead of being allowed 30 per cent. on the gross charges, he was to be allowed an additional 2½ per

cent. where work was brought in from branch agencies the items of which amounted to more than \$20 per week. This was clearly error. The contract, being in writing, could only be modified or altered by a contract in writing, or an executed oral agreement. Section 1698, Civ. Code. The alleged oral agreement as to the sum claimed was unexecuted, and hence no recovery thereon could be had.

Other alleged errors are assigned by appellant, but, in view of the conclusion reached, we deem it unnecessary to consider them. The judgment and order are reversed.

We concur: ALLEN, P. J.; JAMES, J.

15 Cal. App. 651

KRAKER v. SUPERIOR COURT OF CITY
AND COUNTY OF SAN FRANCISCO. (Civ. 939.)

(District Court of Appeal, First District, California. March 21, 1911.)

1. JUSTICES OF THE PEACE (§ 166*)—APPEAL—DISMISSAL.

When an appeal from a justice's court is duly perfected by a defendant upon both questions of law and fact, the case is removed to the superior court for a trial de novo, and it is the duty of plaintiff to bring the case on for trial, and not that of the defendant, and it was error on plaintiff's motion to dismiss an appeal taken by defendant for want of prosecution.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 166.*]

2. APPEAL AND ERROR (§ 120*)—REVIEW.

The action of the superior court in dismissing an appeal from the justice's court may be reviewed by the appellate court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 840-865; Dec. Dig. § 120.*]

3. JUSTICES OF THE PEACE (§ 166*)—APPEAL AND ERROR—DISMISSAL—EFFECT—REVIEW, RIGHT TO—MODE OF REVIEW AND TRIAL DE NOVO.

Where an appeal by defendant from a judgment of a justice of the peace was dismissed and judgment entered for plaintiff without a trial, it was in excess of the superior court's jurisdiction, and the order of dismissal and the judgment should be vacated, and the case stand for trial de novo in the superior court.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 166.*]

Application for a writ of review against the Superior Court and Hon. Thomas F. Graham, judge thereof, to review the action of the Superior Court in dismissing an appeal from a judgment rendered in a justice's court. Order of the superior court vacated and annulled.

Jas. P. Sweeney and Jos. P. Lucey, for petitioner. Edgar C. Levey and George M. Lipman, for respondent.

HALL, J. Petitioner filed his petition in this court for a writ of review, for the purpose of reviewing the action of the superior court in dismissing an appeal taken by said

Kraker from a judgment rendered in the justice's court against said Kraker and in favor of one Albert Mueller, who was the plaintiff in the action in said justice's court. No formal answer was made to the writ, but both parties appeared and obtained leave to file briefs. In the briefs the matter has been presented as upon a demurrer to the petition.

From the facts thus admitted, it appears that an action was commenced in the justice's court in 1904 by Albert Mueller, as plaintiff, against petitioner herein, M. Kraker, and judgment rendered against Kraker in favor of Mueller in said action in January, 1905, for the sum of \$40 and costs. In due time said Kraker duly took and perfected an appeal from said judgment to the superior court upon both questions of law and fact. The papers and files in said action were destroyed by the great fire of April, 1906, but subsequently the records in said action were restored by order of the superior court duly given and made. Thereafter Mueller, the plaintiff in said action, moved the court, upon notice given to the appellant (defendant in said action), to dismiss the appeal taken to the superior court upon the ground that the defendant in said action, had failed and neglected to prosecute said appeal with due diligence. The court granted the motion to dismiss the appeal, and in the same order gave judgment for the plaintiff in said action against the defendant, said Kraker, for the sum of \$40 and costs, without any trial of the issues involved in said action. The action of the superior court, both in dismissing petitioner's appeal and in entering judgment in favor of plaintiff in said action upon said appeal, was clearly without any warrant of law.

[1] When an appeal from the judgment of a justice's court is taken and duly perfected, by a defendant, upon both questions of law and fact, the case is removed to the superior court for a trial de novo, and the superior court must try the case as if there had been no trial in the justice's court. In such case, the appeal being fully perfected, the plaintiff is the actor in the superior as he was in the justice's court, and it is his duty to bring the case on for trial, and no duty in that respect devolves upon the defendant, although he is the appealing party. *Rabin v. Pierce*, 10 Cal. App. 734, 103 Pac. 771; *Alexander v. Municipal Court of Appeal*, 4 Pac. 961.

[2] There has been some conflict in the authorities in this state as to whether or not the action of the superior court in dismissing an appeal from the justice's court may be reviewed (*Carlson v. Superior Court*, 70 Cal. 628, 11 Pac. 788; *Hall v. Superior Court*, 68 Cal. 24, 8 Pac. 509; *Buckley v. Superior Court*, 96 Cal. 120, 31 Pac. 8); but the matter has been finally put at rest by the decision of

the Supreme Court in *Golden Gate Tile Co. v. Superior Court*, 114 Pac. 978, filed March 11, 1911. It is there determined that, where an appeal upon questions of law and fact is properly perfected, the superior court acts in excess of its jurisdiction in dismissing such appeal, and its action may be controlled by the appropriate remedy. In that case a writ of mandamus was issued to compel the trial of an action after the appeal had been in form dismissed. In the case at bar the appeal was dismissed and a judgment in favor of plaintiff thereupon entered, without any trial of the issues presented in the action. This was all without any warrant of law and in excess of the jurisdiction of the court. The order dismissing the appeal was void, and therefore was not an affirmance of the judgment appealed from, nor did it invest the superior court with jurisdiction to enter judgment without trial against the appellant.

[3] The order of dismissal and the judgment against petitioner should be vacated and annulled, when the case will stand for trial de novo in the superior court.

The order and judgment, entered by the said superior court, in the case of *Albert Mueller v. M. Kraker*, dismissing the appeal to said county court by said M. Kraker, and adjudging that said Mueller have and recover from said Kraker the sum of \$40 and interest and costs, is vacated and annulled, as being void and in excess of the jurisdiction of said court.

We concur: LENNON, P. J.; KERRIGAN, J.

15 Cal. App. 662

COGHLAN v. QUARTARARO et al.

SWETT-DAVENPORT LUMBER CO. et al.
v. SAME. (Civ. 853.)

(District Court of Appeal, First District, California. March 21, 1911. Rehearing Denied by Supreme Court May 19, 1911.)

1. APPEAL AND ERROR (§ 302*)—BILLS OF EXCEPTION—MOTION FOR NEW TRIAL—STATUTORY PROVISIONS.

Under Code Civ. Proc. § 648, providing that, when an exception is to a verdict or decision on the ground of insufficiency of evidence, an objection must specify the particular in which such evidence is insufficient, and section 659, providing that a party moving for a new trial must designate the grounds upon which the motion will be made, where the court refused to rule that several plaintiffs had failed to prove their several causes of action, but the bill of exceptions subsequently settled and used upon motion for new trial did not refer to the findings of fact or specify any particulars in which the evidence was insufficient to support any of them, the appellate court cannot review the sufficiency of the evidence to support the findings, either on an appeal from the judgment or from the order denying a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 302.*]

2. JURY (§ 14*)—RIGHT TO JURY TRIAL—FORECLOSURE OF MECHANIC'S LIEN.

An action to foreclose a subcontractor's or materialman's lien is a suit in equity, and the defendant, sued simply as the owner of the property against which it is sought to foreclose the lien and against whom no personal judgment is sought, is not entitled to a jury trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 46; Dec. Dig. § 14.*]

3. MECHANICS' LIENS (§ 73*)—CONTRACTS—SIGNING AND FILING—VOID CONTRACTS—RIGHT TO LIEN.

Where there were two contracts, the first for the erection of a two-story building and the second for an addition of a third story thereto, and each contract provided that the work should be done in conformity with the plans, drawings, and specifications signed by the parties, and each was for over \$1,000, and, as to the first, it appeared that the plans and specifications were not signed, and, as to the second, that no plans or specifications were filed therewith, both contracts were void, and the materialmen were entitled to a lien for the value of the materials and labor furnished without regard to the price named in the original contract or the balance in the owner's hands, due to the original contractor.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 73.*]

4. ACTION (§ 59*)—CONSOLIDATION OF ACTIONS—EFFECT—ISSUES.

Where a materialman in his complaint alleged a valid and properly filed contract between the owner and the contractor, but plaintiff in another action against the same owner alleged that the contracts were never filed, and the two cases were consolidated, either of the plaintiffs could tender an issue as to the validity of the contracts and a finding thereon would bind all parties to the action.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 696; Dec. Dig. § 59.*]

5. MECHANICS' LIENS (§ 271*)—PLEADING—COMPLAINT—AGREED PRICE.

An allegation of an agreed price in an action to foreclose a mechanic's lien, both in the claim of lien and in the complaint, is a sufficient prima facie allegation of value of the work as against a demurrer for uncertainty.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 271.*]

6. MECHANICS' LIENS (§ 154*)—CLAIM BY CORPORATION—SUFFICIENCY.

A claim of lien was signed with the claimant's corporate name, by C., and was also verified by C. The evidence showed that C. had full charge of the corporation and was practically its general manager. *Held*, it was competent for him to make, verify, and file the claim for the corporation.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 261-267; Dec. Dig. § 154.*]

7. TRIAL (§ 163*)—NONSUIT—MOTION—SUFFICIENCY.

A general statement that plaintiff has failed to prove its case is wholly insufficient as a statement of grounds for nonsuit.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 371; Dec. Dig. § 163.*]

8. INTEREST (§ 18*)—UNLIQUIDATED AMOUNT—INTEREST PRIOR TO JUDGMENT.

Where plaintiffs sold material for defendant's building at market rates, which changed from time to time, so as to require proof at the trial of their action to foreclose their lien, the amount due was unliquidated, and could not be made certain by calculation, and it only be-

came certain when fixed by judgment, so that interest thereon cannot be allowed prior to judgment.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 33; Dec. Dig. § 18.*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Consolidated actions by Frank Coghlan and by the Swett-Davenport Lumber Company and another against Salvatore Quartararo and others. From a judgment in each case for plaintiff and an order denying a motion for new trial, defendant Quartararo appeals. Modified and affirmed.

Daniel O'Connell, for appellant. Roger Johnson, for respondent Coghlan. Alex. G. Eells and H. K. Eells, for respondent Swett-Davenport Lumber Co. E. B. Young and F. A. Denicke, for respondent Swiss-American Bank.

HALL, J. Plaintiff Coghlan brought suit against Weisman Bros., as the contractor, and Salvatore Quartararo, as the owner, to recover a balance unpaid him, as subcontractor, for lathing and plastering a building constructed by Weisman Bros. for said Quartararo. The other plaintiffs joined in bringing a similar action against the same defendants, the Swett-Davenport Lumber Company seeking to recover for lumber furnished the contractor for said building, and Lettich-Fain Company seeking to recover for the plumbing of said building. Weisman Bros. defaulted and never appeared. The actions were consolidated and were tried together as one action. Findings of fact were made and judgments entered for the several plaintiffs as prayed for against the contractors, Weisman Bros., and the amounts thereof adjudged to be a lien against the premises of Quartararo, with the usual decree of foreclosure to satisfy the same. Defendant Quartararo appealed both from the judgment and from the order denying his motion for a new trial, and brought both appeals up on the same record, consisting of the judgment roll and a bill of exceptions settled before the hearing upon the motion. It appears that the notice of intention to move for a new trial was not served upon appellant's codefendants, Weisman Bros., and it is insisted by respondent that it was for that reason properly denied. Inasmuch as we think that the motion was properly denied on its merits, we do not deem it necessary to decide this point.

[1] A large portion of appellant's brief is devoted to discussing matters that can only be considered under the head of insufficiency of the evidence to support the findings; but, as there is no specification in the bill of exceptions of the particulars in which it is claimed that the evidence is insufficient to support the findings, we are precluded from reviewing the sufficiency of the evidence, and

must accept the findings of fact made by the court as correct. Section 648, Code Civ. Proc.; Estate of Page, 57 Cal. 238; Snell v. Payne, 115 Cal. 218, 46 Pac. 1009.

The bill of exceptions does show that appellant requested the court to rule that the several plaintiffs had failed to prove their several causes of action, and that said motions were denied. This, however, was before the court had made any findings of fact. The findings of fact were subsequently signed and filed, and the bill of exceptions subsequently settled and used upon the motion for a new trial in no way refers to any of said findings of fact, and much less does it specify any particulars in which the evidence is insufficient to support any of said findings. This is essential before this court can review the sufficiency of the evidence to support the findings, either upon the appeal from the judgment or from the order denying the motion for a new trial. Sections 648 and 659, Code Civ. Proc.; Estate of Page, supra; Snell v. Payne, supra.

[2] Before the commencement of the trial, defendant demanded that the consolidated actions be tried before a jury. This demand was denied, and he then requested that certain issues of fact be submitted to a jury. This was likewise denied. The court did not err in refusing a jury trial, either upon the whole case or upon any special issue. An action to foreclose a mechanic's, subcontractor's, or materialman's lien is a suit in equity, and the defendant, sued simply as the owner of the property against which it is sought to foreclose the lien, is not entitled to a jury trial. Curnow v. Blue Gravel Co., 68 Cal. 262, 9 Pac. 149. In the case at bar the only judgment sought or obtained as against appellant was that of foreclosure of the lien. No personal judgment against appellant was sought or obtained. The action, as against appellant, was similar to an action to foreclose a mortgage, in which action it has been held that a jury trial is properly denied, though the answer present the legal defense of nonexecution of the note and mortgage sued on. Downing v. Le Du, 82 Cal. 471, 23 Pac. 202. It has also been held that the equitable nature of the action to quiet title cannot be changed so as to entitle a defendant to a jury trial, though defendant, being out of possession, file a cross-complaint in ejectment. Angus v. Craven, 132 Cal. 691, 64 Pac. 1091; McNeil v. Morgan, 157 Cal. 373, 108 Pac. 69. From the principles laid down by the above-cited authorities, it is clear that the court did not err in refusing appellant's demand for a jury trial.

[3] Evidence was introduced to the effect that various claimants, including the plaintiffs, had served notices on appellant that they had severally performed labor for and furnished materials to Weisman Bros., the original contractors, to the aggregate amount of about \$3,900, and that thereupon appellant objected to plaintiffs' proceeding with the

trial, and requested the court to rule that he was "justified in refusing to pay plaintiffs anything until there was an accounting and apportioning among the several claimants." The court refused to so rule, and such ruling is assigned as error. The contracts between appellant and Weisman Bros. were void. There were two contracts. The first was for the erection of a two-story building, and the second for the addition of a third story thereto. Each contract provided that the work should be done in conformity with the plans, drawings, and specifications "which are signed by the parties hereto," etc., and each was for over \$1,000. As to the first contract, it appeared that the plans and specifications were not signed, and, as to the second, that "no plans or specifications therein referred to were filed therewith." Both contracts were therefore void (West Coast Lumber Co. v. Knapp, 122 Cal. 79, 54 Pac. 533; Donnelly v. Adams, 115 Cal. 130, 46 Pac. 916; Willamette, etc., Co. v. Los Angeles College Co., 94 Cal. 229, 29 Pac. 629). Consequently plaintiffs were entitled to a lien for the value of the materials and labor furnished and put into the building, without regard to the price named in the original contract between appellant and his contractors or the balance remaining unpaid in the owner's hands. Kellogg v. Howes, 81 Cal. 170, 22 Pac. 509, 6 L. R. A. 588. The court in its ruling, therefore, did not err. What we have said concerning the contracts between appellant and Weisman Bros. being void also disposes of the special defenses set up for the purpose of reducing the amount due from appellant to the contractors. The contracts being void, the plaintiffs were not affected or concerned with the amount due from appellant to his contractors.

[4] In this connection, however, appellant urges that plaintiff Coghlan in his complaint set up a valid and properly filed contract between the owner and the contractor; and insists that he therefore cannot take advantage of the fact that the contract was void for noncompliance with the statute. But the other plaintiffs set up that the contracts were never filed, and the court so found. The actions being consolidated, any of the plaintiffs could tender an issue as to the validity of the contracts, and the finding thereon would bind all the parties to the action. As was said in Union Lumber Co. v. Simon, 150 Cal. 751, 89 Pac. 1077, 1081: "This issue affected the rights of each of the plaintiffs, and its presentation in any of the original complaints became an issue in the consolidated action, and the finding and judgment thereon operated in favor of all the plaintiffs." See, also, Willamette Steam Mills, etc., Co. v. Los Angeles College Co., 94 Cal. 229, 29 Pac. 629.

[5] The point also seems to be made that Coghlan should have sued for the value of his work, and not on the agreed price. But it has been decided that an allegation of the agreed price, both in the claim of lien and in

the complaint, is a sufficient *prima facie* allegation of value, and is sufficient in the absence of a demurrer for uncertainty. *Bringham v. Knox*, 127 Cal. 40, 44, 59 Pac. 198.

[6] At the close of the testimony introduced on behalf of the Swett-Davenport Lumber Company, appellant requested the court "to rule and decide that said Swett-Davenport Lumber Company had failed in proof of its case, in that the claim of lien filed was not made by said corporation and was insufficient, and that said corporation had not proved the value of the materials or the mill work claimed to have been furnished, and that the law applying the payments made by Weisman Bros. on said account showed that there was nothing due said Swett-Davenport Lumber Company for labor or materials furnished to, or for, or charged to, this building; and also that there was no evidence that said labor and materials were actually used in the construction of this building." This request was refused, and appellant excepted. The claim of lien of said plaintiff purports on its face to be the claim of the Swett-Davenport Lumber Company, a corporation, and is in all respects in proper form. It is signed "Swett-Davenport Lbr. Co. By W. E. Code," and verified by W. E. Code, and was introduced in evidence without objection. The evidence shows that W. E. Code had full charge of the business of the corporation—substantially that he was the general manager thereof. It was competent for him to make and file the claim for the corporation and to verify it. *Park & Lacy Co. v. Inter Nos, etc., Co.*, 147 Cal. 490, 82 Pac. 51; *Greig v. Riordan*, 99 Cal. 316, 33 Pac. 913. The testimony of Code and Weisman, one of the contractors, fully meets the other objections to the sufficiency of the case made by said plaintiff. The request of appellant should probably be treated as a motion for a nonsuit, though not so denominated in the motion, and as such it was properly denied. Similar motions were made for similar rulings as to the other plaintiffs, but the grounds of the motions were not stated, except generally that the particular plaintiff had failed to prove his case, and that "a corporation as a subcontractor had no lien under the law."

[7] The general statement that plaintiff had failed to prove its case is wholly insufficient as a statement of grounds for nonsuit, and in such case the motion must be denied (*Miller v. Luco*, 80 Cal. 257, 22 Pac. 195); and the statute gives a lien to subcontractors (*Macomber v. Bigelow*, 126 Cal. 9, 58 Pac. 312). The other motions were therefore properly denied.

[8] Appellant's contention that the court erred in allowing interest on the amount due the Swett-Davenport Lumber Company prior to the judgment must be sustained. This plaintiffs sold at the market rates, which

changed from time to time, and were the subject of proof at the trial. The amount due was unliquidated, and was not capable of being made certain by calculation. It only became certain when fixed by the judgment. Interest in such a case cannot be allowed prior to judgment. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. 423.

In all other respects the judgment is supported by the findings.

The various objections made that go to the sufficiency of the evidence to support the findings cannot be considered for want of any specification of such insufficiency, as we before pointed out. The only error we find in the record is the one allowing interest before judgment to Swett-Davenport Lumber Company.

The order denying the motion for a new trial is affirmed. The judgment is modified by striking from that part awarding judgment to Swett-Davenport Lumber Company the words and figures following, to wit: "With interest thereon at the rate of seven per cent. per annum from the 1st day of August, 1907, amounting to \$176.00 and as so modified the judgment is affirmed as of the date thereof. Appellant is to recover of plaintiff Swett-Davenport Lumber Company one-third his costs of this appeal.

We concur: LENNON, P. J.; KERRIGAN, J.

(159 Cal. 716)

DIEPENBROCK v. LUIZ. (Sac. 1,782.)
(Supreme Court of California. May 2, 1911.)

1. LANDLORD AND TENANT (§ 95*)—LEASES—TERMINATION—CONSTRUCTION.

The provision in a lease that "whenever sold this lease shall cease and be at an end, provided that the party of the first part shall then pay to the party of the second part, for all improvements," etc., is a condition, and not a covenant, and may or may not be exercised at the option of the lessor.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 300; Dec. Dig. § 95.*]

2. LANDLORD AND TENANT (§ 199½*)—RENT—LIABILITY THEREFOR.

Where a tenant under a lease providing that "whenever sold this lease shall cease and be at an end, provided that the party of the first part shall then pay to the party of the second part, for all improvements," etc., held possession under the lease up to and past the time when the rent became due, he was liable for the rent, even though the premises were sold before the rent became due, and he was not offered compensation for his improvements.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 741, 742; Dec. Dig. § 199½.*]

In Bank. Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by M. H. Diepenbrock against Frank J. Luiz. From a judgment for plaintiff, defendant appealed to the District Court of Appeals, and a rehearing was granted. Judgment affirmed.

J. Frank Brown and C. E. McLaughlin, for appellant. R. Platnauer, for respondent.

MELVIN, J. This cause was decided by the District Court of Appeal of the Third Appellate District, and a rehearing was granted in order that we might further examine the authorities applicable to the lease involved in the litigation. After careful examination of the authorities cited and of the arguments of counsel presented in their briefs, we have adopted the opinion of the District Court of Appeal, written by Mr. Justice Burnett, which is as follows:

"The action, based upon a lease of agricultural lands from one R. W. Brown to defendant, is to recover the rental which under the terms of said lease became due on November 15, 1906. The lease was executed on November 11, 1905, and on November 10, 1906, Brown conveyed the premises together with 'the reversion and reversions, remainder and remainders, rents, issues and profits thereof,' to plaintiff.

[1] "The main controversy is over the proper construction of the following clause

in said lease: 'It is agreed by and between the parties hereto that the party of the first part may sell the demised premises at any time during the said term. Whenever sold this lease shall cease and be at an end, provided that the party of the first part shall then pay to the party of the second part, for all improvements placed upon the demised premises to the time of such sale, including the cost of all ditches, built thereon by the latter and all crops then growing thereon, the value thereof to be agreed upon by the parties hereto, and if they do not agree the value thereof shall be fixed by two disinterested persons selected for that purpose, by the parties hereto, and if they fail to agree by a third person selected by them for that purpose, and a majority of the three shall fix the value of such improvement, and the cost of such ditches, and the value of such crops, and as so fixed shall be paid by the party of the first part to the party of the second part.' It is the contention of appellant that the lease was terminated the instant a bona fide sale was effected by the lessor, while respondent claims that the termination was subject to the further condition of payment of the value of the improvements. In other words, the parties differ as to whether the clause providing for said payment constitutes a covenant or a condition. Appellant insists that, in harmony with the rule of construction that every word is to be understood in its ordinary and popular sense, we may adopt any of the following definitions of 'provided' as given by Webster, to wit: 'On condition'; 'by stipulation'; 'with the understanding.' Substituting these various definitions for 'provided' he argues that 'with the understanding' harmonizes perfectly with the text. 'It creates no discord, and does not limit the meaning and effect of that which precedes or succeeds it, much less nullify and render meaningless, important portions of the paragraph in which it is found. On the other hand, the substitution of the definition 'upon condition' creates inconsistency, inharmony and discord. It practically eliminates succeeding sentences where careful provision is made for the ascertainment and payment of the amount while its effect on the preceding sentence 'whenever sold this lease shall cease and be at an end' is to convert an absolute, positive and emphatic declaration into a qualified statement, the effect of which depends upon the will of one of the parties jointly making it.'

"It is undoubtedly true, as claimed by appellant, that stipulations in a contract are not construed as conditions precedent unless that construction is made necessary by the terms of the contract. *Deacon v. Blodgett*, 111 Cal. 418, 44 Pac. 159; *Antonelle v. Lumber Co.*, 140 Cal. 318, 73 Pac. 966. There are also well-considered cases holding that 'provided' does not necessarily impose a condi-

tion. In *Hartung v. Witte*, 59 Wis. 285, 18 N. W. 177, it is said: "But the words, 'upon the express condition' as here used, or the words 'if it shall so happen' or 'provided however' and the like do not always make a condition, and it is often a nice question to determine whether it is a condition or a covenant and courts always construe similar clauses in a deed as covenants rather than as conditions, if they can reasonably do so." 2 Washb. Real Property, 4. In *Stanley v. Colt*, 72 U. S. 119, 18 L. Ed. 502, it is declared that 'the word "provided," though an appropriate word to constitute a common-law condition, does not invariably and of necessity do so. On the contrary, it may give way to the intent of the party as gathered from an examination of the whole instrument, and be taken as expressing a limitation in trust.' Similarly in *Woodruff v. Woodruff*, 44 N. J. Eq. 353, 16 Atl. 6, 1 L. R. A. 330, it is said: "While the words 'provided nevertheless' and 'upon the following conditions' are appropriate words to create a condition, they do not of necessity create such an estate. They and similar words will give way when the intention of the grantor as manifested by the whole deed is otherwise, and they have frequently been explained and applied as expressing simply a covenant or a limitation in trust." Indeed, the decisions are uniform to the point that, while ordinarily the word 'provided' indicates that a condition follows, as expressed in *Boston S. & D. v. Thomas*, 59 Kan. 470, 53 Pac. 472, 'there is no magic in the term, and the clause in a contract is to be construed from the words employed and from the purpose of the parties, gathered from the whole instrument.'

"Respondent, on the contrary, quotes from *Rich v. Hotchkiss*, 16 Conn. 409, *Robertson v. Caw*, 3 Barb. (N. Y.) 410, and *De Vitt v. Kaufman*, 27 Tex. Civ. App. 332, 66 S. W. 224, to the effect that the word 'provided' means 'on condition,' and is the appropriate word for creating a condition precedent. It is admitted by appellant that it is an apt word for that purpose, but he contends that to so interpret it would be against the evident intention of the parties.

"Reflecting, however, that the lease was for the term of five years, and that valuable improvements were likely to be made by the lessee, and that the lessor wanted to be in a position to avail himself of any favorable opportunity to sell the premises to advantage, what is more reasonable than the conclusion that the lessor desired to retain the option to terminate the lease if the would-be purchaser should demand that the premises be conveyed free from incumbrance? Of course, it is only in view of such a contingency that there would be any reason for leaving the lessor a choice as to the payment for the improvements. It would hardly be supposed that he was so generous as to choose to pay unless the exigency of a profitable sale made it to his advantage to do so.

On the other hand, the lessee would hardly be willing to have his valuable leasehold interest destroyed at any time by a sale without at least some protection for his outlay on the property. And he might, quite naturally, desire more security than the mere personal covenant of the lessor to pay him for his improvements. He would, therefore, as a reasonable man, insist that, if the lessor is to have the privilege of selling the property at any time and desires thereby to terminate the lease, it must be upon the condition that he pay for the improvements. It would immediately occur to the parties, however, that, in case the improvements are to be paid for, some question might arise as to their value and for the purpose of determining this the judgment of two—and in case of their disagreement—of three arbitrators, it might be considered expedient to invoke. If the parties had these conditions in mind, would they not with sufficient accuracy express their intention by declaring that 'the lessor may sell the demised premises at any time during said term. Whenever sold the lease shall cease and be at an end, provided that the party of the first part shall then pay to the party of the second part the value of the improvements placed thereon by said party of the second part to be agreed upon by said parties and if they cannot agree, said value to be determined by two disinterested parties and in case of their disagreement a third party shall be selected and a majority of the three shall fix the value of the improvements to be paid by said party of the first part.' This is substantially the language used, and, to adopt the construction of appellant, we must depart from the primary meaning of the word 'provided' and hold that the parties used it in a secondary sense. The argument of appellant is interesting and ingenious, but it cannot change the fact that, attributing the usual and ordinary signification to the language of the parties, a condition is found in the provision in question. Nor, if we bear in mind the contingency already suggested and implied in the terms employed, does the conclusion of the learned trial judge derogate from the force of the seemingly positive promise to pay for the improvements.

[2] "But, accepting appellant's interpretation, how does the case appear? If the lease was terminated by the sale, it was the duty of defendant to surrender the premises. It is, indeed, so provided in these words: 'At the end of said term or early ending of this lease the party of the second part shall surrender possession of the demised premises in good order and condition.' It was the duty of the lessor to pay for the improvements. The lessor failed to pay and the lessee continued in possession. It is admitted that the lessor's covenant was a personal one, it was not made subject to a lien upon the land, nor upon appellant's theory was the lessee authorized to remain in possession until he

was paid for the improvements. The lessee's redress, therefore, for the violation of the lessor's promise, is a personal action against the latter for the value of the improvements. The lessee occupied and used the premises to his profit by virtue of no other right than that created by the lease until after the payment of the rent became due—indeed, until the end of the year. It is true that another lease was executed by plaintiff to defendant and his son, but this was on November 17th—two days after said rent was due—and it was not to take effect until December 1st. There can be no doubt, then, that defendant, having occupied the premises for the whole year, was burdened with the obligation to pay for the use thereof. The only question that could arise would be whether he should pay the rent prescribed in the lease, or what the use of the premises was reasonably worth. This we need not determine, as, in another view, assuming the termination of the lease by the sale, it would seem that defendant cannot escape the payment of the rent. As already seen, the said sale occurred only five days before the rental was to be paid, and less than a month before the expiration of one year of occupancy by said lessee. This \$1,500 was the balance of the annual rental, and since there was no agreement as to any apportionment or abatement of rent, in the absence of any statutory provision, in case of termination of the lease before the rent was due, the rule would be as stated in section 389 of Taylor's *Landlord and Tenant*: 'It is well settled that in all cases of periodical payments, accruing at intervals, and not *die in diem*, there can be no apportionment, for rent will not be apportioned in respect of time, unless by force of a statute or of some special provision of the lease.' But section 1935 of the Civil Code provides the rule in this state as follows: 'When the hiring of a thing is terminated before the time originally agreed upon, the hirer must pay the due proportion of the hire for such use as he has actually made of the thing, unless such use is merely nominal and of no benefit to him.' As has already appeared, the defendant actually had use of the property for the entire year under the original lease, but, if the computation should be limited to the date of the sale, it amounts practically to the same thing, and, under the evidence, it cannot be said that the use was merely nominal or of no value to defendant.

"It was rightly held, we think, that the claim for the rent was transferred to plaintiff, and therefore he was the proper party to institute the action. Indeed, the evidence shows that defendant did not object to paying the rent to plaintiff, but he insisted that he should be reimbursed by the said plaintiff for the value of the improvements. But this cannot be urged as an offset to plaintiff's claim since plaintiff did not undertake to pay therefor. If there be anything due for said

improvements, it must be from the original lessor.

"The judgment is affirmed."

We concur: SLOSS, J.; LORIGAN, J.

SHAW, J. [1] I concur in the judgment of affirmance and I agree with the conclusion of Justice Burnett that the provision in the lease of 1905, requiring the ending of the term upon a sale of the premises by the lessor, is a condition and not a mere covenant. I do not think, however, that the opinion fully states the grounds upon which the judgment must rest. The provision for the termination of the lease upon a sale of the premises was solely for the benefit of the lessor. *Foley v. Constantino*, 43 Misc. Rep. 91, 86 N. Y. Supp. 780. He could undoubtedly waive the benefit thereof and, without terminating the lease, he could sell and convey the premises subject to the lease. The grantee, if the lessor did not act in the matter prior to the conveyance, could also waive the right and continue the lease in force. In that case the lessee would have no right to declare the lease terminated and demand payment for his improvements. The part of the provision which was for his benefit was that which gave him the right to demand payment for his improvements as a condition concurrent with the exercise by the lessor or his grantee of the option to terminate the lease. If either attempted to exercise the option, the lessor could demand payment for his improvements and the lease would not terminate until such payment was made. The evidence shows that the grantee, Diepenbrock, refused to pay for the improvements when the sale to him was made. As neither he nor Brown, the original lessor, paid or offered to pay the lessee for the improvements, the right which they had to terminate the lease upon that sale was thereby waived and the lease continued in force unaffected by the sale. The lessee had the right to continue in possession of the premises for the full term of five years. Instead of doing so, however, the lessee voluntarily executed another lease on November 17, 1906, seven days after the sale and two days after the rent in question became due, whereby he and his son became lessees of the premises upon different terms of rent for the period of one year beginning December 1, 1906. This transaction abrogated the previous lease for all that part of the original term subsequent to the beginning of the new lease. [2] But it did not relieve the lessee from the obligation to pay the rent already accrued under the old lease at the time the new lease was made, nor did it preserve to him the right to demand payment for his improvements. The making of this new lease may have been unwise, but there is no claim that it was not voluntarily and intelligently made. The lessee must take the consequences of the condition in which he has voluntarily placed

himself and pay the rent accrued under the old lease in accordance with his contract to do so.

We concur: HENSHAW, J.; ANGELLOTTI, J.

15 Cal. App. 702

PIERCE et al. v. CITY OF LOS ANGELES et al. (Civ. 816.)

(District Court of Appeal, Second District, California. March 24, 1911.)

1. MUNICIPAL CORPORATIONS (§ 294*)—OPENING STREETS—NOTICE—STATUTORY PROVISIONS.

Under Street Opening Act of 1903 (St. 1903, p. 376) § 3, providing that the street superintendent shall cause notices of the passage of an ordinance for opening a street, to be posted along all streets and parts of streets within the assessment district described in the ordinance, at not more than 300 feet apart, and not less than three in all, evidence held insufficient to sustain the findings of the trial court that notices of the improvement and of the ordinance were properly posted.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 294.*]

2. MUNICIPAL CORPORATIONS (§ 538*)—IMPROVEMENTS—ASSESSMENTS—RESERVATION IN LOWER COURT.

Where plaintiffs did not complain in the trial court of the assessment of damages and benefits in the opening of a street, that certain property, was appraised in excess of its market value, they are estopped to do so on appeal.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1253; Dec. Dig. § 538.*]

3. MUNICIPAL CORPORATIONS (§ 444*)—ASSESSMENTS OF BENEFITS—EFFECT OF FAILURE TO GIVE NOTICE.

Where a street superintendent failed to give the required notice under the street opening act, the city council was without jurisdiction to open the street; hence assessments levied for that purpose were void.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1064; Dec. Dig. § 444.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by H. A. Pierce and another against City of Los Angeles and others. From a judgment for defendants and from an order denying a new trial, plaintiffs appeal. Reversed.

H. A. Pierce and Ingall W. Bull, for appellants. Leslie R. Hewitt and Emmet H. Wilson, for respondents.

JAMES, J. This action was brought for the purpose of securing an injunction restraining defendants from causing to be sold certain real property belonging to plaintiffs. The sale of the property was proposed to be had because of nonpayment of assessments levied against it for the purpose of satisfying costs and expenses in connection with the opening of Forty-Third street in the city of Los Angeles. The proceedings for the opening of said street were taken under the

provisions of the street opening act of 1903 (Stats. 1903, p. 376).

It is alleged in plaintiffs' complaint as one of the causes of action that notices were not posted within the assessment district, as required by section 3 of the act mentioned. That section provides in part as follows: "The street superintendent shall thereupon cause to be conspicuously posted along all streets and parts of streets within the assessment district described in said ordinance, at not more than three hundred feet in distance apart, notices (not less than three in all) of the passage of said ordinance." The ordinance referred to is the ordinance of intention required to be passed by the city council, declaring it the intention of said council to cause the particular improvement in contemplation to be made, and specifying the boundaries of the assessment district. It appears from the evidence that within the assessment district as determined by the ordinance of intention were included a short street called Forty-Second street, a portion of Central avenue, and a portion of Forty-Third street. Central avenue extended across the assessment district from north to south, and Forty-Third street extended from the westerly line of Central avenue, and at right angles thereto, westerly. The distance from the northwesterly corner of Central avenue and Forty-Third street along the westerly line of Central avenue north to the point where said westerly line of Central avenue intersected the northerly line of the assessment district was 135 feet, and from the southwesterly corner of Central avenue and Forty-Third street to the southerly boundary of the assessment district, where it intersected with the westerly line of Central avenue, was the same distance. Forty-Third street is 60 feet in width; Forty-Second street extended from Central avenue 90 feet north from Forty-Third street at right angles to Central avenue and easterly; the northerly boundary of the assessment district being coincident with the northerly boundary of Forty-Second street. It was proposed by the proceedings mentioned to open Forty-Third street from the easterly line of Central avenue easterly, and so make a continuous street of the same across and to the east of Central avenue. From the evidence set out in the bill of exceptions, it appears that no notices of the proposed work were posted on any portion of Forty-Third street within the assessment district. A notice was posted on Central avenue and at a point which would correspond to the corner of Central avenue and Forty-Third street, if the same was opened as contemplated by the proceedings. At the time of the posting of the notices, Forty-Third street did not extend across Central avenue, and notices posted on the easterly side of Central avenue could not be considered as notices posted on that portion of For-

ty-Third street within the assessment district. The statute requires the street superintendent to post his notices "along all streets and parts of streets within the assessment district," and this requirement was not satisfied by the posting of notices in the manner in which they were posted in the proceedings for the opening of Forty-Third street. Evidently, from the testimony of the witness who made the posting, there was a lack of understanding as to what was required to be done by him in that regard, for it appears that after posting Forty-Second street and placing two, or possibly three, notices on Central avenue, he proceeded down the line of the street proposed to be opened and posted notices there also. He failed, however, to cover any portion of Forty-Third street as the same was included within the assessment district, and for that reason the subsequent proceedings were invalid.

[1] We think that the evidence does not sustain the finding of the court, wherein it is determined that notices of the improvement and of the passage of the ordinance of intention referred to in the complaint were posted in the manner and form required by law.

[2] The second ground of complaint urged by plaintiffs, to wit, that in the matter of the adjustment of damages and benefits certain property within the assessment district along the line of Central avenue was appraised at a price greatly in excess of the market value thereof, is not now available as a ground upon which to ask the relief prayed for. The matters embraced within that cause of complaint were all matters which should have been urged during the course of the proceedings, and the failure of plaintiffs to seasonably make complaint thereof estopped them from objecting thereafter.

[3] Because of the failure of the street superintendent to cause the notices of the passage of the ordinance of intention to be posted in the manner required by the street opening act under which the proceedings were had, there was no jurisdiction given the city council to take further action toward the opening of the street as proposed, and the assessments as levied were therefore invalid. It follows from this conclusion that the judgment and order denying plaintiffs' motion for a new trial must be reversed, and it is so ordered.

We concur: ALLEN, J.; SHAW, J.

15 Cal. App. 738

BEDOLLA v. WILLIAMS. (Civ. 864.)

(District Court of Appeal, First District, California. March 31, 1911.)

1. PLEADING (§ 193*)—DEMURRER—COMPLAINT.

A complaint alleged that plaintiff and defendant made a partnership agreement to carry on a dairying business, by which defendant was

to furnish everything, except one-half the hogs necessary to properly conduct the business, that plaintiff was to furnish the labor, that they were to share equally the products and profits, except that the calves should belong one-fourth to plaintiff and three-fourths to defendant, both parties reserving the right to terminate the partnership on notice, that six months afterwards defendant terminated the partnership, assumed exclusive possession of all the property, withdrew the same and refused to account therefor, etc., wherefore plaintiff alleged that the value of his share of the assets was \$2,085, and prayed for an accounting and division. *Held*, that since the complaint showed plaintiff to be entitled to some remedy, either legal or equitable, it was not demurrable for failure to establish a partnership or other relation from which the right to an accounting would arise; the court being required by Code Civ. Proc. § 550, after answer filed, to grant plaintiff any relief consistent with the case made and embraced within the issues.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 429, 439; Dec. Dig. § 193.*]

2. JOINT ADVENTURES (§ 5*)—ACCOUNTING—DEMAND.

Where, in a suit for an accounting arising out of a joint adventure, defendant pleaded a settlement and payment of everything due plaintiff, no demand for an accounting was necessary to plaintiff's right of action.

[Ed. Note.—For other cases, see Joint Adventures, Dec. Dig. § 5.*]

3. JOINT ADVENTURES (§ 5*)—ACCOUNTING—REQUISITES—FINDINGS.

Where, in a suit between parties to a joint adventure for an accounting, the court found that they entered into a business venture, the products and profits of which were to be divided between them in certain proportions, that defendant took possession of the property jointly owned by the parties, and that his plea of settlement and payment was untrue, and found the value of plaintiff's interest, it was not essential to plaintiff's right to recover that the court should also have found that plaintiff and defendant were partners.

[Ed. Note.—For other cases, see Joint Adventures, Dec. Dig. § 5.*]

4. JOINT ADVENTURES (§ 4*)—ACCOUNTING.

Where plaintiff and defendant agreed to conduct a dairying business, plaintiff agreeing to perform all the labor in consideration of a certain proportion of the products and profits, the relation being terminable at the will of either party, plaintiff was not entitled in a suit for an accounting to an allowance for labor in harvesting hay on the farm, because of defendant's termination of the arrangement after the hay was harvested, and before it could be consumed.

[Ed. Note.—For other cases, see Joint Adventures, Dec. Dig. § 4.*]

5. APPEAL AND ERROR (§ 936*)—PRESUMPTIONS.

Code Civ. Proc. § 1033, provides that a party in whose favor a judgment is rendered, and who claims his costs, must deliver to the clerk and serve on the adverse party, within five days after the verdict or notice of the decision, or if the entry of the judgment on the verdict or decision be stayed, then before such entry is made, a memorandum of costs, and that by "decision" is meant the signing and filing of the findings of fact and conclusions of law. A special verdict was filed January 21, 1909, and on May 3d the court directed entry of judgment according to the verdict, which was done, but on June 7th the judgment, on plaintiff's motion, was set aside as inadvertent. Before this was done, on June 8th, plaintiff filed a first cost bill, which

defendant moved to strike as not having been filed within five days after the verdict. This motion being denied, the court, on August 5th, filed findings of fact and conclusions of law and ordered judgment for plaintiff, which was entered August 7th, and on that date plaintiff served a second cost bill, identical in items and amount with the first, which defendant also moved to strike on the same ground. *Held*, that since in an action at law the cost bill must be filed within five days after verdict, unless the entry of judgment is stayed or the court orders the case reserved, in which case it may be filed prior to the entry of judgment, as provided by Code Civ. Proc. §§ 628, 664, it would be presumed that the case was in fact reserved or the entry of judgment stayed, in the absence of an affirmative showing to the contrary, under the rule that all intendments are in favor of the regularity of the action of the court, and that the cost bill was therefore properly filed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3782, 3787; Dec. Dig. § 936.*]

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Action by Charles Bedolla against Matt Williams. From an order denying defendant's motion to strike out plaintiff's cross-bill, and from a judgment in favor of plaintiff, defendant prosecutes separate appeals. Modified and affirmed.

Wallace M. Pence, for appellant. Sargent & Bardin, for respondent.

KERRIGAN, J. In this case there are two appeals, one from the judgment against the defendant, taken upon the judgment roll, and the other from the order denying defendant's motion to strike out plaintiff's cost bill, brought to this court upon a bill of exceptions. As both appeals are included in one transcript, and are argued in one set of briefs, we will dispose of both matters in one opinion.

First, as to the appeal from the judgment.

The complaint alleges that the parties hereto, on May 1, 1907, entered into a partnership agreement for the purpose of engaging in the dairying business; that the defendant was to furnish "all the horses and farming implements, lands, buildings, cows, dairy and dairying fixtures, and one-half the hogs, necessary to properly conduct said business," and the plaintiff was to keep the property in good condition and to do all the labor necessary to carry on said business; that the parties were to share equally in the products and profits thereof, except that it was agreed that all calves, the offspring of cows furnished the partnership by the defendant, born during the existence of the partnership, were to be deemed the joint property of the parties in the proportion of one-quarter to said plaintiff and three-quarters to said defendant. They were to raise hogs in connection with and as a part of the dairying business, "each party to furnish one-half of said hogs; the hogs and the increase thereof, and all profits realized thereby," were to be shared equally. The

complaint further alleges that "the duration of said partnership was not designated by said agreement; both parties thereto reserving the right to terminate said partnership upon notice to the other party." That on the 11th day of November, 1907, six months after the commencement of the business, the defendant by notice terminated and dissolved said partnership, and took sole and exclusive possession of all of the property of said partnership, and withdrew the property theretofore supplied by him for the purpose of conducting said business. That the property of said partnership consists of about 63 calves, about 105 hogs, and about 50 suckling pigs. That the defendant refuses to account to plaintiff for the partnership property, and has converted the same to his own use, and after demand has refused to account to plaintiff for, or pay or transfer to him, his share of the assets of the business. That the plaintiff, in pursuance of the contract, performed labor, in cutting, curing, and stacking hay grown on the premises used for the conduct of the business, the advantage of which labor has been lost to plaintiff by reason of the termination of said partnership. The complaint then alleges that the value of plaintiff's share of said assets is the sum of \$2,085, and prays for an accounting and a division of the net assets, and that he have judgment for said sum of \$2,085.

The defendant demurred to the complaint, both generally and specifically, on the grounds of uncertainty and ambiguity. The demurrer was overruled, and such ruling is now assigned as error.

Appellant's position on this point is that the action is one for an accounting, and that the allegations of the complaint fail to establish a partnership, or any other relationship from which the right to an accounting would arise, and that therefore the complaint fails to state a cause of action.

[1] We think it unnecessary in this case to decide whether or not the agreement between the parties constituted them copartners, or provided for such a joint venture as would entitle either of them to an accounting from the other, because the allegations of the complaint show that the plaintiff is entitled to some remedy, either legal or equitable. In such a case, where, as here, an answer has been filed, the court may grant plaintiff any relief consistent with the case made out by him and embraced within the issues. Code Civ. Proc. § 580. In the case of *Walsh v. McKeen*, 75 Cal. 522, 17 Pac. 674, the rule is stated as follows: "An action does not now, as formerly, fail because the plaintiff has made a mistake as to the form of his remedy. If the case which he states entitles him to any relief, either legal or equitable, his complaint is not to be dismissed because he has prayed for a judgment to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

which he is not entitled. 'Legal and equitable relief are administered in the same forum, and according to the same general plan. A party cannot be sent out of court, merely because his facts do not entitle him to relief *at law*, or merely because he is not entitled to relief *in equity*, as the case may be. He can be sent out of court only when, upon his facts, he is entitled to *no relief*, either at law or in equity.'

We have no doubt the complaint was good as against the general demurrer. As to the special grounds urged, viz., uncertainty and ambiguity, the statement of plaintiff's cause of action is not as clear and satisfactory as it might be; but it does not appear that plaintiff's rights have been prejudiced by the court's action in overruling his demurrer based upon those grounds, and we would not be justified in reversing the case, because the defendant was required to go to trial on the complaint as filed. Code Civ. Proc. § 475. The court committed no prejudicial error in overruling the demurrer.

Defendant filed his answer, denying that he entered into a partnership with plaintiff, and alleged in that behalf that he entered into an agreement with plaintiff for the conduct of the said dairy business under the terms of which the plaintiff was to perform all the labor in conducting said business, and that he was to receive as full compensation therefor a certain proportion of the products of said business. The answer further alleged that the plaintiff had defaulted in several respects in the performance on his part of said agreement; that he had agreed with defendant to terminate their said agreement, and that a settlement had been had between them. The answer admitted that the defendant had taken and retained possession of the property belonging to said dairy business.

The cause was tried with a jury. A general verdict being waived, the jury found, in answer to special issues submitted by the parties, that the plaintiff duly performed his part of the agreement; that the value of plaintiff's interest in the partnership property was \$473.31, and that the value of the labor performed by plaintiff in cutting and stacking hay was \$90.

After the return of this special verdict, the defendant introduced further evidence, and the cause was submitted to the court for decision. Subsequently the court filed findings of fact and conclusions of law. It found generally in accordance with the allegations of the complaint, and against those of the answer, and adopted the special findings of the jury, and rendered judgment in favor of plaintiff for the sum of \$555.31, being the aggregate of the two sums above mentioned, less \$8, about which deduction no question is raised.

[2] This judgment is attacked by the defendant as not supported by the findings, or by the verdict. Appellant's argument is that

there is no finding of a partnership, nor of a conversion by defendant, nor of a demand by plaintiff for possession. Leaving out of consideration for the moment the item of \$90 included in the judgment as the value of plaintiff's labor in cutting and stacking hay, the defendant in his answer expressly admits that upon the termination of the agreement he took possession of all the property of the dairy business, and alleges that he made a cash settlement with the plaintiff of all his demands arising out of the said agreement. In view of this allegation, the question of a demand was an immaterial issue, since the position taken by defendant was that he had settled with plaintiff and paid him everything due.

[3] Nor was it necessary for the court to find specifically that the plaintiff and defendant were partners. It found that the parties entered into a business venture, the products and profits of which were to be divided between them in certain proportions; that the defendant took possession of the property jointly owned by the parties, and that the allegation in his answer that he had settled with the plaintiff was untrue, and found the value of plaintiff's interest in such property.

[4] We think the only respect in which the judgment is not supported by the findings is as to the item of \$90, the value of plaintiff's labor in cutting and stacking hay. The court found as a fact that under the agreement between the parties it was plaintiff's duty to perform all the labor required in the business, and that his compensation for such labor was a certain proportion of the products and profits. Plaintiff therefore was not entitled to an extra allowance for the labor in question. The court seems to have taken the view that, because the hay upon which this labor was expended had not been consumed at the termination of the agreement, it was only equitable to allow this sum to plaintiff as the value of such labor. But almost necessarily in the conduct of such an undertaking as was here entered upon there would be on hand at its termination property produced by the labor of one or other of the parties; and, in the absence of any fraudulent or oppressive conduct on the part of one of the parties in terminating the contract, there seems to be no reason why the labor performed in producing this property should not be deemed compensated by the share in the products and profits allotted to the party performing it. We conclude that the judgment is not supported by the findings to the extent of this item of \$90.

[5] 2. As to the appeal from the order denying defendant's motion to strike out plaintiff's cost bill. In considering this point, it will be necessary to refer to the dates of the various proceedings in the trial court. The special verdict of the jury hereinbefore referred to was given and filed January 21,

1909. On May 3d following the court directed the clerk to enter judgment in accordance with the special verdict, which was done, but subsequently, on June 7th, this judgment was, on motion of the plaintiff, set aside as having been inadvertently entered. Before this was done, however, to wit, on May 8th, the plaintiff filed a first cost bill. Defendant made a motion to strike this cost bill out, on the ground that it had not been filed within five days after the verdict. This motion was denied, and no appeal is taken from such order. On August 5th the court filed its findings of fact and conclusions of law, and ordered judgment for the plaintiff, as we have seen, which was entered on August 7th, the appeal from which judgment we have already considered. On said last-mentioned date plaintiff served and filed a second cost bill, identical as to items and amount with the first. Thereafter defendant moved to strike out this cost bill, on the same ground that he had moved to strike out the first, viz., that it was not filed within five days after the special verdict of the jury. The court denied this motion, and it is from such order that the defendant has appealed.

Section 1033 of the Code of Civil Procedure provides that a party in whose favor a judgment is rendered, and who claims his costs, must deliver to the clerk and serve on the adverse party, within five days after the verdict or notice of the decision, or, if the entry of the judgment on the verdict or decision be stayed, then before such entry is made, a memorandum of costs, and that by "decision" is meant the signing and filing of the findings of fact and conclusions of law.

It is appellant's contention that the action was an action at law, and that the cost bill should have been filed within five days after the verdict of the jury. Considering, for the purpose of the argument, that the action is one at law, then the cost bill should have been filed within the time stated by appellant, unless it appears that the entry of the judgment was stayed, or unless the court ordered the case reserved for argument or further consideration, in which case, if filed prior to the entry of the judgment, it would be in time. Code Civ. Proc. §§ 628, 664. But it appears from the record, satisfactorily we think, that the case was in fact reserved for argument by briefs. Even if that were not true, and the record were silent as to the cause of the delay in the entry of the judgment, we would have to assume, in the absence of an affirmative showing to the contrary, that the court had followed the plain terms of the Code. All intendments are in favor of the regularity of the action of the court; and it is incumbent on the appellant to show error affirmatively. *McLennan v. Wilcox*, 126 Cal. 51, 58 Pac. 305; *People v.*

Holmes, 118 Cal. 444, 50 Pac. 675. And we would also assume, for the purpose of sustaining the order of the court, that while, as seen from the above-mentioned dates, the cost bill was filed on the same day that the judgment appealed from was entered, yet that in point of actual time the filing of the cost bill preceded the said entry. On the other hand, if this be considered as a case in equity, the cost bill having been filed within five days after the decision, it was unquestionably in time. The court did not err in denying said motion.

The judgment is modified by striking out therefrom the sum of \$90, and as thus modified it shall stand affirmed; the order denying defendant's motion to strike out plaintiff's cost bill is affirmed; appellant to recover costs of this appeal.

We concur: LENNON, P. J.; HALL, J.

15 Cal. App. 724

ROYAL et al. v. LANGE et al. (Civ. 903.)
(District Court of Appeal, Second District, California. March 24, 1911.)

CANCELLATION OF INSTRUMENTS (§ 53*)—FINDINGS—SUFFICIENCY.

A finding that a contract to purchase land was induced solely through false representations was sufficient, without a finding that plaintiffs' consent would not have been given but for such representations.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 109-111; Dec. Dig. § 53.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Nannie Royal and another against Charles Lange and others. Judgment for plaintiffs, and defendant Mrs. Anna Sievert appeals. Affirmed.

Roland G. Swaffield and Swaffield & Hood-enpyl, for appellant. Tom C. Thornton and T. R. Archer, for respondents.

JAMES, J. This action was brought by plaintiffs to enforce the rescission of a contract made for the purchase of real property. It was alleged in the complaint that the consent of plaintiffs to the execution of the contract was obtained by means of false and fraudulent representations and pretenses. Findings and judgment were against the defendants, and from the judgment the defendant Anna Sievert has appealed.

The only point relied upon by appellant is stated by her counsel in his brief as follows: "There is no finding that the misrepresentations were material, or that the consent of plaintiffs would not have been given, had such representations not been made. * * * It is the contention of appellant that, inasmuch as there is no finding in terms or in substance that the consent of plaintiffs would not have been given, had it not been for the

representations, the representations found cannot, under the law of this state, be held material. In short, that in order to recover the plaintiffs must allege and prove, and the court must find, that the consent of the plaintiffs to the contract in question would not have been given, had it not been for the misrepresentations."

We do not agree with the construction given to the findings of the trial court by appellant's counsel. The court did find that the plaintiffs believed and relied upon the false representations, and that, induced solely thereby, they gave their consent to the contract. It was not necessary that the findings in terms should recite that the consent of plaintiffs would not have been given, had the false representations not been made; a finding that the plaintiffs were induced solely by reason of the false representations to execute or make the contract is an equivalent statement of the ultimate fact, and altogether sufficient.

The judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

15 Cal. App. 614

SHEPPARD v. SHEPPARD. (Civ. 913.)

(District Court of Appeal, Second District, California. March 15, 1911. Rehearing Denied by Supreme Court May 12, 1911.)

1. APPEAL AND ERROR (§ 938*)—EXTENDING TIME FOR FILING—PRESUMPTIONS.

Since, under Code Civ. Proc. § 1054, the statutory time fixed for settling and allowing a bill of exceptions may be extended by the court, the presumption is, in the absence of anything in the record to the contrary, that it was extended by stipulation or order of court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3795-3803; Dec. Dig. § 938.*]

2. APPEAL AND ERROR (§ 227*)—PRESENTATION OF QUESTIONS BELOW—OBJECTIONS TO BILL OF EXCEPTIONS.

Where no objection was made in the trial court to the settling of the bill of exceptions, a contention on appeal that it was not settled within the time allowed by law cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 227.*]

3. EXCEPTIONS, BILL OF (§ 45*)—PREPARATION AND SETTLING—RULES.

The rule in respect to the preparation and settling of bills of exception is similar to that which prevails with reference to statements on appeal and on motion for new trial.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 45.*]

4. DIVORCE (§ 184*)—APPEAL—ERROR NOT AFFECTING RESULT.

Where a judgment in a divorce action did not adjudicate the character of the estate owned by the parties, and no divorce was granted either party, a finding that certain property is not separate, but community, property, is harmless error, as it could not affect the judgment.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 184.*]

5. HUSBAND AND WIFE (§ 283*)—SEPARATE MAINTENANCE—DUTY TO SUPPORT WIFE LIVING APART FROM HUSBAND.

While the law does not impose upon a husband the duty of supporting a wife who lives separate and apart from him against his will and consent, where, on his part, and notwithstanding past offenses, he offers to fulfill the marriage contract and give her a home with him, such offer must be made in good faith, in order to constitute a defense to the wife's claim for separate maintenance.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 283.*]

6. APPEAL AND ERROR (§ 1008*)—REVIEW—QUESTION OF FACT.

In a wife's action against her husband for separate maintenance, the question whether the husband in offering to fulfill the marriage contract and to give the wife a home with him, notwithstanding her past misconduct, was made in good faith so as to constitute a defense, was a question of fact for the determination of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3969; Dec. Dig. § 1008.*]

7. APPEAL AND ERROR (§ 663*)—EXCEPTIONS—FINDINGS OF COURT—MATTERS NOT SHOWN BY THE RECORD.

While a finding might be construed as a recital by the court of a fact, which, in the absence of evidence to the contrary, could be deemed prima facie proof of its existence, where a bill of exceptions states that it contains all the matters and things occurring at the trial, and it discloses an absence of everything touching the question, it overcomes the presumption arising from such recital.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2853-2855; Dec. Dig. § 663.*]

8. APPEAL AND ERROR (§ 714*)—RECORD—MATTERS FORMING PART OF.

A transcript of proceedings presented by respondent and certified by the stenographic reporter as being correct, from which it appears that respondent's attorney stated to the court that a certain stipulation had been made, and, in reply to an inquiry of the court as to whether or not there was a record of such stipulation, replied, "Yes, sir; it was entered in the minutes of the court at that time," was not entitled to consideration as a part of the bill of exceptions or otherwise.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2958-2963; Dec. Dig. § 714.*]

9. STIPULATIONS (§ 9*)—RECORD—INCORPORATION OF STIPULATION.

Since Code Civ. Proc. § 283, provides that a stipulation, to be effective, must be evidenced by an agreement filed with the clerk or entered upon the minutes of the court, and not otherwise, a recital in a transcript of proceedings presented by respondent that respondent's attorney informed the court that a certain stipulation had been made, and had been entered in the minutes of the court, was insufficient to support an order of the court allowing counsel fees in alleged conformity to the provisions of the stipulation which were not otherwise shown by the record.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 16-21; Dec. Dig. § 9.*]

10. APPEAL AND ERROR (§ 671*)—RECORD—MATTERS PRESENTED FOR REVIEW.

In a suit by a husband against his wife for divorce, in which the wife filed a cross-complaint for separate maintenance, a recital in the bill of exceptions on appeal by the husband from a decree in favor of the wife on the cross-

complaint that the court "ordered that within 35 days plaintiff pay to defendant to enable her to defend this action the sum of \$50, it being stipulated in open court that all other matters concerned in this application shall be considered at the trial hereof and that any order proper in the judgment of the court shall then be made herein, with same effect as though made at this time," was insufficient to show the existence of a stipulation which would support an order of the court allowing defendant \$150 as attorney's fees after the trial of the cause; the stipulation or any evidence of its contents not otherwise appearing in the record.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 671.*]

11. APPEAL AND ERROR (§ 1140*)—REVERSAL—REMITTITUR.

Where a portion of a judgment predicated on an erroneous finding is clearly ascertainable, and the proceedings as disclosed by the record are correct in other particulars, a new trial should not be ordered, provided such excess is remitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462-4478; Dec. Dig. § 1140.*]

Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action for divorce by Samuel Sheppard against Lucinda Sheppard, in which defendant files a cross-complaint for support and maintenance. From a judgment in favor of defendant awarding her permanent support and maintenance, plaintiff appeals. Modified and affirmed.

E. B. Drake, for appellant. Gray, Barker, Bowen, Allen, Van Dyke & Jutten, and P. E. Greer, for respondent.

SHAW, J. In addition to a statement of the grounds upon which the action was based, the complaint alleged that all the property owned by plaintiff was his separate estate, and that there was no estate belonging to the marital community. By answer defendant denied all these allegations and filed a cross-complaint, whereby, upon sufficient facts therein alleged, and without asking for a decree of divorce, she asked for permanent support and maintenance. Plaintiff answered the cross-complaint, denying the allegations contained therein. The issues thus tendered by the answers to the complaint and cross-complaint were all found in favor of defendant; whereupon judgment was rendered against plaintiff and in favor of defendant, awarding her permanent support and maintenance of \$50 per month, and giving her a lien upon certain real estate therein described as security for the payment of same, and also awarding her \$150 as attorney's fees. Plaintiff appeals from this judgment upon a bill of exceptions.

Notice of the entry of the judgment was served upon plaintiff on December 17, 1909, and a copy of the bill of exceptions was served upon respondent on January 18, 1910, and the same was settled and allowed by the court on January 29, 1910. Respondent for

the first time in this court interposes an objection to a consideration of the bill of exceptions for the alleged reason that it was not settled and allowed in time.

[1] Under section 1054 of the Code of Civil Procedure, the statutory time fixed for the performance of the act may be extended by the court, and, as every intendment is in favor of the regularity of the action of the court, we must presume, in the absence of anything to the contrary, that the time was extended by stipulation or order of the court.

[2] Moreover, there is nothing in the transcript to show that any objection was made below to the settling of the bill of exceptions, and hence, even if a valid objection might have been interposed, the failure so to do must be deemed a waiver of such right. *Patrick v. Morse*, 64 Cal. 462, 2 Pac. 49; *Higgins v. Mahoney*, 50 Cal. 444; *Churchill v. Flournoy*, 127 Cal. 356, 59 Pac. 791.

[3] The rule in respect to the preparation and settling of bills of exception is similar to that which prevails with reference to statements on appeal and on motion for new trial. Section 145, *Hayne on New Trial and Appeal*.

Appellant attacks the finding of the court to the effect that the property described in the pleadings was not the separate estate of plaintiff, but the same was community estate of the husband and wife.

[4] The judgment does not purport to adjudicate or establish the character of the estate owned by the parties, or either of them. As no divorce was granted either party, there was no occasion for making findings touching their property rights. Had the court found the estate to be the separate property of plaintiff, as insisted upon by appellant, such fact could not affect the judgment rendered. Hence, conceding the finding not justified by the evidence, nevertheless, inasmuch as it was not necessary in support of the judgment, the error must be disregarded as immaterial.

In his answer to the cross-complaint, plaintiff alleged that he had "urged defendant to return to his place of residence and reside with him and resume the relation of man and wife." The court found this allegation to be untrue. Appellant insists that such finding is not justified by the evidence.

[5, 6] Conceding, as we do, that the law does not impose upon a husband the duty of supporting a wife who lives separate and apart from him against his will and consent, where on his part, and notwithstanding past offenses, he offers to fulfill the marriage contract and give her a home with him, such offer must be made in good faith, and the question of good faith is one of fact to be determined by the trial court. *McMullin v. McMullin*, 123 Cal. 653, 56 Pac. 554. From an examination of the evidence, as disclosed

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

by the record, we cannot say that the trial court erred in concluding that there was a lack of good faith on the part of the plaintiff in making such offer. The action was instituted while plaintiff and defendant were living together. There is no evidence that he offered to dismiss or discontinue the action instituted against defendant. We may suggest, however, that under the provisions of section 137, Civil Code, it is at any time within the power of the court, in its discretion, to vary, alter, or revoke the order awarding separate support and maintenance to the wife. We doubt not that upon a proper application for a modification or revocation of the order, accompanied by an offer on the part of the husband to furnish his wife with a suitable home within his means, and a proposal made in good faith to treat her with conjugal kindness, the court would lend its aid in effecting a reconciliation that would enable these parties during the short remaining years of life to continue not only in name, but in fact the relation, with all that it implies, of husband and wife, entered upon 55 years ago.

[7] The court found "that it was stipulated between counsel for the respective parties in open court, when application was made heretofore and before the trial of this cause for an allowance for attorney's fees in behalf of defendant and cross-complainant, that the amount thereof should be fixed by the court at the time of the trial." Upon this finding the court adjudged "that defendant Lucinda Sheppard have and recover of the plaintiff the sum of one hundred and fifty dollars, allowed as attorney's fees." It is conceded that, in the absence of such stipulation, the court was without authority to make such order after trial, for the reason that it was not necessary to enable the wife to prosecute or defend the action. *Loveren v. Loveren*, 100 Cal. 493, 35 Pac. 87. The bill of exceptions certified by the trial judge as being correct states that it contains all the evidence introduced at the trial, and "contains all the matters and things that occurred upon the trial of the same," but it is silent as to any evidence whatsoever in support of the finding upon which this order is based. Assuming that the finding might be construed as a recital by the court of a fact which, in the absence of evidence to the contrary, could be deemed *prima facie* proof of its existence, nevertheless, the bill of exceptions containing all that occurred at the trial, and disclosing an absence of anything touching the question, overcomes the presumption arising from such recital.

[8] Recognizing this fact, respondent has presented a transcript of proceedings, certified by the stenographic reporter as being correct, from which it appears that respondent's attorney stated to the court that such stipulation had been made, and, in reply to an inquiry of the court as to whether or not there was a record of such stipulation, re-

plied: "Yes, sir; it was entered in the minutes of the court at that time." We are referred to no authority, statutory or otherwise, which would entitle this document to consideration as a part of the bill of exceptions, or for any purpose whatsoever.

[9] Conceding, however, that it is entitled to consideration, the only fact thereby established is that the attorney for respondent, it not being made to appear that appellant's counsel was present, stated that such stipulation had been made and entered in the minutes of the court. Neither the stipulation nor minute entry thereof was offered in evidence, and no proof was offered that such stipulation had been made. To be effective, a stipulation made by counsel must be evidenced by an agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise. Section 283, Code Civ. Proc.

[10] Upon the suggestion of a diminution of the record, counsel for respondent has filed herein a certified copy of a minute entry made by the trial court, as follows: "Ordered that within thirty-five days plaintiff pay to defendant, to enable her to defend this action, the sum of fifty dollars, it being stipulated in open court that all other matters concerned in this application shall be considered at the trial hereof, and that any order proper in the judgment of the court shall then be made herein with same effect as though made at this time." Waiving all question of the irregularity of the mode of presenting evidence touching the question at issue, and considering the entry as though incorporated in the bill of exceptions, all that appears therefrom is that all other matters concerned in the application should be considered at the trial. What the other matters were, if any, is not made to appear. Nothing is disclosed by this minute entry which tends to show that the parties entered into any stipulation relating to attorney's fees, or the postponement of the fixing of the same to the time of trial.

For the reasons given, it appears that the court erred in adjudging that respondent should have and recover from appellant \$150 as attorney's fees.

[11] Inasmuch, however, as that portion of the judgment predicated upon this erroneous finding is clearly ascertainable, and the proceedings as disclosed by the record are correct in other particulars, a new trial should not be ordered, provided such excess be remitted. *Salstrom v. Orleans, etc., Mining Co.*, 153 Cal. 551, 96 Pac. 292; *Curran v. Hubbard*, 114 Pac. 81. It is therefore ordered that if respondent, within 30 days from the filing hereof, files with the clerk of this court her written consent that the judgment of the superior court be modified by striking therefrom the provision adjudging payment to her of said sum of \$150 attorney's fees, said judgment shall be and is modified accordingly, and the judgment affirmed. Otherwise, and

in case respondent fails to file such consent in writing, the judgment is reversed.

We concur: ALLEN, P. J.; JAMES, J.

15 Cal. App. 705

FAIR v. HOME GAS & ELECTRIC CO.
(Civ. 842.)

(District Court of Appeal, Second District, California, March 24, 1911.)

1. EVIDENCE (§ 67*)—PRESUMPTIONS—CONTINUANCE OF FACT OR CONDITION.

Where a gas pipe or main in front of certain premises is shown to have once existed, it will be presumed, under Code Civ. Proc. § 1963, to have continued, in the absence of evidence of change.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 87, 88, 103; Dec. Dig. § 67.*]

2. GAS (§ 22*)—REFUSAL TO SUPPLY CONSUMER—ACTION FOR DAMAGES—EVIDENCE—SUFFICIENCY.

In an action by a consumer against a gas company to recover the penalty provided by Civ. Code, § 629, for neglect to supply gas, required by his written contract, evidence held sufficient to support a finding that the plaintiff was, at the time he made application, an occupant of the building and premises referred to in his complaint, and that the same was not more than 100 feet from defendant's gas main, and that defendant's exaction of a cash deposit or bond as a condition to supplying plaintiff with gas was an arbitrary discrimination against plaintiff.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 18; Dec. Dig. § 22.*]

3. GAS (§ 22*)—REFUSAL TO SUPPLY CONSUMER—ACTION FOR DAMAGES—COMPLAINT.

A complaint based upon Civ. Code, § 629, requiring a gas company, on application of an owner or occupant of a building not more than 100 feet from one of its mains, to supply gas therefor, and authorizing recovery of damages for its failure for 10 days to do so, which alleges a demand in writing upon defendant to supply plaintiff with gas for use in and about said house and premises, and defendant's refusal to comply therewith unless a bond was given, and that for a stated period plaintiff was without the use of any heating or illuminating gas, sufficiently avers, in the absence of anything other than a general demurrer, that the defendant refused to supply plaintiff with gas for lighting.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 18; Dec. Dig. § 22.*]

4. APPEAL AND ERROR (§ 173*)—PRESENTATION OF GROUNDS FOR REVIEW.

Where defendant, in an action for damages for failure to supply gas to plaintiff, as required by Civ. Code, § 629, raises no question before the trial as to the purposes for which the gas was to be used, and in its answer alleges that it had been at all times and was then willing to furnish gas to plaintiff, and offers to connect its pipes on plaintiff's premises for furnishing gas to plaintiff on compliance with defendant's request for bond, defendant cannot, on appeal, raise for the first time the question as to the purposes for which the gas was required.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1120; Dec. Dig. § 173.*]

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by Peter Fair against the Home

Gas & Electric Company. Judgment for plaintiff, and from a general order granting defendant's motion for a new trial, plaintiff appeals. Reversed.

See, also, 13 Cal. App. 589, 110 Pac. 347.

E. C. Campbell, for appellant. P. H. Moore, Halsey W. Allen, and Campbell & Moore, for respondent.

SHAW, J. The suit was instituted to recover the statutory penalty provided by section 629 of the Civil Code, which is as follows: "Upon the application in writing of the owner or occupant of any building or premises distant not more than one hundred feet from any main, or direct or primary wire, of the corporation, and payment by the applicant of all money due from him, the corporation must supply gas or electricity as required for such building or premises, and cannot refuse on the ground of any indebtedness of any former owner or occupant thereof, unless the applicant has undertaken to pay the same. If, for the space of ten days after such application, the corporation refuses or neglects to supply the gas or electricity required, it must pay to the applicant the sum of fifty dollars as liquidated damages, and five dollars per day as liquidated damages for every day such refusal or neglect continues thereafter."

By appropriate allegations plaintiff brings the case within the provisions of the section, it being alleged, among other things, that plaintiff occupied a house and premises in the city of Redlands, known and designated as No. 536 Chestnut avenue, which house and premises were during the times in question distant not over 100 feet from one of the gas mains owned and operated by defendant, a corporation engaged in the manufacture and distribution of gas to the inhabitants of said city; that on July 29, August 14, and August 24, 1908, plaintiff made demand in writing upon defendant that it supply him with gas for use in and about said house and premises, but defendant refused to comply with such demand, unless plaintiff should give a satisfactory indemnity bond or make a cash deposit to protect defendant from any loss which it might be subjected to in connection with the gas service, and to insure the preservation of the meter; that such exaction as a condition of supplying gas to plaintiff was an arbitrary discrimination against him; that for the period extending from June 26, 1908, to the time of the filing of the complaint, plaintiff was without the use of any heating or illuminating gas. In its answer defendant, among other things, denied that said building so occupied by plaintiff was at any of the times mentioned in the complaint distant not more than 100 feet from its gas main, but made no denial of the alleged fact that the premises were within 100 feet there-

from; admitted the making of a demand for a bond or cash deposit as alleged, but denied that the making of such demand was an arbitrary discrimination against plaintiff; denied that plaintiff had been without gas for illuminating or heating purposes subsequent to June 26, 1908; and further answering alleged: That it had at all times been ready and willing to supply plaintiff with gas as demanded at his said premises and residence, through the service pipes belonging to defendant, and connecting said gas main with said residence and premises, provided plaintiff would make a cash deposit or give a bond indemnifying defendant against any liability for loss of its property. As to all of said issues, the court found in favor of plaintiff.

The motion for a new trial was made upon a statement of the case which, among other alleged errors, specified the insufficiency of the evidence to justify the finding to the effect that the plaintiff was, at the times when he applied for gas, an occupant of the building and premises known as No. 536 Chestnut avenue, in the city of Redlands, and that the same were at said times distant not more than 100 feet from defendant's gas main. As heretofore stated, defendant made no denial as to the alleged distance of its gas main from plaintiff's premises, but limited its answer in this regard to a denial that the building was within 100 feet of its gas main. Assuming that proof was necessary for the purpose of establishing the fact that both the building and premises were distant not more than 100 feet from the main, plaintiff testified at the trial had on April 27, 1909, as follows: "I couldn't say exactly how long the gas main of the defendant has been in front of my place; I remember when it was put there; it must have been several years ago." The application for gas was made less than one year before the trial. Plaintiff, however, was not questioned with reference to the distance; but his testimony, in the absence of contradiction, is sufficient to establish the fact that defendant's pipe or main was laid in the street upon which his premises and building fronted at a time prior to the making of his application.

[1] As no evidence whatever was introduced to the contrary, it will be presumed that no change was made in the location of the main, but that its position as laid continued up to the time of the trial. Section 1963, Code Civ. Proc.; *Eltzroth v. Ryan*, 89 Cal. 135, 26 Pac. 647. For the purpose of showing the distance intervening between the property of plaintiff and the gas main, Isaac Ford, a civil engineer, was called as a witness. His testimony, in connection with a plat introduced in evidence, and upon which the points in question were marked and delineated, clearly and conclusively established the fact that at the time of the trial the distance from the gas main to the point where the defendant's service pipe entered the rear part of plaintiff's building was 92 feet, and

that both the building and premises were well within 100 feet from the gas main. Conceding that the evidence of Ford was directed to the status and condition existing at or immediately preceding the time of the trial, nevertheless, it being shown that the pipe or main was laid several years before this time, then, in the absence of any evidence to the contrary—and there is none—it will be presumed that no change in the location thereof was made during the period intervening between the date of laying the same and the time when Ford made the measurements of distance.

[2] Inasmuch as the main was laid several years before the date of the trial, and no change was made therein, it must follow that evidence as to its location with relation to plaintiff's building and premises shown to exist at the time of the trial sufficiently proves such location at the time when application for gas was made. We are therefore of the opinion that the evidence justifies the finding in this regard made by the court.

The finding that exacting from plaintiff a cash deposit or bond as a condition of supplying him with gas was an arbitrary discrimination against plaintiff is fully justified by the evidence. Indeed, such fact was admitted both by defendant's answer and the testimony of its secretary, who stated that defendant had no rules or regulations, pursuant to which the exaction of a deposit or bond was made a condition of supplying gas to its consumers.

[3] It is also claimed that the evidence was insufficient to justify the finding that plaintiff made application for gas for *lighting* purposes upon the premises, or that defendant refused to supply him with gas for use thereon for *lighting* purposes. It is sufficient to say that the court did not make such finding. In this regard the finding is in the language of the complaint, which alleges that plaintiff demanded gas for "said building and premises." In a former appeal (*Fair v. Home Gas, etc., Co.*, 13 Cal. App. 589, 110 Pac. 347), we held the complaint good as against a general demurrer, and we adhere to that opinion.

[4] When the demand was made upon defendant for gas, it raised no question as to the purposes for which it was to be used, but offered to furnish it, provided plaintiff would comply with the conditions imposed upon him alone, and in its answer alleges: "That defendant at all times has been and is now willing to furnish gas to plaintiff, and does hereby offer to connect its said service pipes now on premises of plaintiff, for furnishing gas to plaintiff, provided plaintiff complies with said conditions." Assuming, as claimed by defendant, that the statute has reference alone to the supplying of gas for lighting purposes, nevertheless, since up to the trial of the case no question appears to have been properly raised as to the purposes for which the gas was to be used, defendant should not now for the first time be permit-

ted to urge such objection. Moreover, the court found (and the finding is not attacked) that at the time when the demands were made plaintiff was without illuminating gas.

A careful examination of the errors of law specified as occurring at the trial discloses no error in the rulings of the court upon the admission and exclusion of evidence.

For the reasons given, we have reached the conclusion that the court erred in granting the motion for a new trial, and the ruling of the court in this regard is reversed.

We concur: ALLEN, P. J.; JAMES, J.

15 Cal. App. 620

PEOPLE v. OVERACKER. (Cr. 173.)

(District Court of Appeal, Second District, California. March 17, 1911.)

1. INDICTMENT AND INFORMATION (§ 53*)—REQUISITES—NAMES OF WITNESSES.

Under Pen. Code, § 943, requiring the state's witness to be listed on the indictment, the names of the state's witnesses need not be indorsed on an information; Pen. Code, § 988, providing for arraignment by reading and delivering a copy of the indictment or information, "including the list of witnesses," being limited to indictments, so far as it refers to such list.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 162; Dec. Dig. § 53.*]

2. HOMICIDE (§ 170*)—EVIDENCE—EXPLAINING ACCUSED'S PRESENCE.

One accused of murder committed while opening an obstruction on decedent's land which caused surface water to back up on accused's adjoining land could show the natural course of drainage at the place, since, if decedent maintained a nuisance, accused had the right under Civ. Code, § 3502, to abate it.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 170.*]

3. CRIMINAL LAW (§ 1170*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Error in excluding testimony for accused was harmless, where he gave uncontradicted testimony on the same point.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.*]

4. WITNESSES (§ 286*)—EXAMINING WITNESSES—REFRESHING MEMORY.

Accused's witness having testified that decedent's reputation was bad, and, on cross-examination, that he discussed decedent's reputation with a particular person, but, on redirect, that he could not repeat even the substance of what that person said, it was not error to exclude a question asked by accused, "In order to refresh your memory, did he say anything about" decedent's "having any trouble with other people?"

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 930, 994-999; Dec. Dig. § 286.*]

5. CRIMINAL LAW (§ 1166½*)—HARMLESS ERROR—MISCONDUCT BY JUDGE.

The trial judge's inadvertent misconduct in stating that testimony was of a very light class if witness talked with others, and could not remember their names, was harmless error, where he at once admonished the jury not to consider statements not embodied in the instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3125; Dec. Dig. § 1166½.*]

6. HOMICIDE (§ 188*)—EVIDENCE—DECEDENT'S REPUTATION.

Testimony as to decedent's reputation was properly stricken where witness talked with no one concerning it until after the homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 391-397; Dec. Dig. § 188.*]

7. HOMICIDE (§ 190*)—EXAMINING WITNESS—DECEDENT'S REPUTATION.

An affirmative answer by accused to a question whether any of the threats made by decedent were communicated to him was properly excluded; the question being too broad.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 190.*]

8. CRIMINAL LAW (§ 696*)—EVIDENCE—EXPLAINING ACCUSED'S ACTS.

In a murder trial, it was error to strike out from the answer of defendant, when asked why he shot deceased, the words, "I thought he was ready to start in on the extermination."

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 696.*]

9. CRIMINAL LAW (§ 481*)—OPINION EVIDENCE.

The question whether proffered witnesses to accused's insanity were sufficiently acquainted with him was a matter for the discretion of the trial judge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1070; Dec. Dig. § 481.*]

10. CRIMINAL LAW (§ 829*)—HARMLESS ERROR—INSTRUCTIONS.

In a trial for murder committed while opening an obstruction on decedent's land to permit the passage of surface water flowing from accused's adjoining land, error in refusing to instruct on accused's rights as an upper proprietor was cured by an instruction that, regardless of other facts, if accused shot under fear of threatened death or great bodily harm, he should be acquitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

11. CRIMINAL LAW (§ 815*)—INSTRUCTIONS.

Instructions ignoring the requirement by Civ. Code, § 3502, that one must act without committing a breach of the peace in abating a private nuisance, were properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1922, 1936; Dec. Dig. § 815.*]

12. CRIMINAL LAW (§ 475*)—EXPERT TESTIMONY—DECEDENT'S POSITION.

Description of the position of decedent's body when he was shot is not a proper subject for expert opinion to contradict testimony of eyewitnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1063; Dec. Dig. § 475.*]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

S. H. Overacker was convicted of murder, and he appeals. Reversed.

Montgomery & Tarver and Lecompte Davis, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of the crime of murder, and the jury, in the exercise of the discretion left to it, fixed his punishment at imprisonment in the state prison for life. Judgment followed accordingly. Defendant appeals from the judg-

ment, and from an order denying his motion for a new trial.

On the morning of January 13, 1910, defendant fired upon Gustavus A. Winn, a neighbor, with a rifle, inflicting wounds from the effects of which Winn died almost immediately. For a number of years prior to the tragedy the two men lived on adjoining ranches. That of defendant was above the land of Winn and the natural grade or fall was from the land of the former toward and upon the land of the latter. A depression, called by many of the witnesses a "slough," marked a water course extending upon and through the land of Winn, into which some portion at least of the surface and storm waters from the land of defendant had been accustomed to flow. It is difficult to ascertain from the record just what the course of this slough or drain was, as many of the witnesses referred to a map or diagram when testifying before the jury, and the points, lines, and directions indicated by them are not shown in any way in the transcript of the testimony. Sufficient is shown, however, to make it clear that the topography of the ground was as has been stated. At the time of the killing of Winn, the feeling existing between the defendant and the former was not friendly. The men had not been friends for several years prior thereto. Their causes of difference were several, but the chief dispute was over the refusal of Winn to allow the storm and surface waters coming southward over the defendant's land to continue their flow down through the natural depression there located. This dispute was the immediate cause of the fatal affray which occurred on the morning of January 13th. For a long time prior thereto, Winn had maintained banks inside of the line dividing his land from defendant's, and these obstructions during the rainy season especially so impeded the course of the water as to cause it to become impounded and "back up" over and upon defendant's land. On the day upon which Winn was killed, Overacker, the defendant, had gone across onto the deceased's land near the dividing line, and with a shovel had made an opening in a bank situated thereon, in order to allow the water which was impounded to escape. Winn discovered him in the act of cutting the bank, and drove him off from his (Winn's) land. While driving him away, Winn struck at him with a shovel, but did not succeed in hitting him. Defendant tripped and fell into the water as he was being struck at by Winn, and upon regaining his feet went on to his own house, and Winn retired from the scene after replacing the earth that defendant had removed from the bank or dyke. Upon reaching his house, defendant immediately prepared to return to the place where he had been at work. He got his rifle to take with him, and to his wife, who endeavored to

dissuade him from his purpose, said that he was going to "protect himself." He returned to the line fence, where he laid his rifle down, and then crossed to the dyke with his shovel, and commenced to throw out the earth again to make an opening for the passage of the water. His wife had followed him, and remained a short distance away, a silent witness to the tragedy which followed. Soon after the defendant had resumed his shoveling on the dyke, Winn, the deceased, coming from the direction of his house, which was located farther to the south, started toward him. Up to this point there is no material conflict in the evidence as to the events occurring on that morning. Winn advanced toward and approached to within about 75 or 80 feet of the place where defendant was at work. Both defendant and his wife testified that Winn carried a gun. The wife of the deceased and his 17 year old daughter testified that, after the difficulty occurring earlier in the morning when Winn struck at Overacker with a shovel, the former had come to the house, and told them that Overacker had gone after a gun, and for them to come out and witness that he did have a gun. They testified that deceased carried no gun, but that he carried a shovel. Other witnesses who observed the affray from distant points saw no gun in the hands of Winn. When Winn reached the point of nearness to Overacker as indicated, the defendant stopped digging, stepped over to where his rifle lay, picked up the firearm, and opened fire upon Winn. After the first shot Winn turned partially or wholly about, and started back toward his barn. One or two shots followed, when Winn dropped to the ground and died. Defendant then returned to his house, and instructed his wife to telephone for a doctor and the sheriff. To the latter officer he shortly surrendered himself. The testimony of both defendant and his wife was that the deceased had a gun in his hands at the time he approached defendant, and that he drew this gun upon defendant before any shots were fired. Whether or not Winn had a gun and did aim at defendant was a question for the jury to determine. The contention of defendant was that he killed Winn in necessary self-defense. There was testimony to the effect that Winn had said that he was going to keep after the "crackerjacks," meaning defendant's family, until he had exterminated them. Defendant testified that, when Winn drew the gun on him, he remembered the threat of Winn to exterminate his family, and believed that he was about to be shot. On behalf of defendant evidence was also introduced for the purpose of showing that Overacker was insane at the time he fired the fatal shot.

Defendant has assigned as errors a great number of the rulings of the trial court made during the course of the proceedings

which resulted in his conviction. The points urged will be considered in the order in which they are presented.

[1] 1. There was no error committed in denying the motion of defendant to set aside the information filed against him, on the ground that the names of the witnesses for the prosecution were not indorsed thereon. Section 988 of the Penal Code provides that an arraignment is made by "reading the indictment or information to the defendant and delivering to him a true copy thereof, and of the endorsements thereon, including the list of witnesses." This provision must be construed to mean that, if the charge made is contained in an indictment, then the list of witnesses whose names are by section 943 of the Penal Code required to be attached to an indictment shall be furnished to the defendant. The names of witnesses for the prosecution are not required to be indorsed upon an information. Our Supreme Court has so held in the case of *People v. Neary*, 104 Cal. 377, 37 Pac. 943.

[2] 2. Error is assigned because of the ruling made sustaining the objection of the prosecution to a question asked of a witness as to the natural course of drainage of the lands at and about the place where the shooting occurred. Samuel Talbert was called as a witness by defendant and asked to point out on a map the course of the surface drainage, and replied (evidently pointing to the map): "There is a natural slough running right down here across Mr. Winn's place to the county road. It comes right down back of Mr. Winn's. It comes clear out to the county road." This question was then asked: "Q. How long have you known that natural drainage to be there?" An objection to the question was sustained by the court. Later, and while the same witness was under examination, counsel for defendant offered to show "that the natural drainage of the surface waters which fall upon the lands of Mr. Holyland, and particularly upon the land of the defendant, is in a southerly direction, and that there is a natural drain from the defendant's land upon and through the lands of Mr. G. A. Winn (the deceased), and we offer to show that Mr. Winn built an embankment so as to stop the natural drainage of the water, and that the stoppage of that natural drainage impounded the water upon Mr. Overacker's, the defendant's, land, and caused the same to be overflowed and his crops drowned out and perished." Upon objection again being made by the district attorney, the defendant was refused by the court leave to introduce this testimony. The testimony offered was competent and material. The defendant in his effort to show that he acted in self-defense was entitled to have the whole situation as it tended to furnish a reason for his act in going upon the land of Winn on the morning of January 13th, or his right so to do, shown

to the jury. As to which of the two men was the aggressor would depend, in some measure at least, upon the right possessed by each to be in the place where he was, at the time the encounter took place. If Winn was maintaining an unauthorized embankment upon his property which so obstructed the surface water as to prevent it from flowing in a natural way off from the land of his neighbor, and to cause it to become impounded and to overflow the defendant's land, the result of his act would amount to a private nuisance, which defendant would have the right to abate. "A person injured by a private nuisance may abate it by removing, or, if necessary, destroying the thing which constitutes the nuisance, without committing a breach of the peace, or doing unnecessary injury." Civ. Code, § 3502. The refusal of the court to allow defendant to show the things offered to be shown by the witness Talbert was error.

[3] And this error would appear to be of a highly prejudicial character, had not other testimony illustrating the physical contour of the same lands been allowed to be introduced and no evidence having been offered by the prosecution in contradiction thereof. The defendant himself was allowed to testify very fully as to the course of the natural drainage from his land and through Winn's. Witness Charles R. Schenck, a surveyor, was also allowed to testify upon the same subject. It cannot, therefore, be said that the defendant was prejudiced by this ruling of the court.

[4] 3. An objection was sustained to a question asked by defendant's counsel of the witness Samuel Talbert on redirect examination. The question was this: "Q. In order that I may refresh your memory, did he say anything about Mr. Winn's having any trouble with other people?" The witness was here called to testify as to the general reputation of deceased for peace and quiet in the neighborhood in which he lived. He had testified that that reputation was bad. On cross-examination he stated that he had discussed Winn's reputation with a Mr. Farnsworth, who told him of different troubles Winn had had regarding water. On redirect examination he testified that he could not repeat, even in substance, what Farnsworth had said, and the question which was objected to then followed. There was no error in sustaining this objection. The witness had answered as fully as he was able, and had said that he could not, in substance even, tell what Farnsworth had said.

[5] In a discussion occurring between the respective counsel and the court upon the objection last made, the trial judge remarked: "If the witness has talked to others and cannot remember the names, it seems to me it is a very light class of evidence." Exception was taken by defendant to the language of the court. No doubt the remark which in

effect was an expression of the opinion of the court as to the weight of the testimony, and therefore improper to be made, was inadvertently uttered, for the trial judge immediately admonished the jury that they were not to consider any remarks of counsel or the court, or any statement of the judge not given in the final instructions. This admonition we must assume was heeded by the members of the jury, and was effective to clear their minds of any prejudicial effect that the court's words might otherwise have had.

[6] 4. There was no error in striking out the testimony of the witness Page as to the general reputation of the deceased for peace and quiet. This witness stated that he had talked with no one until after the tragedy regarding the reputation of Winn for the traits mentioned.

[7] Neither was it error to strike out the affirmative answer of the defendant Overacker to the following question: "Q. Were any of the threats made by Winn communicated to you?" The question included too much. The witness might have been asked properly what threats were communicated to him, and defendant might have followed this testimony up, or preceded it, by showing that such threats were actually made by Winn. Moreover, the defendant was allowed to testify at other points in his examination as to threats shown to have been uttered by Winn which were communicated to him.

[8] It was error for the court to strike out from the answer of defendant, when asked why he shot deceased, the words, "I thought he was ready to start in on the extermination." The entire answer of the witness was as follows: "A. Because he drew his gun on me, and I had in mind his threat to exterminate my family and I thought he was ready to start in on the extermination." Defendant was entitled to tell the jury what his state of mind was at the time he shot deceased. If he believed that he stood in grave danger of suffering death or great bodily injury at the hands of the deceased, and that fear was a reasonable one under all of the circumstances of the case, his plea of necessary self-defense would have been clearly sustained. The jury could get no picture of the operations of defendant's mind unless he told them of his fears, his beliefs, and his mental anxiety, and the reasons for them. Knowing all of these things, then the jury would have furnished them various of the qualities which it was their duty to weigh in determining whether the defendant acted as a reasonable man might have acted under all the circumstances of the case. But by referring to other testimony given by defendant sufficient is found to relieve the action of the court in striking out this testimony of prejudicial effect. The defendant in telling the story of the shooting in the first instance, and speaking of the action of Winn, said: "He [Winn] raised his gun on me,

jerked it up quick. Then, of course, I supposed he meant to shoot me." By this answer he sufficiently told the jury what his state of mind was, and in that view the portion of the answer referred to which was stricken out by the court would be merely cumulative.

[9] 5. Prejudice to the substantial rights of defendant is claimed by reason of a number of other rulings of the trial judge on the admissibility of evidence as to the mental condition of the defendant. In all of the instances where testimony as to the opinion of witnesses was asked to be given on the question of the sanity of the defendant and ruled out, whatever may be our opinion as to the competency of such testimony as judged from the written record, it is sufficient to say that the trial judge had the discretion to determine whether the witnesses were intimate acquaintances of defendant or not, and that no plain abuse of that discretion is shown. *Estate of Carpenter*, 94 Cal. 416, 29 Pac. 1101; *People v. Barthleman*, 120 Cal. 14, 52 Pac. 112; *People v. Lane*, 101 Cal. 516, 36 Pac. 16; *People v. Schmitt*, 106 Cal. 52, 39 Pac. 204. Admitting it to be allowable and competent for witnesses not intimate acquaintances to describe the appearances, actions, and conduct generally of a person whose sanity is questioned, no prejudicial error resulted from the refusal of the court to allow the testimony touching such matters, and found mainly in the depositions of witnesses residing in other counties, to be introduced. These witnesses had known defendant at varying times during 10 to 20 years prior to the date of the shooting of Winn. They had not known him for a long series of years immediately prior to the tragedy. The court had discretion to exclude testimony which was remote in point of time from the date of the homicide. *People v. Cord*, 157 Cal. 565, 108 Pac. 511.

Other alleged errors occasioned by the admission or rejection of testimony are assigned, but a close and careful examination of the record does not disclose any prejudice to have been worked defendant by reason of any of these rulings, and they may be thus briefly dismissed. There are two remaining questions, however, demanding serious consideration. They are: First. The failure of the court to instruct the jury as to the right of a landowner to have surface water falling upon his land follow its natural course in escaping, even though it run upon and over the land of his neighbor. Second. The ruling of the court in admitting, over the objection of defendant, testimony of a physician wherein the witness said that at the time the first shot was fired the deceased was standing with his left side toward the person shooting at him and with his left hand by his side.

[10] 6. The court refused to give to the jury the following instruction offered by defendant: "You are instructed that when two

fields, or pieces of land, are adjacent, and one is lower than the other, the owner of the upper field has a natural easement to have the water that falls upon his land to flow off from the same upon the field below, which is charged with a corresponding servitude, and if you believe from the evidence that the land occupied by or belonging to Gustavus A. Winn, deceased, was adjacent to and lower than the land of the defendant, Overacker, then you are instructed that the land belonging to or occupied by Winn was subject to all the natural flow of water from the land of the defendant, and that the deceased Winn had no legal right to erect embankments, dykes, dams, or levees, whereby the natural flow of the surface water from the land of defendant would be stopped, or in any way to obstruct the flow of said water from the land of the defendant." This instruction correctly stated the law defining the rights of adjacent landowners on the subject of which it treated. It might well have been given. As to whether or not its refusal was rendered harmless depends altogether upon the scope of other instructions which the court did submit to the jury. Among other instructions given by the court was the following: "If you find that at the time the defendant fired the fatal shot that killed the deceased he was being violently attacked by the deceased, and that the circumstances were sufficient to excite the fears of a reasonable man that he was about to suffer death or great bodily harm at the hands of the deceased, and that the defendant acted under the influence of such fears alone, then you must acquit the defendant." By this instruction the jury was told, in effect, that, however they might resolve the circumstances of the case, whatever their finding might be upon the questions of fact, that, if they believed that defendant feared at the time he fired the fatal shots that he was about to suffer death or great bodily injury at the hands of Winn, he was justified in killing him as he did. This instruction assigned to defendant all of the rights he would be entitled to claim, assuming that he went upon the land of Winn on the morning of the tragedy rightfully. The giving of it seems to save the refusal of the court to give the first instruction quoted from having a prejudicial effect. It would have been better, however, after evidence had been admitted showing the course of the storm water upon the lands of the defendant and the deceased, and the various obstructions placed in its way by deceased, to have told the jury what the rights of the respective land owners were, so that the jury might have had a measure to which to apply the evidence in making up their conclusions on the question as to whether or not defendant acted in necessary self-defense.

[11] The view we have taken is adopted

with less reluctance than it would have been had the instructions offered by defendant following that which we have first quoted made a complete and correct definition of defendant's rights under the facts therein assumed. Instructions numbered 72 and 73 were to the effect that if Winn, the deceased, erected embankments which caused the surface water falling upon defendant's land to become obstructed and prevented it from flowing away, and that defendant at the time of the deadly encounter was endeavoring to remove the obstruction, he was acting within his legal rights. These instructions omitted the important qualification found in section 3502 of the Civil Code, which gives the right to a person affected by a private nuisance to abate it, where he can do so "without committing a breach of the peace." The defendant should have furnished instructions correct and complete in their declaration of the law. Otherwise he cannot complain of their rejection.

[12] 7. The court erred to the prejudice of the rights of the defendant in admitting testimony given by Dr. Charles D. Ball. This witness, a physician, had seen nothing of the encounter between Overacker and Winn. He performed a post mortem examination upon the body of Winn, and traced the course of the several bullets which entered it. Defendant and his wife had both testified that deceased had a gun, and that he drew it upon defendant before defendant opened fire upon him. Dr. Ball was asked by the district attorney the following question: "Q. I will ask you, doctor, what position must G. A. Winn have been in in relation to the one who fired the shot when he was shot through the left arm and side?" This question touched a matter vital to defendant under his plea of self-defense. It called for a description of the position of the deceased's body when the shot was fired which entered his left arm, and was not a proper subject of expert testimony. Against an objection of defendant, the witness was allowed to answer the question, which he did, saying: "A. Mr. Winn had his left side toward Mr. Overacker, with his left hand by his side, when he received the bullet that struck him first." There was no motion to strike out any portion of the answer. The latter portion thereof, to wit, "the bullet that struck him first," may not have been directly responsive and by the failure of defendant to move to strike it out he waived complaint of that statement. Not so, however, as to those portions which were responsive to the question. The witness' reply was directly responsive when he said: "Mr. Winn had his left side toward Mr. Overacker, with his left hand by his side." That the matter upon which the witness was being examined was not proper to be proved by opinion evidence is established in the following cases: *People v. Westlake*, 62 Cal. 309; *People v. Farley*, 124 Cal. 594, 57 Pac.

571; *People v. Milner*, 122 Cal. 181, 54 Pac. 833. In the case of *People v. Durrant*, 116 Cal. 217, 48 Pac. 85, it is said: "Where the ultimate conclusion is one to be reached by the jury itself from the facts before it, and the so-called expert evidence is allowed which presents to a jury a conclusion other than that to which they might have arrived, the admission of this improper evidence is tantamount to a declaration by the court that they may set aside their exclusive right of judging and accept the judgment of the expert." In the case under consideration, the autopsy developed the fact that the bullet which entered the left arm and side so entered the left arm midway between the elbow and shoulder joint, passed forward and a little upward, thence out of the arm near the armpit, and across and through the muscles of the left side of the chest and upward into the pectoral muscles. The question proposed to the expert comprehended an inquiry into the position of his body and its members at the time deceased was shot. The evidence as to what the autopsy revealed might have been received by the jury as confirmatory of defendant's statement that, when the first shot was fired, Winn had his gun drawn and aimed. It is possible that the left arm so employed might have received a bullet which would in its course have proceeded as in the manner shown by the autopsy, and the jury might have been warranted in so concluding. The admission of the so-called expert evidence upon the question was, as said in the *Durrant* Case, tantamount to a declaration by the court that the jury might accept such opinion to the exclusion of their own convictions based upon the evidentiary facts, and therein, in our opinion, lies the prejudicial character of the error.

Upon a retrial, the court will doubtless be careful to see that the defendant's rights under his plea to the charge, especially in the particulars noticed in this opinion, are fully guarded and defined to the jury. While prejudice is not imputed because of several rulings made, we cannot refrain from suggesting that it would be better to avoid the ground for objection altogether by permitting the theories under which defendant sought to have his defense established to be given full illustration to the jury, both by the evidence and in the instructions.

The judgment and order are reversed.

We concur: ALLEN, P. J.; SHAW, J.

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ANDREEN v. ANDREEN. (Civ. 786.)
(District Court of Appeal, First District, California. March 28, 1911.)

1. DIVORCE (§ 161*)—INTERLOCUTORY DECREE—RIGHT TO SET ASIDE—NOTICE—HEARING.

Under Code Civ. Proc. § 473, authorizing the court to relieve a party from a default judg-

ment, a valid interlocutory decree of divorce rendered on publication of summons, defendant not appearing, cannot be set aside by order made without notice and hearing.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 161.*]

2. DIVORCE (§ 181*)—DECREE—APPEAL—TIME FOR TAKING.

The time to appeal from a decree of divorce runs from the date of its entry.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 181.*]

3. DIVORCE (§ 161*)—INTERLOCUTORY DECREE—TIME FOR APPLICATION TO SET ASIDE.

The time for making a motion under Code Civ. Proc. § 473, authorizing the vacation of judgments, to vacate a default interlocutory decree of divorce, runs from the date of its entry; and, where no motion is made within one year from its entry to vacate it, a final decree entered must be permitted to stand; the right to such a final decree having become absolute at the end of the year.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 161.*]

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by Emil F. Andreen against Mary C. Andreen. From an order denying a motion to vacate a final decree, defendant appeals. Affirmed.

Karl F. Kennedy, for appellant. Wm. F. James, for respondent.

KERRIGAN, J. This is an appeal from an order denying a motion to vacate a final decree in an action for divorce.

The plaintiff brought an action against the defendant for a divorce. Jurisdiction of the defendant was acquired by publication of the summons, and, having failed to appear or answer within the time allowed by law, her default was entered, and subsequently, to wit, on October 11, 1907, after trial, the court found that the plaintiff was entitled to a divorce from the defendant, and accordingly on that day an interlocutory decree in his favor was regularly entered.

In April, 1908, defendant learned of the entry of this decree, and, desiring to resist the divorce proceedings, she employed an attorney for that purpose in the month of September following. Immediately prior to October 7, 1908, it appears that defendant's attorney prepared an affidavit of merits and a notice of motion to permit the defendant to answer to the complaint, but that, upon applying for an order shortening the time for the service of such notice of motion, he was advised, it seems, by the trial judge that no showing of merits or notice of motion was necessary to enable the defendant to answer. The attorney, acting upon this advice, failed to serve or file his notice of motion, but instead took a minute order on said 7th day of October, purporting to permit defendant to answer; and on that day an answer, denying the material allegations of the complaint, was in fact served and filed. On October 19, 1908, more than a year having

elapsed since the entry of the interlocutory decree, the court, disregarding the answer on file, granted the plaintiff a final decree of divorce.

Subsequently, on December 31, 1908, the defendant moved to set aside the final decree on the ground that she "was surprised by the action of the court in granting the final decree, and upon the ground that the final decree was void for the reason that the interlocutory decree had been set aside and vacated." Delay and carelessness characterize all defendant's conduct in this proceeding. According to an affidavit filed on behalf of plaintiff, the defendant knew of the pendency of the action immediately after it was commenced, and was fully advised at that time by her former attorney concerning her rights in the matter. According to her own showing, she knew of the entry of the interlocutory decree in the month of April, about six months after the entry thereof, and failed to seek the aid of counsel until the following September, and she made no proper motion for any purpose until December 31, 1908, more than a month after the final decree was granted and regularly entered. Moreover, the trial judge denied, at least by implication, that he had advised defendant's attorney that no notice of motion to be permitted to file an answer was necessary.

In view of this showing, it might well be held that the defendant was guilty of laches, and therefore not entitled to the benefit of the clause of section 473 of the Code of Civil Procedure hereinafter quoted. *Hoffman v. Superior Court*, 151 Cal. 386, 90 Pac. 939; *Zobel v. Zobel*, 151 Cal. 98, 90 Pac. 191. But we will pass this point without deciding it.

Coming now to the last ground of the motion, namely, that the final decree was void for the reason that the interlocutory decree had been set aside and vacated, this interlocutory decree was never in terms set aside. [1] But, even if it be conceded that the filing of an answer with the permission of the court was in effect tantamount to an order vacating this decree, still such order would be void, having been made without notice to the plaintiff. Certain it is that a decree valid on its face cannot be set aside without notice and a hearing. Section 473, Code Civ. Proc.; *Vallejo v. Green*, 16 Cal. 160; *Reilly v. Ruddock*, 41 Cal. 312; *Sutton v. McMillan*, 72 N. C. 102; *Lyon v. McMillan*, 72 N. C. 392; *Irvine v. Davy*, 88 Cal. 495, 26 Pac. 506.

The other ground of defendant's motion is equally untenable. One of the clauses of section 473 of the Code of Civil Procedure provides as follows: "When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant * * * at any time within one year after the rendition of any judgment in

such action, to answer to the merits of the original action." It has been held that, in making a motion under this provision, a showing of mistake, surprise, inadvertence, or excusable neglect is unnecessary. *Gray v. Lawlor*, 151 Cal. 352, 90 Pac. 691; *Holiness Church v. Metropolitan Ass'n*, 12 Cal. App. 445, 107 Pac. 633. And defendant would seem to claim that, as the service of summons in this case was constructive, she had one year from the entry of the interlocutory decree within which to move to set it aside; and that, as she failed through an inadvertence to make such a motion in season, she should be entitled to have the final decree vacated, and to file her answer to the complaint. A mere statement of her position seems destructive of her contention. However, we will briefly consider it.

[2. 3] The time for taking an appeal from a decree of divorce, or for making a motion under the provisions of said section 473 to vacate the same, runs from the date of its entry. *Claudius v. Melvin*, 146 Cal. 257, 79 Pac. 897; *Deyoe v. Superior Court*, 140 Cal. 476, 74 Pac. 28, 98 Am. St. Rep. 73; *Reed v. Reed*, 9 Cal. App. 748, 100 Pac. 897; *Pereira v. Pereira*, 156 Cal. 1, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107. In this case no motion was made at all, or within one year from the entry of the interlocutory decree, to vacate the same; hence the final decree must be permitted to stand. But in conclusion, assuming that the final decree was entered against the defendant through her excusable neglect, still the setting of it aside would serve no purpose; for the year from the entry of the interlocutory decree having run, and no motion having been made to vacate it, the plaintiff would be absolutely entitled to the final decree. Section 473 provides the circumstances and the time within which a party, having suffered a judgment of default to be entered against him, may have such judgment vacated and be permitted to answer. Here the defendant utterly failed to bring her case within the provisions of that section, and the trial court committed no error in denying her motion.

The order appealed from is affirmed.

We concur: LENNON, P. J.; HALL, J.

HAGERTY v. CONLAN. (Civ. 820.)

(District Court of Appeal, First District, California. March 21, 1911.)

1. ELECTIONS (§ 280*) — CONTEST — JURISDICTION — SERVICE OF CITATION — ALIAS CITATION.

The superior court having, by the filing of a statement of an election contest, acquired jurisdiction of the subject-matter, had power to acquire jurisdiction of contestee's person by the issuance and service of an alias citation, where

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the original citation was not properly served on him.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 264; Dec. Dig. § 280.*]

2. ELECTIONS (§ 276*)—CONTEST—PROCEEDINGS—HEARING—TIME—ISSUANCE OF ORDER—“THEREUPON.”

Code Civ. Proc. § 1118, providing that within five days after the time for filing statements in election contests the county clerk must notify the superior court of statements filed, and it shall “thereupon” order a special session on a day not less than 10 nor more than 20 days from the date of the order, is not mandatory in the sense that the order must be issued upon the same day the court is notified of the contest, the word “thereupon” not necessarily meaning “immediately”; so that, where the sheriff failed to serve citation upon contestee as prescribed by statute, the court could vacate the original order calling a special session and make another, designating a day for hearing the contest after issuance of an alias citation; Code Civ. Proc. § 1121, giving it all powers necessary to a determination of the contest.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 304; Dec. Dig. § 276.*]

For other definitions, see Words and Phrases, vol. 8, pp. 6953-6955.]

3. ELECTIONS (§ 278*)—CONTEST—CONTINUANCE OF PROCEEDINGS.

Code Civ. Proc. § 1118, provides that within five days after the time for filing statements in election contests the county clerk must notify the superior court of statements filed, when it shall thereupon order a special session to be held on a day not less than 10 nor more than 20 days from the date of the order. January 3d was designated as the date for hearing an election contest, and on January 6th an order was made continuing the hearing to January 7th, after which the hearing was suspended pending the determination by the appellate court of the trial court's power to proceed, and, after the appellate court's decision, the only matters considered before the judgment of dismissal was rendered on January 24th were the motion to dismiss and contestant's application for an alias citation. *Held*, that the fact that such matters were finally decided after the expiration of 20 days from the date set for hearing did not operate as a continuance of the contest beyond the time fixed by the statute; since neither the failure of the sheriff to properly serve citation nor the inaction of the court can deprive contestant of the right to be heard.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 278.*]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Election contest by William R. Hagerty against Charles T. Conlan. From a judgment dismissing the proceeding, contestant appeals. Reversed for further proceedings.

C. L. Dam, George Appell, E. F. Moran, A. L. O'Grady, and Geo. F. Snyder, for appellant. Edward Lande, for respondent.

LENNON, P. J. This is an appeal upon a bill of exceptions from a judgment of dismissal.

Charles T. Conlan, the respondent herein, was on the 22d day of November, 1909, declared to have been elected judge of the police court of the city and county of San Francisco. On the 1st day of December,

1909, the appellant, an elector of said city and county, instituted proceedings in the superior court, under the provisions of part 3, tit. 2 of the Code of Civil Procedure, contesting the right of respondent to the office. The court thereupon designated the 3d day of January, 1910, as the time for a special session of the court to hear and determine the contest. On the 27th day of December, 1909, the clerk of the court issued a citation, directed to respondent, commanding him to appear at the special session of the court on the day designated, and answer appellant's statement of contest. This citation was delivered to the sheriff of the city and county of San Francisco, and it was returned as having been served upon respondent by leaving a copy thereof at his last known place of residence. On January 3, 1910, the day previously designated by the court for the holding of a special session, respondent, without submitting to the jurisdiction of the court, appeared specially, and in open court filed a written notice of motion to dismiss the proceedings, upon the ground that the citation had not been served in the manner required by section 1119 of the Code of Civil Procedure. On the 6th day of January, 1910, the motion to dismiss was heard, and the trial court found that “the service was not in conformity with that section of the Code providing for a citation” in cases of this character. The court, however, was of the opinion that the citation required by section 1119 of the Code of Civil Procedure was in the nature of a subpoena rather than a summons, and, as the contestee was personally present in court, no further citation was necessary. The motion to dismiss was denied, and the hearing of the contest was formally continued to the following day, January 7, 1910. Thereupon respondent applied to this court for and received an alternative writ of prohibition, directed to the superior court of the city and county of San Francisco, commanding it to show cause on a day certain why it should not be prohibited from hearing said cause. Pending the hearing and determination of the alternative writ of prohibition, all proceedings in the matter of the contest were stayed by order of this court, upon the theory that the failure of the sheriff to serve the citation in the manner and within the time required by law divested the superior court of jurisdiction to hear and determine the contest, or make any further order in the premises.

There was pending in the said superior court at the same time the contest in question was instituted another contest between Fred L. Hilmer et al. and Thomas P. O'Dowd for the office of supervisor of the city and county of San Francisco. The service of the citation in this latter contest, as in the case at bar, was by the trial

court declared to be fatally defective. Both contests had been consolidated, and were to be heard together, when O'Dowd made application to this court for an alternative writ of prohibition directed to said superior court, which was granted; and later, on January 18, 1910, the said superior court was peremptorily prohibited by this court from proceeding in the contest against him for precisely the same reasons given in the case of Conlan upon the issuance of the alternative writ of prohibition therein. On January 18, 1910, Charles T. Conlan, the respondent herein, orally moved the said superior court to vacate the order of January 6, 1910, denying his motion to dismiss the contest against him, and in lieu thereof, to enter an order granting a dismissal of said contest. This oral motion was made and based upon the opinion of this court, rendered in the O'Dowd Case, that the trial court did not have jurisdiction to entertain the proceedings, and upon all of the grounds theretofore specified in the written notice of motion to dismiss. This motion to vacate and then dismiss was resisted by appellant, and at the same time appellant requested the court to issue an alias citation. The motion was submitted to the court for decision on the date of its making, and thereafter on January 24, 1910, the following order was entered upon the minutes of the court: "In this action it is ordered by the court that the order heretofore made, denying motion to dismiss proceedings, be and the same is hereby set aside. It is further ordered that the motion to dismiss proceedings be, and the same is hereby, granted, and that judgment of dismissal be entered." On the 25th day of January, 1910, the trial court denied appellant's application for an order directing the issuance of an alias citation, "upon the ground that the issuance and service of an alias citation would necessitate a continuance of said proceeding, and that said court had no jurisdiction or authority to grant a further continuance of said proceeding." In the judgment which was subsequently entered upon this minute order, it is recited that "Charles T. Conlan * * * having moved this court in writing to dismiss the above-entitled proceeding upon the grounds enumerated in said written motion, and among others because of the want of jurisdiction of this court in the premises; * * * and the court having taken said motion under advisement and thereafter denied the same, and in the meantime the District Court of Appeal in and for the First Appellate District having pronounced the law in election contest cases with respect to the nature and mode of service of citation in election contests; and * * * the attorneys for said Charles T. Conlan having thereafter moved this court * * * to vacate and set aside the said order denying said motion to dismiss, and to

grant said respondent's motion upon all of the grounds, affidavits, and records and showing upon which said motion to dismiss had first been made, as aforesaid, * * * and now being fully advised in the premises—it is by the court ordered that said motion to vacate and set aside said order denying said motion first made herein be granted; * * * that said proceeding be dismissed, and the said motion to dismiss the same is hereby granted. * * *" On the 18th day of March, 1910, upon the petition of Hilmer, the contestant in the O'Dowd Case, the proceedings in that case had in this court, wherein a peremptory writ of prohibition was granted, were transferred for rehearing and decision to the Supreme Court of the state. Upon the rehearing there O'Dowd's application for a writ of prohibition was denied on October 28, 1910.

On this rehearing of the O'Dowd Case it was held and finally decided by the Supreme Court that the superior court of the city and county of San Francisco acquired jurisdiction of the subject-matter of the contest by the filing of the statement of contest within the prescribed statutory time; that the provisions of section 1119, Code of Civil Procedure, are simply directory, and therefore could not be construed as a limitation upon the jurisdiction of the trial court; that, under the provisions of section 1121 of the Code of Civil Procedure, the trial court was invested with jurisdiction when it appeared that, without any fault on the part of the contestant, there had been a failure to serve the citation in the manner and within the time prescribed by law, to continue the hearing of the contest for a period not further than twenty days from the date designated by the court for the hearing of the contest, and order another citation to issue for service upon the contestee; and, finally, that "a reasonable construction of the provisions relative to contests of election requires the conclusion that mere failure of the sheriff to serve the citation on the party whose office is contested in due form or at all before the day fixed for the hearing did not affect the jurisdiction of the court to further entertain the contest against petitioner." *O'Dowd v. Superior Court*, 111 Pac. 751.

The question of law arising out of the facts of this case, as to the jurisdiction of the lower court to proceed with the contest, and now presented to this court upon appeal from the judgment of dismissal is precisely the same as that decided by the Supreme Court upon, substantially, a similar state of facts in the O'Dowd Case on application there for a writ of prohibition.

[1] The decision of the Supreme Court of the question of jurisdiction involved in the O'Dowd Case is decisive of the principal question presented here; and we therefore are compelled to hold that the lower court,

having acquired jurisdiction of the subject-matter of the contest upon the filing of appellant's statement of contest, was invested with the power to acquire jurisdiction of the person of the contestee by the issuance and service of an alias citation, notwithstanding the failure of the sheriff to properly serve the original citation. Upon the hearing of the O'Dowd Case, the Supreme Court declined to discuss or decide the effect of the lower court's failure to make, on the day when it first met in special session, or at any time thereafter, an order for the continuance of the proceeding and the issuance of an alias citation, upon the ground that the action of the lower court in that behalf was not involved in the petition for a writ of prohibition and could not be reviewed in that proceeding. The same question, however, is presented upon this appeal, and must be here decided.

The trial court, in refusing the request of appellant for an alias citation, evidently acted in the belief that section 1118 of the Code of Civil Procedure, with reference to the order fixing a day for the special session, was mandatory rather than directory; that, having once made an order fixing a day for the hearing of the contest, such order could not be changed or superseded by a second order designating another day for the hearing, and the order of dismissal having been made at a period of time more than 20 days distant from January 3, 1910, the day originally set, jurisdiction to hear and determine the contest was exhausted.

Section 1118 of the Code of Civil Procedure provides that within five days after the end of the time allowed for filing statements in election contests "the county clerk must notify the superior court of the county or city and county of all statements filed. The court shall thereupon order a special session to be held on some day to be named by it, not less than ten nor more than twenty days from the date of such order. * * *

[2] Notwithstanding the use of the word "thereupon," the requirements of this section, with reference to the time of making the order designating a special session of the court, are not mandatory. "This word 'thereupon' does not of necessity mean 'immediately.'" *Cal. Academy of Sciences v. Fletcher*, 99 Cal. 210, 33 Pac. 855. As said by the Supreme Court of this state in *Porphry Par. Co. v. Ancker*, 104 Cal. 342, 37 Pac. 1052, where the court was considering a section of the street law, in which it is provided that the superintendent of streets shall thereupon cause certain posting to be done, the word refers to the order of time in which the act shall be done, and is not a mandatory regulation requiring immediate performance; that it should follow within a reasonable time is the most that should be claimed." *Dudley v. Superior Court*, 13 Cal. App. 271, 110 Pac. 146.

The scope and spirit of the reasoning of the Supreme Court in its decision of the O'Dowd Case warrants the conclusion that the failure of the sheriff to serve the original citation in conformity with section 1119 of the Code of Civil Procedure affected only the trial court's power to proceed with the contest upon the day originally designated for the special session of the court, and that the provisions of section 1118 of the Code of Civil Procedure, requiring the court to order a special session, are not mandatory in the sense that such order shall be made upon the same day that the court is notified by the clerk of the institution of the contest. This being so, and the trial court having met in special session, at the time and place originally designated, to hear the contest, it had "all the powers necessary to a determination thereof" (Code Civ. Proc. 1121); and respondent, being a necessary party to a complete determination of the controversy, and not being before the court, could and should have been brought in by an alias citation. For this purpose it would have been competent and proper for the trial court to have vacated the original order calling for a special session, and in lieu thereof made another order designating another day, not less than 10 nor more than 20 days from the date of the second order, when the court would again sit in special session to hear and determine the contest. *Thomas v. Van Zandt*, 56 Wash. 595, 106 Pac. 141.

As far as the record here discloses, but one order for the continuance of the contest itself was made and entered by the trial court. This was the order made on January 6, 1910, after the motion to dismiss was first heard and determined, continuing the hearing of the contest to the next day, January 7, 1910. From this date on it is apparent that the hearing of the contest upon its merits was suspended pending the determination by this court of the trial court's power to proceed in the premises. After the decision of that question by this court, and until the judgment of dismissal was finally made and entered by the trial court, on January 24, 1910, the only matters considered and continued from day to day by the trial court were the motion to dismiss and appellant's application for an alias citation.

[3] The fact that the trial court continued these matters from time to time for hearing, and finally decided them after the expiration of 20 days from the date originally set for the special session of the court did not operate as a continuance of the contest itself beyond the time prescribed by the statute. The disposition of respondent's motion for a dismissal of the action and appellant's application for an alias citation was exclusively within the control of the trial court. When appellant filed his statement of contest in accordance with the provisions of section 1115 of the Code of Civil Procedure, he had

done all that was required of him by the statute; and neither the nonfeasance of the sheriff nor the inaction of the court can avail to deprive appellant of the right to be heard upon his statement of contest.

It will be noted that but one motion to dismiss the proceeding for lack of jurisdiction was made by respondent, and that this motion was presented to the trial court on January 3, 1910, the date originally set for the special session of the court, and this motion was disposed of on January 6, 1910. Thereafter, on January 18, 1910, upon the oral motion of respondent, the trial court vacated and set aside its order of January 6, 1910, denying the motion to dismiss, and thereupon the attorneys for respondent moved the trial court "to grant said respondent's motion (to dismiss) upon all of the grounds, affidavits, records and showing upon which said motion to dismiss had been first made. * * *" On January 24, 1910, the trial court ordered "that said proceeding be dismissed and the said motion to dismiss the same is hereby granted." It is but fair to assume from all that was said and done in the premises that it was the intent and purpose of the trial court and of the parties to the proceeding that the order of dismissal, although made and entered on January 24, 1910, should relate back to and be considered as having been made on January 3, 1910. This interpretation of the situation restores the parties to their original standing before the trial court, and leaves the cause in a position to be proceeded with, upon the court acquiring jurisdiction of the person of respondent, as if the judgment of dismissal had not been rendered.

The judgment is reversed, and the trial court directed to designate another day for a special session of the court; to thereupon issue an alias citation for service upon respondent, and upon a return thereof showing a service in the manner and within the time required by law, to hear and determine the contest.

We concur: KERRIGAN, J.; HALL, J.

15 Cal. App. 726

WALKER et al. v. BEAUMONT LAND & WATER CO. (Civ. 920.)

(District Court of Appeal, Second District, California. March 24, 1911.)

1. CARRIERS (§ 316*)—PASSENGERS—NEGLIGENCE—PRESUMPTION.

The presumption of negligence which attaches when a passenger is injured through the use of the carrier's instrumentalities requires defendant to prove that the injury was without negligence on his part by showing an inevitable accident.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1261, 1262, 1283-1294; Dec. Dig. § 316.*]

2. NEW TRIAL (§ 72*)—INSUFFICIENCY OF EVIDENCE—DUTY OF TRIAL COURT.

If the trial court believes that a verdict is clearly against the weight of the evidence, it should set it aside, and grant a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 146-148; Dec. Dig. § 72.*]

3. APPEAL AND ERROR (§ 977*)—NEW TRIAL (§ 6*)—DISCRETION OF TRIAL COURT—GRANTING A NEW TRIAL.

The trial court has a wide discretion in passing on a motion for a new trial, and its ruling will not be disturbed in absence of clear abuse thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.* New Trial, Cent. Dig. §§ 9, 10; Dec. Dig. § 6.*]

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by Thomas F. Walker and another against the Beaumont Land & Water Company. From an order setting aside a verdict for plaintiffs and granting a new trial, plaintiffs appeal. Affirmed.

Jones & Drake and E. B. Drake, for appellants. Byron Waters, for respondent.

ALLEN, P. J. The action was one by a passenger for damages on account of personal injuries alleged to have been occasioned through the negligence of a common carrier. Upon the trial a verdict resulted in plaintiffs' favor, and the trial court, upon a motion duly made, set aside such verdict and granted a new trial, from which order plaintiffs appeal.

[1] The presumption of negligence which attaches when a passenger is injured through the use of instrumentalities employed by the carrier and under his care requires the defendant to prove that the injury was without negligence on defendant's part, and that the damage or injury has been occasioned by inevitable casualty or by some cause which human foresight could not prevent. *Kline v. Santa Barbara, etc., Ry. Co.*, 150 Cal. 745, 90 Pac. 125. Defendant undertook to perform this duty, and evidence is in the record tending to show that the accident was occasioned by the team, which was drawing the coach in which plaintiff was a passenger, becoming frightened at a loose horse in the highway, and, becoming unmanageable, the coach was upset and the injury resulted. There was evidence further tending to show that the team used by defendant was safe and gentle, the driver competent, experienced, and careful, and the vehicle used fit and proper for the purposes intended. Further, that the driver did all a prudent and careful man would or could do to avert the accident. The trial court in an opinion delivered in connection with the order appealed from, and which is set out in respondent's points and authorities, states as his conclusion that these facts were established and no negligence upon defendant's part was shown.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[2] It is said in *Bates v. Howard*, 105 Cal. 178, 38 Pac. 715: "The court having heard the evidence, and having had ample opportunity to judge as to the demeanor, manner, and credibility of the witnesses, may, if he is dissatisfied with the verdict, and is of opinion that it is clearly against the weight of evidence, set it aside and grant a new trial." This he may do, even though there be a substantial conflict in the evidence.

[3] A wide discretion reposes in the trial judge in such matters, and, except an abuse is apparent, his judgment will not be disturbed. An examination of the entire record presented upon this appeal convinces us that the trial judge was fully warranted in his conclusion, and his judgment should be affirmed. It is so ordered.

We concur: JAMES, J.; SHAW, J.

159 Cal. 723

KAST v. MILLER & LUX. (Sac. 1,845.)
(Supreme Court of California. May 11, 1911.)

1. ATTORNEY AND CLIENT (§ 72*)—AUTHORITY OF ATTORNEY—EVIDENCE—SUFFICIENCY.

Evidence in an action by a detective for services held sufficient to show that the authority of defendant's attorney was not limited by Code Civ. Proc. § 283, but that in the prosecution of criminal cases it extended to the employment of the plaintiff as a detective.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 72.*]

2. PRINCIPAL AND AGENT (§§ 21, 121*)—CREATION OF RELATION—EVIDENCE OF AGENCY—TESTIMONY OF AGENT.

The fact of agency when it rests in parol may be established by the testimony of the agent himself, and his testimony is admissible and competent to prove the agency and the nature and scope of his authority, and to bind his principal thereby.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 39, 402; Dec. Dig. §§ 21, 121.*]

3. PRINCIPAL AND AGENT (§ 22*)—CREATION OF RELATION—EVIDENCE OF AGENCY—DECLARATIONS OF AGENT.

Declarations in pais by one assuming to act as agent are incompetent to establish the fact of agency.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40; Dec. Dig. § 22.*]

4. PRINCIPAL AND AGENT (§ 22*)—AUTHORITY—EMPLOYMENT OF DETECTIVE—ADMISSIBILITY OF EVIDENCE.

In an action by a detective for services, an instruction by defendant's attorney on engaging plaintiff to show the evidence he obtained to certain persons, is admissible.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 22.*]

5. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Evidence that defendant's attorney when engaging plaintiff, a detective, and instructing him whom to report to, had stated that he had employed the persons to whom plaintiff was to report, held harmless.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

In Bank. Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Action by C. S. Kast against Miller & Lux. Judgment for plaintiff, and defendant appeals. Affirmed.

F. A. Fee and E. F. Treadwell, for appellant. Robert L. Hargrove and George W. Mordecai, Jr., for respondent.

LORIGAN, J. In an action brought by plaintiff for personal services rendered defendant and for money expended at its special instance and request, a verdict for plaintiff was rendered, and from the judgment entered thereon defendant appeals on a bill of exceptions. Certain cases were being prosecuted in Madera county for the alleged larceny of horses belonging to the defendant Miller & Lux, and that corporation retained Judge Ostrander as an attorney to assist the district attorney of Madera county in the prosecution of these larceny cases. In April, 1908, Judge Ostrander engaged the plaintiff

as a detective to gather evidence in behalf of the prosecution in the cases referred to, and to report the results of his efforts to other special counsel likewise employed by Miller & Lux in such cases. The agreement of Ostrander with plaintiff was to pay the latter \$5 per day and necessary incidental expenses, and to further pay him the sum of \$250 for each conviction secured. The business agent of the defendant, one Shannon, was present when this agreement was made by Ostrander with the plaintiff, though he took no part in making the contract. No claim was made in the answer of defendant that plaintiff had not performed the services for which suit was brought, the defense being that he had not been employed by defendant or by any one authorized by it to make the contract with him upon which he sued. In support of his claim that Judge Ostrander was empowered to make the contract of employment plaintiff called Judge Ostrander himself as a witness, who testified: "I was employed by Henry Miller in person in connection with these grand larceny cases. I knew that he was president and manager of the corporation. * * * As attorney my duties were to take such measures as I deemed expedient for the purpose of legitimately assuming the prosecution of the case." It was further shown that Judge Ostrander paid the plaintiff \$20 on account of his employment for which the business agent of the defendant Shannon, reimbursed him, and that Shannon himself paid plaintiff on account of such employment the further sum of \$55. It also appeared in the evidence that about the time the contract was made by Ostrander with plaintiff an effort was made by the former to have the employment of plaintiff nominally made by the district attorney of the county of Madera, the services of plaintiff to be paid by Miller & Lux; this employment was suggested to avoid criticism or attack on the plaintiff before the jury as a detective in the special employment of Miller & Lux. In addition to this there was testimony brought out during the presentation of the case of plaintiff tending to show that the only authority given to Ostrander by defendant to employ anybody was limited to the employment of a shorthand reporter. This was practically all the evidence bearing on the authority of Ostrander as agent of Miller & Lux to make the contract with plaintiff and bind the corporation thereby. No evidence at all was offered on behalf of the defendant, it resting its case on the evidence offered by plaintiff.

One of the principal points made by appellant is that the evidence was insufficient to warrant the jury in finding (as they necessarily did by their verdict against defendant) that Ostrander was authorized by defendant to employ the plaintiff, it being insisted

that as the evidence showed that Ostrander was simply employed as an attorney for defendant, his power was limited by section 283 of the Code of Civil Procedure, which provides that an attorney can only bind his client in any steps of an action by his agreement filed with the clerk or entered in the minutes of the court and not otherwise, and that in order to bind the defendant by contract it was essential for plaintiff to show direct authority conferred on Ostrander to do so, and such authority does not exist where the evidence merely shows the relationship of attorney and client.

[1] But from Judge Ostrander's statement of the purpose of his employment in these cases, and of the authority conferred on him by defendant and his conduct in the matter, we are satisfied that the jury had a right to conclude that such authority embraced the power to employ the plaintiff as a detective. Ostrander's position was something more than that of an attorney representing his client in a single suit in court. He was employed to assist in the prosecution of several criminal cases in which the defendant was interested with a view to securing the conviction of the offenders, and he was invested with authority to take such measures as he deemed expedient "in assuming the prosecution" of these criminal cases. This involved something more than appearing in court as an assistant to the district attorney. It involved on behalf of his clients the taking of all legitimate and proper measures to make the prosecution successful, including, among others, the employment of a detective to seek and obtain evidence, interview witnesses, and take their statements, so that full presentation of the case of the prosecution might be made on the trial. It must, of course, be conceded that the employment of the detective for such a purpose is legitimate, proper, and expedient, and the jury were warranted in finding that under the general discretionary power vested in Ostrander to take such means as he deemed expedient, he had authority to employ the plaintiff as a detective as a measure of expediency.

As bearing, too, on the question whether the employment of plaintiff came within the scope of the authority conferred by defendant on Ostrander according to the latter's statement of the authority conferred on him, is the circumstance that both Ostrander and the business agent of defendant, Shannon, paid plaintiff money under his contract of employment, the payment made by Ostrander being refunded to him by the agent of defendant. It is hardly probable that Ostrander or Shannon would make payment to the plaintiff out of their own funds. On the contrary, the circumstances surrounding the payment would warrant the jury in inferring that they were made from the funds of the defendant. It is to be observed also

that while an unsuccessful effort was made on the cross-examination of the witnesses of plaintiff to show that the contract employing plaintiff was entered into at the suggestion of Ostrander with the county of Madera, the payment for the services of plaintiff to be made by Miller & Lux, still the fact that this effort was made by Ostrander to have Madera county contract and Miller & Lux pay, was likewise a circumstance bearing on the claim of plaintiff that authority was conferred on Ostrander in his employment as attorney to bind Miller & Lux in the employment of a detective. Of course, these are not controlling circumstances, but they were proper to be taken into consideration by the jury in determining what in fact was the extent of Ostrander's authority under his own statement of it and illustrated by his conduct. In this view there was certainly evidence presented by plaintiff tending to support his claim of the agency of Ostrander and its sufficiency was a matter for the jury. Aside from this point of the insufficiency of the evidence to sustain the verdict the appellant insists that the court erred in the admission of testimony. As far as this claim involves the proposition that the testimony of Ostrander himself was inadmissible to prove the fact of plaintiff's agency it is untenable.

[2] The rule is well established that the fact of agency when it rests in parol may be established on the trial by the testimony of the agent himself. His testimony is admissible and competent to prove the agency and the nature and scope of his authority and to bind his principal thereby. This is the general, and, it may be said, the universal rule. *Mechem on Agency*, § 101; *Parker v. Pond*, 121 Ala. 529, 25 South. 898; *O'Leary v. German A. Ins. Co.*, 100 Iowa, 390, 69 N. W. 686; *Brown v. Cone*, 80 App. Div. 413, 81 N. Y. Supp. 89; *Lawall v. Gorman*, 180 Pa. 532, 37 Atl. 98, 57 Am. St. Rep. 662; *Garber v. Blatchley*, 51 W. Va. 147, 41 S. E. 222; *New Home S. M. Co. v. Seago*, 128 N. C. 158, 38 S. E. 805; *Union Hosiery Co. v. Hodgson*, 72 N. H. 427, 57 Atl. 384; *Nostrum v. Halliday*, 39 Neb. 829, 58 N. W. 429, and a host of other authorities that might be cited. It follows therefore that the testimony of Ostrander given on the trial upon the matter of his authority was properly admitted.

[3] While the rule is well established that the testimony of an agent sworn as a witness in a case when the question of his agency is involved is competent to establish it and its extent and nature, as any other witness, it is equally as well established that extrajudicial statements or declarations in pais of one assuming to act as agent are inadmissible and incompetent to establish the fact of agency. To this proposition it is only necessary to cite our own authorities on the subject. *People v. Dye*, 75 Cal. 108, 16 Pac. 537; *Hubback v. Ross*, 96 Cal. 426, 31 Pac.

353; *Bergtholdt v. Porter Bros.*, 114 Cal. 681, 46 Pac. 738; *Ferris v. Baker*, 127 Cal. 520, 59 Pac. 937; *Petterson v. Stockton*, 134 Cal. 244, 66 Pac. 304.

[4] It is claimed by appellant that this latter rule was violated in the admission of certain testimony. The only testimony to which it is claimed it could apply (because the other testimony of plaintiff the admission of which is complained of in the briefs of appellant appears to have been stricken out by the court on motion of appellant) is the statement of plaintiff that "Mr. Ostrander and Mr. Larew both told me the night they hired me that Mr. Ostrander had hired Mr. Fee and Mr. Larew, and whatever evidence I gathered to show it to them. Those were the instructions." Judge Ostrander lived in Merced county. Mr. Larew and Mr. Fee were attorneys at law, the former residing in Madera county where the prosecutions were pending and where plaintiff also resided. This testimony as far as it relates to the instructions given by Ostrander to plaintiff that he report the result of his investigations to Larew and Fee is open to no objection. In fact, as far as Larew is concerned, the witness had previously testified to the same effect without objection.

[5] But assuming that the rule invoked by appellant was violated in permitting the witness to testify to the further statement of Ostrander that he had employed these persons to whom plaintiff was to report, we do not think that the error was of such a prejudicial character as to warrant a reversal of the cause.

There is nothing further presented on the appeal requiring consideration.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; MELVIN, J.; SLOSS, J.; HENSHAW, J.

159 Cal. 735

ROGERS DEVELOPMENT CO. v. SOUTHERN CALIFORNIA REAL ESTATE INV. CO. (L. A. 2,633.)

(Supreme Court of California. May 12, 1911.)

1. VENDOR AND PURCHASER (§§ 54, 209, 254*)—EQUITABLE INTERESTS.

A contract purchaser, though in default in payments, had an equitable interest which he could convey, and hence can enforce an agreement by the vendor to repurchase, and assert a lien for the agreed repurchase price.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 85, 425-427, 627-651; Dec. Dig. §§ 54, 209, 254.*]

2. VENDOR AND PURCHASER (§ 187*)—DEFAULT BY PURCHASER—WAIVER.

A contract vendor waived the purchaser's default in payments by agreeing to repurchase.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 374, 375; Dec. Dig. § 187.*]

3. VENDOR AND PURCHASER (§ 209*)—CONTRACT TO REPURCHASE—CONSIDERATION.

A contract purchaser's surrender of possession acquired under the agreement, and his placing a deed in escrow sustain the vendor's agreement to repurchase.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 209.*]

4. VENDOR AND PURCHASER (§ 259*)—VENDOR'S LIEN—WHAT ESTATES AFFECTED.

A vendor's lien is limited to the estate or interest conveyed.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 658-663; Dec. Dig. § 259.*]

5. VENDOR AND PURCHASER (§ 274*)—LIEN—FORECLOSURE—COUNTERCLAIM.

Under Code Civ. Proc. § 437, authorizing inclusion of a counterclaim in an answer, and under section 438, describing a counterclaim as a cause of action arising from the transaction sued on, in a suit by a contract vendor to foreclose, the purchaser can counterclaim on the vendor's agreement to repurchase and enforce a lien for the repurchase price.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 274.*]

6. JUDGMENT (§ 252*)—CONFORMITY TO PRAYER.

A prayer for general relief entitles one to any relief appropriate to the facts pleaded.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 441, 442; Dec. Dig. § 252.*]

Department 1. Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by Rogers Development Company against the Southern California Real Estate Investment Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed and remanded.

Elmer R. McDowell, E. Earl Crandall, and William Hazlett, for appellant. Purington & Adair, for respondent.

SHAW, J. Plaintiff sued to foreclose agreements for the sale of certain parcels of land, and to recover possession thereof and quiet title thereto, and obtained judgment as prayed for. The defendant appeals from the judgment and from an order denying its motion for a new trial. On September 14, 1906, the plaintiff and defendant executed six separate written agreements constituting parts of one transaction, whereby plaintiff sold to defendant a number of tracts of land containing, in all, 1,154.45 acres, at prices aggregating \$154,837.50. The agreements contemplated the subdivision of the land, the sale thereof in smaller parcels by defendant to third persons and the conveyance of such parcels by the plaintiff directly to such purchasers. It was stipulated that certain parts of the purchase money on such sales should be paid to the plaintiff as a condition precedent to such conveyance, and should be credited to the defendant on the prices to be paid by it. The sum of \$5,000 was to be paid in cash by the defendant and the balance of the respective prices for the several parcels was to be paid in annual installments thereafter on Septem-

ber 14th of each year. Each of the first five agreements related to a different parcel of land, specifying the price and terms on which it was sold. The sixth agreement applied to the others generally and provided that if defendant paid the \$5,000 in cash, and at least \$5,000 each year thereafter for five years, and also paid to plaintiff upon the sale of any subdivisions, as contemplated, the portions of the purchase price called for by the particular agreement covering it, so far as the aggregate of such sales exceeded \$5,000 annually, then the total price should be reduced to \$125,000 and defendant was to have 10 years thereafter to pay the balance of \$95,000 out of sales to third persons as provided in the several agreements. The cash payment of \$5,000 was made. On September 18, 1906, a parcel was sold for \$7,500, all of which was paid to plaintiff, and, by a special agreement, was credited solely on the amounts to become due on the second, third, fourth and fifth agreements. The amounts due thereon, annually, according to the terms of the respective agreements, amounted in all to \$7,825. The first agreement required an annual payment of \$5,000. It will thus be seen that the \$7,500 received by plaintiff was not sufficient to pay the amounts due on the last four agreements on September 14, 1907. Defendant claims that, under the general reduction of price and annual payments provided in the sixth agreement, these sums were proportionally reduced, and that on that basis only \$5,000 a year was to be paid on all the agreements and only \$3,057.07 annually on the last four agreements, and that therefore the \$7,500 was sufficient to pay the amounts due on those agreements for the years 1907 and 1908, and \$1,385.86 of the payment for 1909. But, by the terms of the sixth agreement, this reduction was made conditional, and was not to continue in force unless defendant paid the minimum sum of \$5,000 on all the agreements, at the expiration of each year. Therefore, since the \$3,057.07 of the \$7,500 was to be credited only on the annual payments of 1907 on the last four agreements and the balance of that fund was to be reserved for payments of 1908 thereon, the first agreement would be unprovided for. There should have been paid on that agreement the sum of \$1,942.93 to make up the \$5,000 payment of September 14, 1907, in order to entitle the defendant to the reduction in payments and price provided for. This payment was not made. Two payments, amounting to \$115, were made in 1906, on account of sales of small lots. No other payments have ever been made. Consequently, the defendant did not comply with the conditions upon which the reduction in payments depended and thereby it forfeited its rights to such reduction and became bound to pay the full prices agreed on upon all the agreements.

Under these circumstances, the plaintiff and defendant, in July, 1908, entered into a contract whereby plaintiff agreed to purchase

of the defendant all the right, title, and interest of the defendant in and to all of the said lands, and to pay therefor the sum of \$1,500 as soon as the abstracts of title there-to were satisfactory and a proper deed was made and delivered. The plaintiff was to see that the abstracts of title were satisfactory and the defendant was to execute the deed and place it in escrow with the Citizens' National Bank, to be delivered upon payment of the \$1,500. The deed was executed accordingly, its form was approved by plaintiff, and it was delivered in escrow as directed. It is not claimed that the defendant had placed any incumbrance on the land, or that it had parted with any interest it had therein, or otherwise affected the title, but the plaintiff did not have the abstracts of title brought down to date. Plaintiff claims that this devolved on the defendant, but the evidence in the record shows that the plaintiff agreed to attend to it. The defendant alleged the making of this contract and the tender of performance, in its answer and cross-complaint, and prayed judgment for the \$1,500, and for general relief. The court found that the answer and cross-complaint in that respect were true. Plaintiff refused to pay the \$1,500, or to take the deed. It still remains in escrow for delivery to plaintiff.

[1] Defendant contends that, upon these facts, the court should not have made an absolute decree quieting plaintiff's title, but should have adjudged that defendant was entitled to recover the \$1,500, and to have a lien on the lands therefor. We are of the opinion that the defendant was entitled to this relief. It had, under the aforesaid agreements, at the time it made said deed, an equitable interest in the land, which it had the right to convey. We may concede that defendant was then in default in its payments and that the plaintiff might have declared the defendant's interest forfeited by reason of such default. [2] Such default and forfeiture could be waived by plaintiff. The execution of the contract to buy the interest of defendant for \$1,500 was a sufficient waiver of the right of plaintiff to declare the forfeiture. [3] There is no merit in the claim that the contract was without consideration. The defendant was in possession of the greater part of the land, holding under the agreements aforesaid. In consequence of this contract of plaintiff to repurchase, defendant gave the possession to plaintiff, and it has ever since retained possession of all the lands. The yielding of possession constituted a sufficient consideration for the contract. Indeed, the mutual stipulations of the parties, that is, the actual conveyance in escrow by one, and the promise by the other to pay the price, both being valid, constituted a sufficient consideration. *Siddall v. Clark*, 89 Cal. 321, 26 Pac. 829; *Van Loben Sels v. Bunnell*, 120 Cal. 680, 53 Pac. 266; *Rodgers v. Wittenmyer*, 88 Cal. 553, 26 Pac. 369; *Gallagher v. Equitable, etc., Co.*, 141 Cal. 707, 75 Pac. 329; 9 Cyc. 323; 6 Am.

& Eng. Ency. of Law, 727. The contract of each in this particular was valid. The agreement of plaintiff to take the interest of the defendant in the land and pay \$1,500 therefor was in writing, and the defendant's conveyance, having been duly executed and delivered in escrow, without power of withdrawal by the grantor, was effectual to pass title upon the performance of the conditions by the grantee. *Bury v. Young*, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186; *Wittenbrock v. Cass*, 110 Cal. 1, 42 Pac. 300; *Wilhoit v. Salmon*, 146 Cal. 444, 80 Pac. 705; 1 *Devlin on Deeds*, §§ 321, 327, 328, 333.

[4] The transaction was, in effect, an agreement to rescind the previously executed agreements of sale and to limit and settle the amount to be restored to the defendant as a consequence of such rescission. It also constituted a sale by the defendant of its interest in the land for a price which has not been paid. It is therefore entitled to a vendor's lien for the price on the interest conveyed. *Burchard v. Record* (Tex.) 17 S. W. 241; *Warren v. Fenn*, 28 Barb. (N. Y.) 333; *Anderson v. Spencer*, 51 Miss. 871; *White v. Blakemore*, 8 Lea (Tenn.) 65; *Fry v. Prewett*, 56 Miss. 783. These cases and many others hold that the vendor's lien attaches when real property is sold, although the interest sold may be only an equitable estate, or merely a leasehold estate. The lien of a vendor is founded upon the just principle that the vendee ought not to be allowed to keep land unless he pays the price. It follows from this that it attaches only to the estate or interest for which the price was to be paid. If the sale is of an equitable interest, only, and is made to one who already has the legal title, the lien will not attach to the legal estate in fee, but only to the equitable interest or estate which was the subject of the sale. This lien, in the present instance, may not be of much value to the defendant, since the result of its enforcement by foreclosure sale would not be a sale of the fee, but only a sale of the rights which the defendant had under the agreements at the time of the resale, rights which required the payment of large sums of money as a condition of obtaining any benefit. But the lien is not destroyed by the precarious nature of the estate on which it is imposed.

[5, 6] It is also clear that the defendant had the right, under sections 437 and 438, Code of Civil Procedure, to allege this debt and lien as a counterclaim against the plaintiff in this action. The complaint alleges the making of the six agreements, the breach thereof by defendant, and consequent forfeiture of defendant's interest and right in the land. The prayer was for a foreclosure of defendant's rights, for the quieting of plaintiff's title, and for the recovery of possession of the land. Section 438 describes a counterclaim as a cause of action arising out of the transaction

set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. This claim for the \$1,500 and the lien therefor arose out of the previous sale, set forth in the complaint, and the breach of said agreements, alleged therein. It was connected with the subject of the action, being a lien on an interest in the land in controversy. It was not, as defendant claims, a complete bar to the plaintiff's action, but it entitled the defendant to some relief which would qualify to some extent the relief to which plaintiff would otherwise be entitled. The plaintiff is entitled to a decree declaring it to be the owner of the land free from all claim or right of the defendant, except a lien in favor of defendant for \$1,500, and interest, upon the equitable estate held by the defendant at the time of the execution of the escrow deed. The defendant is entitled to a personal judgment for the \$1,500 and a decree declaring it a lien as aforesaid. It does not pray for any foreclosure of such lien, but the prayer for general relief is a sufficient foundation for any relief appropriate to the facts stated. Doubtless no foreclosure sale will be necessary. There seems to be no necessity for a retrial. The material facts are not in dispute, and they are sufficiently found in the written decision of the court.

The judgment is reversed and the cause is remanded with directions to enter judgment on the findings in accordance with this opinion.

We concur: ANGELLOTTI, J.; SLOSS, J.

159 Cal. 749

CITY OF MADERA v. MADERA CANAL
& IRRIGATION CO. (Sac. 1,801.)

(Supreme Court of California. May 12, 1911.)

1. WATERS AND WATER COURSES (§ 244*)—
BRIDGES—CONSTRUCTION—LIABILITIES.

In the absence of statute, a canal constructed across a highway must not interfere with the use of the highway, and a highway constructed across a canal may not interfere with the use of the canal, and hence the public, in the latter case, must bear the expense of building the bridge; the reason being that the acquisition of a subsequent easement does not carry with it the right to injure or destroy a prior one.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 244.*]

2. WATERS AND WATER COURSES (§ 244*)—
BRIDGES—CONSTRUCTION—LIABILITIES—
STATUTE—"MAINTAIN."

Civ. Code, § 551, which provides that no canal can be laid out, constructed, or maintained so as to obstruct any public highway, and that the one so maintaining or using such a canal must repair the bridges, etc., was enacted in its present form in 1905. Before that it provided that every water or canal corporation must construct and keep in good repair at all times for public use across their canal, flume, etc., all the bridges that the county may require. This section was based on prior statutory provisions, passed nearly half a century

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

before. Pol. Code, § 2694, provides that when highways are laid across canals on public lands those using the canals must prepare them so that the highway may cross without danger, and section 2737, providing penalties for obstructing or injuring highways, contains provisions for bridging ditches which cross pre-existing highways. *Held* that, in view of these provisions the original act did not impose upon the owners of canals the duty of bridging them whenever the public should lay out a road over them, and that the present section does not impose that duty, for the word "maintain," which is the basis of the claim, should be construed merely as a prohibition against maintaining a canal in such a way that it would injure an existing highway.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 244.*

For other definitions, see *Words and Phrases*, vol. 5, pp. 4277-4281; vol. 8, p. 7712.]

In Bank. Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Action by the City of Madera against the Madera Canal & Irrigation Company. From a judgment for defendant, plaintiff appeals. Affirmed.

R. E. Rhodes and Francis A. Fee, for appellant. W. H. Davis, Robert L. Hargrove, and George W. Mordecai, Jr., for respondent. Frank H. Short and E. E. Keech, amici curiæ.

SLOSS, J. The city of Madera commenced this action against the defendant to recover the sum of \$500, the cost of constructing a bridge across a ditch or canal of said defendant. A demurrer to the complaint was sustained, and judgment entered in favor of the defendant. From this judgment plaintiff appeals.

The complaint shows that since March, 1907, the plaintiff has been a municipal corporation of the sixth class; that the defendant, since 1888, has been a corporation organized under the laws of this state, and during all this time it has been the owner and in the possession of certain canals and ditches and engaged in the business of furnishing through said canals and ditches waters for domestic and other useful purposes. Yosemite avenue, a public street of the city of Madera, crosses one of the main canals or ditches of the defendant at a point within the city limits. The avenue in question "was dedicated, opened and laid out through and across said ditch of said defendant corporation subsequent to the construction of said canal or ditch." It is further alleged that in September, 1907, the board of trustees of the plaintiff ordered and directed that a bridge be constructed on said Yosemite avenue over and across defendant's canal or ditch at a point where the said canal crosses said Yosemite avenue; that the plaintiff made a written demand upon defendant to construct said bridge; that the defendant failed and refused for more than seven days, and ever since has failed and refused to construct said bridge, where-

upon the plaintiff constructed a suitable bridge, necessarily expending therefor the sum of \$500. The prayer is for judgment against the defendant for said sum of \$500.

The plaintiff seeks to support its claim by the provisions of section 551 of the Civil Code. That section reads as follows: "No canal, flume, or other appliance for the conducting of water must be so laid, constructed, or maintained as to obstruct any public highway; and every person or corporation owning, maintaining, operating, or using any such canal, flume, or appliance, crossing or running along any public highway, must construct, maintain, and keep in repair such bridges across the same as may be necessary to the safe and convenient use of such highway by the public; and, on failure so to do, the board of supervisors of the county, after seven days' notice in writing to said person or corporation, may construct or repair such bridge or bridges, and recover of such person or corporation the amount of the expenditure made in so doing."

The principal question presented upon this appeal, and the only one which we find it necessary to consider, is whether or not this section was intended to impose upon the owners of canals, flumes, or other appliances for the conducting of water the duty of constructing and maintaining bridges across the same upon the line of streets or highways laid out and opened after the construction of the canal, flume, or other appliance. The complaint raises this question squarely, and was no doubt framed with the intent of so doing, for it avers *ex industria* that Yosemite avenue was not laid out until after the construction of the canal or ditch by the defendant.

[1] If there were no statutory provision at all, it would be the duty of one running a canal or a ditch across an existing highway to so construct and maintain such canal or ditch as not to interfere with the use of the highway. The acquisition of a subsequent easement does not carry with it the right to destroy or hamper the exercise of the prior one. But a different situation is presented where, after the construction of a canal or a ditch, the public seeks to lay out roads or streets across or along the line of the ditch. In such cases, the duty of constructing the roads or streets and of overcoming such obstructions as may be found in their path would normally fall upon the public for whose convenience and use the roads or streets are laid out. If a natural water course is encountered and a bridge becomes necessary, the cost of the bridge must be borne by the governmental subdivision charged with the duty of constructing and maintaining the road. Even though the surface of the ground may have been changed from its natural condition, the expense of constructing a road through the land so altered

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

is not, without a statutory provision to that end, thrown upon the owner of the land or the one who has lawfully and properly changed its original condition. *City of Denver v. Mullen*, 7 Colo. 345, 3 Pac. 693.

Whether or not the Legislature may constitutionally impose upon those who have acquired the right to so conduct water the burden of constructing and maintaining across their ditch or other conduit suitable bridges or other crossings over public roads that may be subsequently established is a question much discussed in the briefs. Most of the cases cited on either side deal with regulations requiring railroads to provide suitable crossings wherever public highways may intersect the right of way. The decided weight of authority favors the view that such requirements may, in the exercise of the police power, be applied to highways established after the construction of the railway. *State v. Dist. Ct.*, 42 Minn. 247, 44 N. W. 7, 7 L. R. A. 121; *State v. St. Paul, etc., Co.*, 98 Minn. 380, 108 N. W. 261, 28 L. R. A. (N. S.) 298, 120 Am. St. Rep. 581, and cases cited. There is no such perfect analogy between a railroad and a water conduit that considerations affecting the one can for all purposes be safely applied to the other. Whether a statute having the effect which the appellant attributes to section 551 would be valid is a question that is not necessarily answered by a reference to the rulings on enactments governing railroad crossings. But, as we have intimated, our view of the meaning of this section is such as to make it unnecessary to consider this question.

Before passing to a discussion of the interpretation of section 551, we may remark that we shall not here review the various decisions to which we have been cited on the proper construction of statutes requiring railroad or canal companies to construct crossings where the railroad or canal intersects a public highway. Most of the cases dealing with railroads lend some support to the appellant's contention. On the other hand, statutes relating to canals have more often been read as referring only to highways existing when the canal was constructed. This may be due in part to the difference in the subject-matter. Whatever may be the just view of the relation between public highways and railroads, there would seem to be, in natural justice and equity, no compelling reason why the owners of canals or ditches should be burdened with the obligation of constructing bridges to enable the public to cross on the line of a road or street that may, at any future time, be laid out. However this may be, so much depends upon the peculiar phraseology employed in each case that we cannot, in reading our own statute, derive much help from the views expressed by other courts in dealing with different statutes.

[2] Section 551 provides that no canal must be laid out, constructed or maintained

as to obstruct any public highway; and every person or corporation owning, maintaining, operating or using any such canal, crossing or running along any public highway, must construct, maintain, and keep in repair such bridges across the same as may be necessary to the safe and convenient use of such highway by the public. If the first part of the section did not contain the word "maintain"—that is to say, if it provided that no canal must be so laid out or constructed as to obstruct any public highway—there would seem to be little room for the contention that the Legislature intended to impose upon the owner of the canal or other appliance for conducting water, the duty of bridging highways subsequently laid out. We do not think the use of the word "maintain" is sufficient to justify a change in this construction. This word can be given complete effectiveness by making it refer to the duty of the owners with regard to highways existing at the time the canal was constructed. A canal might, in the first instance, be so laid out as not to obstruct an existing highway. It might thereafter, however, get into such condition as to obstruct a highway crossing it. For example, the flow of water might leave deposits in the bed of the canal and so raise the surface of the water so as to impede the use of the highway. The flow of water might be increased so as to make necessary a bridge over a canal or ditch which could theretofore have been forded without danger or inconvenience. The banks of the ditch might be allowed to fall into disrepair. In such cases the public would not be protected in the use of its highway by a mere requirement that the ditch should not be laid or constructed so as to obstruct the highway. The prohibition against "maintaining" it in such manner as not to create an obstruction is necessary to protect the public in the possession of the rights which it enjoyed when the ditch was originally laid out. So limiting the operation of the section to existing highways, a natural and reasonable construction is given to its terms, and every provision contained in it is given due effect.

Section 551 was amended and enacted in its present form in 1905. Theretofore, it read "every water or canal corporation must construct and keep in good repair, at all times, for public use, across their canal, flume or water pipe, all of the bridges that the board of supervisors of the county in which such canal is situated may require, the bridges being on the lines of public highways and necessary for public uses in connection with such highways." This section, which was a part of the original Code, was based upon various prior statutory provisions (St. 1862, p. 541; St. 1869, 1870, p. 660; St. 1871, 1872, p. 732). It is argued by the appellant that these prior enactments plainly showed an intent to require corporations owning ditches, etc., to construct bridg-

es over the same on the line of public highways, whether the highways existed at the time the ditch was laid out or were thereafter opened, and that it is not to be presumed that the Legislature intended to change a policy that had existed for almost half a century. But we think the argument is based upon insufficient premises. It is by no means clear, and it has never been held, that the prior statutes should be so construed as to apply to highways not in existence at the time of the construction of the ditch or canal, and there are strong reasons for holding that they should not be so construed. This view of the meaning of section 551 and its predecessors is fortified by a consideration of other Code provisions. Section 2694 of the Political Code provides that "whenever highways are laid out to cross railroads, canals, or ditches, on public lands, the owners or corporations using the same must, at their own expense, so prepare their roads, canals, or ditches that the public highway may cross the same without danger or delay. And when the right of way for a public highway is obtained through the judgment of any court over any railroad, canal, or ditch, no damages must be awarded for the simple right to cross the same." Here is an enactment dealing specifically with highways laid out after the construction of a canal, ditch, etc. The first sentence of this section has reference only to crossings upon public lands, and its operation and effect have only an incidental bearing upon the present discussion. The second sentence, however, is not so limited, and the plain implication from the language used is that while the railroad, canal, or ditch is subject to crossing by a public road without any compensation for the mere right to cross, the further burden of constructing a bridge or other necessary crossing is not imposed upon the owner of such railroad, canal or ditch, but rests upon the public agency constructing the highway. Section 2737 of the Political Code, too, is in point. See *County of Fresno v. Canal Co.*, 68 Cal. 359, 9 Pac. 309. It contains provisions for bridging ditches which cross public highways, and puts the expense of such bridges upon the person constructing the ditches. The language of this part of the section seems to have reference only to ditches constructed across pre-existing highways, and even in such cases the supervisors are given authority, with the consent of the owners of ditches, to declare such bridges to be public property of the county, and to maintain them at the expense of the county. Reading all these sections together, we think the respondent is right in its contention that the Legislature did not intend to impose upon the owners of ditches or other artificial conduits of water the duty of bridging the same whenever the public, after the construction of the canal, ditch or other con-

duit, should undertake to lay out a new road across the water conduit. This being so, the complaint stated no cause of action, and the demurrer was rightly sustained.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

15 Cal. App. 766

EGAN v. SOUTHERN PAC. CO. (Civ. 924.)
(District Court of Appeal, Second District, California. April 3, 1911. Rehearing Denied by Supreme Court June 2, 1911.)

1. APPEAL AND ERROR (§ 1001*)—REVIEW—VERDICT—CONCLUSIVENESS.

A verdict will not be disturbed on appeal if there is any evidence to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3928; Dec. Dig. § 1001.*]

2. MASTER AND SERVANT (§ 137*)—INJURIES TO EMPLOYEES ON TRACK—LOOKOUT.

Where laborers were working on a railroad track, it was negligence for those in charge of a train which was upon a grade above them where it was impossible for the engineer or fireman to see the track to let it down by force of gravity upon the laborers without warning and without a lookout on the rear.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 274; Dec. Dig. § 137.*]

3. MASTER AND SERVANT (§ 236*)—INJURIES TO EMPLOYEES ON TRACK—CONTRIBUTORY NEGLIGENCE.

Where a laborer on a railroad right of way, upon seeing that a train, which had passed, had stopped some distance away, went back to work, standing outside the rails and not looking at the train again, he was not guilty of contributory negligence, precluding recovery for injuries occasioned by the negligence of those in charge of the train in backing it down upon him without warning, as he had a right to assume that the train would not be backed without warning.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 739, 740; Dec. Dig. § 236.*]

Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by Martin Egan against the Southern Pacific Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

J. W. McKinley and D. C. McGarvin, for appellant. Morton, Riddle & Holizer, for respondent.

ALLEN, P. J. The action was one by a laborer in defendant's employ for the recovery of damages on account of personal injuries. The plaintiff, an old and experienced track laborer, was employed by defendant and engaged at the time of the accident as a member of a gang repairing defendant's roadbed at a point near a siding. Upon the siding at the time of the accident was a gravel train. A water train of 10 or 12 cars approached the siding, and, when some 400 feet therefrom, the water train was cut in two, and the engine and five or

six cars were run up above the point where the siding intersected the main track. The main track was constructed on a 1 per cent. grade from the point where the water train first stopped to and above the siding. The engineer in charge of the water train, when moving up the grade, noticed and saw the men engaged in work upon the track. After the engine with these cars had proceeded up the track to a point above the intersection of the switch with the main track, one of the water cars was detached and under the charge of a brakeman was run down by gravity below the point of the switch, where it was taken up by the engine of the gravel train and attached thereto. While this car was being disposed of, plaintiff discontinued his work upon the track. After the car was taken up by the gravel train engine, plaintiff looked up the track and saw the engine with the four or five remaining cars standing motionless, no one being in sight, except the fireman, who was sitting in the cab door with his feet upon the steps. Plaintiff then resumed his work, standing outside the main track, but with a pick endeavoring to remove stones and earth supporting the ties upon which the rails were laid. While thus engaged in work those in charge of the engine and water cars above plaintiff, without any warning or signal, backed the same down the track, and by reason of the grade no indication of their approach was observed by plaintiff, and no one was upon the rear end of the train thus being backed down to give any warning, nor was any warning given by any one of the approach of the train by bell, whistle, or otherwise. The result was that plaintiff was struck by the rear car thus being backed down and seriously injured. Had plaintiff been apprised of the approach of the train, a single step backward would have removed him from the place of danger. Evidence is in the record tending to establish all of the foregoing facts. A verdict was returned in favor of plaintiff and a judgment rendered thereon, from which judgment and an order denying a new trial defendant appeals.

But two questions are presented by appellant.

[1] The first is a contention that the testimony shows no negligence on defendant's part; and, second, that contributory negligence is shown on the part of plaintiff sufficient to preclude his recovery. Both of these matters were of necessity resolved against appellant by the jury in reaching its verdict, and both are questions of fact, and should not be disturbed if there is any evidence in their support. We are of opinion that under the circumstances connected with the operation of this train negligence was clearly shown. [2] It cannot be said that one in charge of the operation of a railroad train, with knowledge that persons are employed and engaged in work upon the track,

is warranted in backing a train, as was done in this instance, without warning and without having any one upon the rear end to observe necessity for warning where, as in this case, it was not possible for the engineer or fireman to see who or what was upon the track over which they were seeking to back the train. It was a negligent operation of the train approaching wantonness.

[3] Nor do we believe that the record discloses contributory negligence upon the part of plaintiff. It cannot be disputed that one familiar with the dangers connected with an employment as a general rule assumes the risks incident thereto, and that a railroad track upon which trains are run is itself a warning to persons of discretion and intelligence of its dangerous character and the necessity for the exercise of care in its use. Applying these rules to plaintiff, however, it is clearly shown that he did look and saw a motionless train a distance from him upon the main track. There was nothing to indicate an intention of immediate action upon the part of those in charge. Plaintiff was there to work, and to this work it was his duty to give attention. Having first exercised his sense of sight and no imminent danger being evident, it was his duty to resume work, and he was rightfully upon the track. If it be said that it is the duty of one thus employed to be constantly exercising his sense of sight, it is the equivalent of saying that he must not work when a train is standing upon the track above him, for he could not work and at the same time observe the approach of the train. One thus employed upon the track occupies a very different position from the pedestrian or stranger entering upon the track and using the same as a thoroughfare or seeking to cross the same. In both instances care and the exercise of the senses are required before entering upon the place of danger, but the duty which devolves upon the one to continue the exercise of his sense of sight should not be held to devolve with the same strictness upon the other employed by the railroad company to work upon such track. Plaintiff, being rightfully upon the track and in the performance of a duty enjoined upon him by the defendant in the exercise of an employment upon said track, had a right to assume that the train would not be backed down upon him without warning, and it should not be said that he contributed to his own injury in the doing of that which his employment required that he should do. *Morgan v. Robinson Co.*, 157 Cal. 348, 107 Pac. 695. The evidence supported the findings implied by the verdict, and we see no error in the action of the court denying a new trial.

Judgment and order affirmed.

We concur: JAMES, J.; SHAW, J.

16 Cal. App. 1

SHAW v. CALDWELL et al. (Civ. 807.)

(District Court of Appeal, Third District, California. April 3, 1911. Rehearing Denied by Supreme Court June 1, 1911.)

1. MINES AND MINERALS (§ 55*)—CONVEYANCE—DEED—CONSTRUCTION—"MAY."

A bargain and sale deed to a half interest in a mine in consideration of \$1 and the doing of necessary assessment work to hold the claim at the grantees' expense also provided that the grantees might work and develop the mine at their own cost, and that all gold or proceeds taken therefrom for 20 years should be divided equally among the parties; that is, each to have one-third thereof. *Held*, that the provision for working the mine apart from the doing of the assessment work was a mere license to be exercised by the grantees, or not, at their election; the word "may" not being construed to mean "must."

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 160; Dec. Dig. § 55.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4418-4447; vol. 8, p. 7719.]

2. MINES AND MINERALS (§ 55*)—CONVEYANCE—CONSTRUCTION—CONDUCT OF PARTIES.

The conduct of the parties to a conveyance of an interest in a mine treating a provision of the deed as an optional license to the grantees to work the mine on shares and not as obliging them to do so will be given effect by the courts in construing the provision in the deed, the terms of which indicate such intention.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 160; Dec. Dig. § 55.*]

3. MINES AND MINERALS (§ 55*)—CONVEYANCES—LIMITATIONS—CONDITION SUBSEQUENT.

A conveyance of an interest in a mining claim provided that the grantor did grant, bargain, and sell unto the grantees an undivided half interest in the premises for a consideration of \$1, and the required assessment work to be done by the grantees at their own expense. *Held*, that a subsequent provision that the grantees might work the mine at their own expense, the grantor and grantees sharing equally in the proceeds, was neither a condition subsequent, being no part of the consideration for the deed, nor a limitation on the grantees' estate in the premises.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 159-161; Dec. Dig. § 55.*]

4. LICENSES (§ 44*)—WHAT CONSTITUTES—"LEASE" DISTINGUISHED.

A license in respect to real estate is an authority to do a particular act or series of acts on the land of another without possessing an estate therein. The test to determine whether an agreement for the use of real estate is a license or a lease is whether the contract gives exclusive use of the premises against all the world, including the owner, in which case it is a lease, or whether it merely confers a privilege to occupy under the owner, in which case it is a license, the question to be determined by a construction of the instrument.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 98; Dec. Dig. § 44.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4043-4049; vol. 8, pp. 7702, 7703; vol. 5, pp. 4133-4141; vol. 8, p. 7706.]

5. MINES AND MINERALS (§ 84*)—LICENSE—REVOCATION.

Where a deed to an interest in a mine contained a provision that the grantees might work the mine on shares, the grantor was entitled to his share of the proceeds in case the grantees

elected to work the mine under their license, which, so far as the grantor's remaining interest was concerned, was revocable at his pleasure, being a mere personal privilege, and not a covenant running with the land.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 213; Dec. Dig. § 84.*]

6. LICENSES (§ 58*)—CREATION—REVOCATION.

A license, being a mere personal privilege, is revocable at the will of the licensor, whether created by deed or other written instrument.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 116-120; Dec. Dig. § 58.*]

7. MINES AND MINERALS (§ 84*)—LICENSE—REVOCATION—CONVEYANCE TO ANOTHER.

Where the owner of a mine conveyed an interest therein and provided in the deed that the grantees might work the mine on shares at their option, the license so acquired by the grantees in so far as the owner's remaining interest in the mine was concerned, being a personal privilege, was revoked by a subsequent conveyance of such remaining interest to another.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 213; Dec. Dig. § 84.*]

8. ESTOPPEL (§ 23*)—DEED—WARRANTY AGAINST INCUMBRANCE—EFFECT.

Where the owner of a mine having conveyed a half interest therein conveyed his remaining interest, and warranted by his deed that he had not conveyed any interest in his part of the property to any one and had not suffered any incumbrance to attach thereto, he could not thereafter claim that he had previously given the grantees in his first deed the right to the exclusive possession of the whole mine for a term of 20 years by a provision in their deed authorizing them to work the mine on shares.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 52-60; Dec. Dig. § 23.*]

9. ESTOPPEL (§ 23*)—DEED—RESERVATION—RIGHTS OF GRANTOR.

Where a mineowner conveyed his remaining interest by a warranty deed reciting that he did grant, etc., all his interest, the same being a one-half undivided interest in and to the property, but, in addition, specified that it included all the dips, spurs, and angles, and all the metals, ores, gold and silver bearing rock and earth therein, and all rights, privileges, and franchises thereto belonging, and the rents, issues, and profits thereof, he could not thereafter assert that he was still the owner of an interest in the property by an alleged reservation in a former deed to the other half of the property by which the grantees in that deed were authorized to work the mine on shares.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 52-60; Dec. Dig. § 23.*]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by Herbert Shaw against E. F. Caldwell and others. Judgment for plaintiff, and defendants E. F. Caldwell and Martha Caldwell appeal. Reversed.

J. C. Webster, for appellants. J. B. Curtin, for respondent.

BURNETT, J. On February 5, 1904, plaintiff was the owner of the Hunter Creek mine. On said date, by a grant, bargain, and sale deed, he conveyed to E. Caldwell and E. F. Caldwell "an undivided one-half interest in and to" said mine. It is recited in said deed that it was "for and in consideration of one dollar to him in

hand paid by the parties of the second part," and also "it being one of the considerations of this conveyance that said parties of the second part will, during the period in which the party of the first part shall be the owner of the remaining one-half of said mine, do and perform at their own cost and expense all work required to be done upon said mine in order to comply with the provisions of section 2324 of the Revised Statutes of the United States, and, should they fail at any time so to do, then the party of the first part shall be entitled to have said one-half interest in said mine as hereby conveyed, reconveyed to him, and the parties of the second part shall thereafter have no interest in said mine." The deed likewise contained this clause: "It is furthermore agreed that the parties of the second part may work and develop said mine at their own cost and expense and all gold or proceeds taken therefrom for a period of twenty years from date hereof shall be divided equally among the parties hereto, that is to say, each party hereto shall have one-third of said proceeds." On the 24th day of January, 1906, for a consideration of \$100, plaintiff sold and conveyed to one Thomas Armstrong "all of his right, title and interest, same being a one-half undivided interest, of, in and to" said mine, and, prior to the beginning of this action defendant, D. J. Sutton, by mesne conveyances, had succeeded to this interest. On the 28th day of July, 1906, the said E. Caldwell conveyed all of his interest in said property to defendant Martha Caldwell. No gold was taken out of the mine until after the conveyance by plaintiff to Armstrong as aforesaid, and the action was brought to recover one-third of the proceeds of the development of the mine from and subsequent to July 30, 1906. The court found that the said agreement as to the division of the proceeds of the mine is still in full force and effect, and that "plaintiff is entitled to have paid over to him by defendants E. F. Caldwell and Martha Caldwell one-third of all gold and proceeds derived from operating and working the mine for a period of 20 years from and after the 5th day of February, 1904," and, upon an account taken, it was determined that at the time of the trial there was due, under this agreement, the sum of \$72.30, for which amount judgment was entered for plaintiff. From this judgment, the appeal is taken by defendants E. F. Caldwell and Martha Caldwell.

[1] The decisive factor in the case is the construction of said agreement as to the development of the mine and the division of the proceeds. By appellants it is contended that this constitutes a mere permission or license to work the property at their own expense, which might be exercised or not by the Caldwells, and which was in fact never exercised until it was revoked by the plaintiff when he executed the said convey-

ance to Armstrong. This seems to be in entire accord with the natural and ordinary signification of the terms employed. It is to be observed that the agreement is "that the parties of the second part may work and develop said mine at their own cost and expense." More apt words could hardly have been selected to empower the parties of the second part to exercise a choice in the matter. It is not made imperative, and there is no agreement on their part that they will work the mine at their own expense. The only obligation imposed upon them is that concerning the division of the proceeds as aforesaid in case they exercise their discretion to so develop the mine. It is true that "may" is sometimes construed as "must," but this is only for the purpose of effectuating the intention of the parties. There does not appear to be any reason why we should depart here from the ordinary meaning of the terms employed.

[2] On the other hand, several circumstances seem to concur in support of the natural interpretation of the language found in said agreement. One of these circumstances is the conduct of the parties themselves. Admittedly for two years no effect was given to this provision. Plaintiff worked the mine, in connection with the other parties to the agreement, and there seems to have been no contention that the latter were required to operate it at their own expense. In other words, the parties, by their actions, interpreted the contract as permissive merely. Again, the only other possible view of the provision is that it was intended as a part of the consideration for the conveyance of one-half of the mine to said parties, or that it constitutes a limitation upon the estate conveyed to the latter.

[3] As to the former contention, it may be said that there is nothing in the deed itself to show that it was a part of the consideration, and it seems unreasonable to conclude that it should be so held. Indeed, the consideration is mentioned expressly as \$1 and the assessment work to be done by the grantees. Thereby, in accordance with a familiar rule of construction, must the provision before us be deemed no part of the consideration for said conveyance. Furthermore, it may be urged that the performance of the assessment work seems to have been sufficient compensation for one-half of the mine, and it may be added that, since the grantees were entitled to one-half of the proceeds by virtue of the said conveyance, the additional award of one-sixth could hardly have been considered more than sufficient to reimburse them for the labor and expense of the development of plaintiff's portion of the mine.

Likewise, we fail to see anything in the language used or the surrounding circumstances to indicate any purpose to impose any condition upon the estate conveyed to the grantees. By the formal terms employed

in the granting clause, plaintiff did "grant, bargain and sell" to said grantees an undivided one-half interest in said premises, "together with all and singular the tenements and appurtenances thereto belonging or otherwise appertaining." The fee thereby conveyed could only be reduced or qualified by language equally plain. Nothing of the kind is found. Indeed, if the agreement in controversy be regarded as a part of the consideration, it cannot be deemed as creating a condition subsequent or modifying in any degree the estate conveyed. In *Hartman v. Reed*, 50 Cal. 485, it is held that "if one conveys to another a tract of land, part of a Mexican grant, in consideration of an agreement by the other to prosecute the claim before the courts for final confirmation, and the grantee fails to fulfill his agreement, the title vests absolutely and the remedy of the grantor for the breach of the agreement is an action for damages."

In *Lawrence v. Gayetty*, 78 Cal. 126, 20 Pac. 382, 12 Am. St. Rep. 29, the consideration was the promise to make valuable improvements, and the court said: "It must be borne in mind that the plaintiff did not contract to convey upon the performance of the contract on the part of the defendants. Therefore his promise was not dependent upon theirs, nor was there anything appearing in the deed, or in the contract under which it was made, showing or tending to show that a compliance with their promise was regarded as a condition subsequent, or that a failure to perform on their part should in any way affect the title conveyed to them. The case is precisely in principle the same as if the plaintiff had conveyed and taken a note for the purchase money, and the defendants had failed to pay the same." In *Cullen v. Sprigg*, 83 Cal. 56, 23 Pac. 222, it is held that "the recital in a deed that it is in consideration of a certain sum and that the grantee is to do certain things is not an estate upon condition, not being in terms upon condition, nor containing a clause of re-entry or forfeiture." To the same effect is *Behlow v. Southern Pac. R. R. Co.*, 130 Cal. 16, 62 Pac. 295, wherein the familiar doctrine is asserted that "conditions subsequent, especially when relied on to work a forfeiture, must be created by express terms or clear implication and are to be construed strictly against a forfeiture which is not favored in law." It is held, further, that "a provision in the deed by which the railway company agrees, as a further consideration of the grant, to place two stations at a location to be selected by the grantor, at which all trains must stop, is not a condition upon which the estate is granted and is not available to defeat the estate created by the grant, but is merely a personal covenant on the part of the grantee."

[4] The situation is clearly brought within the definition of a license in respect to real estate, which is an authority to do a

particular act or series of acts upon the land of another without possessing an estate therein. 25 Cyc. 640. The test to determine whether an agreement for the use of real estate is a license or a lease is whether the contract gives exclusive possession of the premises against all the world, including the owner, in which case it is a lease, or whether it merely confers a privilege to occupy under the owner, in which case it is a license, and this is a question of law arising out of the construction of the instrument. Id.

It is said in *Wheeler et al. v. West et al.*, 71 Cal. 126, 11 Pac. 871: "There is a broad distinction between a lease of a mine, under which the lessee enters into possession and takes an estate in the property, and a license to work the same mine. In the latter case the licensee has no permanent interest in the property, or estate in the land itself, but only in the proceeds, and in such proceeds, not as realty but as personal property; and his possession, like that of an individual under a contract with the owner of land to cut timber or harvest a crop of potatoes thereon for a share of the proceeds, is the possession of the owner." This license granted to the said parties affected, of course, only the one-half interest belonging to plaintiff, as their ownership of the other half carried with it necessarily the right of possession and development.

[5] As to the plaintiff, his right under the provision in question was to insist upon one-third of the proceeds of the mine in case the licensees exercised their option, and it was his privilege to revoke the license at his pleasure. The license was in fact revoked by his said conveyance to Armstrong. This necessarily follows from the nature of a license. It being a mere personal privilege, it is not, of course, a covenant running with the land, it does not bind, therefore, the successors in interest of the parties, and it would be manifestly inequitable to allow the plaintiff to enjoy the benefits of the agreement when he had deprived the other parties of the reciprocal privilege conferred by said provision.

[6] "A license is founded upon personal confidences, a mere personal privilege extending to the person to whom it is given, and is therefore not assignable and an attempt to assign terminates the privilege." "A mere license, which is nothing more than a personal privilege, is revocable at the pleasure of the licensor, and the fact that the license was created by a written instrument, or even conferred by deed, does not affect the rule of revocability at the option of the licensor." 25 Cyc. 644. "A license may be revoked by a sale and conveyance of the land without reserving the privilege to the licensee or by a lease or mortgage of the same, for a mere license cannot work a breach of the warranty of title." 25 Cyc. 650.

[7] The foregoing is undoubtedly the view

of the situation taken by plaintiff when he executed said deed to Armstrong. The following covenants were therein implied: "(1) That previous to the time of the execution of such conveyance the grantor has not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantee. (2) That such estate is at the time of the execution of such conveyance free from incumbrance done, made, or suffered by the grantor, or any person claiming under him." Section 1113, Civ. Code. According to respondent's theory of the case, he had previously conferred upon said grantees the right to the exclusive possession of the whole of said land for the term of twenty years and he comes into court insisting that they now have such right.

[8] He cannot do this in the face of his warranty that he had not conveyed any interest in his part of the property to any one, and had not suffered any incumbrance to attach to it. But it is insisted that Armstrong had notice of the previous conveyance, and therefore he took the estate subject to the previously imposed burden.

[9] Manifestly this would be of material significance if the former grantees were asserting some interest in the estate apparently conveyed by plaintiff to Armstrong, but it would require a long search to find an authority holding that the grantor of such a conveyance would be heard to assert that he was still the owner of an interest by virtue of a reservation in a former deed. By the said conveyance, the plaintiff does not only "grant, bargain, sell, remise, release, and forever quitclaim unto the said party of the second part, and to his heirs and assigns, all of his right, title and interest, same being a one-half undivided interest in and to" said property, but he specifies "together with all the dips, spurs and angles and also all the metals, ores, gold and silver bearing rock, quartz rock and earth therein; and all the rights, privileges and franchises thereto incident, appurtenant and appurtenant or therewith usually had and enjoyed, and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining, and the rents, issues and profits thereof." It is needless to add that, in view of the foregoing recitals, it is a conclusive presumption against the plaintiff that he was at the time the absolute owner of an undivided one-half interest in said mine. Subdivision 2, § 1962, Code Civ. Proc.

Nor can it be claimed that this is a circumstance of no concern to appellants. They have recognized the said provision as conferring simply a personal privilege, and therefore, considering it revoked by the said deed from plaintiff to Armstrong, they cannot consistently dispute the right of Armstrong's grantee to one-half of the proceeds of the mine. Under respondent's contention, they must unquestionably yield to him

two-thirds of the balance, and be content with one-sixth of what the mine yields.

The case upon which respondent principally relies is *Downing v. Rademacher*, 133 Cal. 220, 65 Pac. 385, 85 Am. St. Rep. 160. Therein it is held, as stated in the syllabus, that "where the owner of a mine deeded two-thirds thereof, the sole consideration of which was a contemporaneous written agreement reciting its execution and agreeing that the grantee should have the exclusive right to work the mine, and should mill and reduce all ores taken therefrom, and deliver one-third of all minerals to the grantor, the deed and agreement constitute one instrument as between the parties and grantees with notice, and must be read as though each referred to the other and incorporated its terms; and the deed is in effect subject to the conditions set forth in the agreement." It is to be observed as to that case that the contract entered into was the sole consideration for the deed, there was an entire failure of such consideration, and the court held that the circumstances showed that the grant of the mine was conditional. From another standpoint the conclusion of the court is shown to be just and equitable. *Downing* brought suit to quiet his title. This, as well settled, is an equitable action. The circumstances of the case made peculiarly applicable the maxim that "he who seeks equity must do equity." It is indeed strange that it should be contended that a plaintiff declining to pay any part of the consideration or to meet his obligation imposed thereby could obtain from a court of equity a decree establishing his title without being required, as a condition precedent, to perform his promise, by virtue of which the conveyance to him had been made. As stated in the *Downing* Case by the late Mr. Justice Temple: "As between the parties, at least, there is no such magic in a conveyance of a title in fee which can be used to do an owner out of his property."

The cases from other jurisdictions cited by the court in the *Downing* Case also exhibit a situation totally different from what we have here. For instance, in *Richter v. Richter*, 111 Ind. 456, 12 N. E. 698, the real consideration was a contemporaneous agreement in writing by the terms of which the son agreed to support his father so long as he should live. A few months afterwards the son refused to perform this contract. The father brought suit for a reconveyance. The defense was that the consideration for the deed was the agreement, and the only remedy the father had was to sue upon it. But the court, applying the familiar doctrine that, "in the construction of deeds as in construing other writings, courts seek to ascertain and give effect to the real intention of the parties as such intention may be gathered from the language of the whole instrument," reached the just conclusion that the parties intended that the estate

should be held and enjoyed on condition that the grantee perform the acts specified and therefore that it was a conditional estate. So in *Manning v. Frazier*, 96 Ill. 279, the defendant entered into a written contract with John R. Squire and O. D. Payne by which he, in consideration of \$1 and the agreements contained in the contract, bargained, sold, and conveyed to them, their heirs and assigns, all of the coal, limestone, iron ore, rock oil, and other minerals in, upon, or under a certain farm or tract of land which was particularly described, and contains 700 acres. The deed granted to them the right to enter upon and search for such minerals, and to dig, mine, explore, and occupy with necessary structures and buildings, and to mine and remove the coal, limestone, etc. And the parties of the second part were bound to enter upon and make search for coal, etc., within two years from that date. They were also bound to have preparations made for taking out coal for market within two years, and they were to pay to the party of the first part 12 cents for each ton of coal and limestone mined and removed from the land, and for ore 10 cents per ton, payments to be made quarterly. The only questions decided were that the transaction amounted to a sale of real estate and that the grantor had a vendor's lien on the coal, etc., in the entire mine for the whole of the purchase price, the court saying: "The minerals were sold, the purchase money was not paid, and, as complainant did nothing manifesting an intention to waive his vendor's lien, equity will hold that it attached and must be enforced for the amount of purchase money due and unpaid." It must be apparent that none of the foregoing cases involved the question of license and each of them possessed features appealing irresistibly to the conscience and compelling the decision that was rendered.

To summarize: It appears reasonably certain: (1) That a mere license was created by the agreement in controversy and not a condition subsequent. (2) That it operated neither to convey nor to reserve any estate in any part of the mine to which it related. Indeed, this is implied in the finding of the court "that on the 5th day of February, 1904, the plaintiff executed to one E. Caldwell and defendant E. F. Caldwell an instrument in writing wherein and whereby the said plaintiff did sell and convey unto said E. Caldwell and defendant E. F. Caldwell the individual one-half of the Hunter Creek mine," and "that on the 24th day of January, 1904, the plaintiff sold and conveyed the remaining one-half of said Hunter Creek mine to one Thomas Armstrong by deed and conveyance in the words and figures following." (3) That the payment by said licensees to plaintiff of one-third of the proceeds in case the mine was operated by

the former at their expense implied the reciprocal duty on the part of plaintiff not to interfere with their possession of the whole of said mine. (4) That said license was revocable at the pleasure of the licensor, and it was actually revoked by said conveyance to Armstrong.

These views necessarily lead to a decision different from that reached by the learned trial judge, and the judgment and order are therefore reversed.

We concur: **CHIPMAN, P. J.; HART, J.**

15 Cal. App. 710

CITY OF SANTA MONICA v. LOS ANGELES COUNTY. (Civ. 917.)

(District Court of Appeal, Second District, California. March 24, 1911. Rehearing Denied by Supreme Court May 23, 1911.)

1. LIENS (§ 18*)—STATUTORY LIENS—PROCEEDINGS TO PERFECT.

A lien declared by statute is not dependent for its existence on a subsequent act, though such act may be necessary to its enforcement, but when such an act is done it relates back to the time of the accrual of the lien.

[Ed. Note.—For other cases, see *Liens*, Dec. Dig. § 18.*]

2. TAXATION (§ 109*)—LIABILITY FOR TAXES—TIME OF ACCRUAL.

The liability of real property for taxes accrues on the first taxation Monday in March in each year, though the tax is not levied and assessed till later, and hence an omission or irregularity in subsequent proceedings affecting the levy and assessment does not destroy the liability, which, under Pol. Code, § 3806, may be corrected in a subsequent year and the liability enforced.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 142; Dec. Dig. § 109.*]

3. TAXATION (§ 183*)—PROPERTY LIABLE TO—PURCHASE BY MUNICIPAL CORPORATIONS.

A city acquiring real estate after the first Monday in March, but before a levy and assessment of a tax by the county, authorized to levy taxes for specified purposes, is liable for the tax; the acquisition of the premises by the city not carrying with it any interest in the lien created by the tax for county purposes.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 295; Dec. Dig. § 183.*]

4. MUNICIPAL CORPORATIONS (§ 54*)—COUNTIES (§ 1*)—NATURE OF ORGANIZATION.

A municipal corporation is but a branch of the state government established to aid the Legislature in providing for the wants and welfare of the public within the territory for which it is organized, and the Legislature may determine the extent to which it will confer on it any power, and this is true as to counties and their government.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 142; Dec. Dig. § 54;* *Counties*, Cent. Dig. § 1; Dec. Dig. § 1.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by the City of Santa Monica against Los Angeles County. From a judgment for plaintiff, defendant appeals. Reversed.

Rehearing denied by Supreme Court; Beatty, C. J., dissenting.

J. D. Fredericks and Hartley Shaw, for appellant. H. W. Taft and Tanner, Taft & Odell, for respondent.

ALLEN, P. J. This action was brought by the city of Santa Monica against the county of Los Angeles to recover the amount of taxes levied and assessed in September, 1903, against certain real property acquired by said city after March 1st of that year, but before such assessment was levied. The city paid such taxes under protest and judgment was rendered in its favor against the county for the recovery of the amount so paid, from which judgment the county appeals.

[1] The sole question involved is as to the operative effect of such levy of taxes made under the circumstances of this case. It is appellant's contention that the lien for the taxes of 1903 attached on the first Monday of March of that year, and the subsequent fixation of the amount, through levy and assessment, was but a step necessary for the enforcement of the already established lien. This upon the authority of *Couts v. Cornell*, 147 Cal. 564, 82 Pac. 194, 109 Am. St. Rep. 168, and cases there cited. In a construction of section 2884, Civil Code, which provides that a lien may be created by contract to take immediate effect as security for an obligation not then in existence, our Supreme Court, in *Tapia v. Demartini*, 77 Cal. 386, 19 Pac. 641, 11 Am. St. Rep. 288, has said that a mortgage covering future advancements, as against subsequent incumbancers, becomes a lien for the whole sum advanced from the time of its execution, although the right to enforce the collection thereof can only arise upon each advancement being made. The analogy lies in this, that a lien declared by positive statute is not dependent for its existence upon subsequent acts requisite to its enforcement. When these acts are performed they, by relation, become part of the established lien and are secured thereby.

[2] In the matter of taxation, the obligation imposed upon the property is such as to render it liable for the tax thereafter levied and assessed, which is an immediate liability created, even though there be an omission or irregularity in subsequent proceedings affecting the levy and assessment. These may in a subsequent year be corrected and the liability enforced. Section 3806, Pol. Code.

[3] In our opinion, the city in the case under consideration occupies no position different from that which it would have occupied had it acquired the property after the levy and assessment had been made and equalized, in which event the property so acquired was subject to the lien on account of the taxes levied and unpaid, unless there is merit in respondent's contention that the

lien of the county and state merged in the title acquired by the municipality, which is an integral part of the state government.

[4] "A municipal corporation is but a branch of the state government, and is established for the purpose of aiding the Legislature in making provision for the wants and welfare of the public within the territory for which it is organized, and it is for the Legislature to determine the extent to which it will confer upon such corporation any power to aid it in the discharge of the obligation which the Constitution has imposed upon itself." *Chico H. S. Board v. Supervisors*, 118 Cal. 120, 50 Pac. 275. This is true as to counties and their government. Under the law counties are authorized to levy taxes for certain school and county purposes, and when collected the taxes are so applied. With reference to such matters the city may not exercise any right. Plaintiff by its organization as a part of the state government has not been vested with power to aid the state in connection with county government or school government under the control of the county authorities. The taxes so levied upon the property were levied and assessed by the county for purposes within its jurisdiction. The bare acquisition of the premises upon which the tax levy attached did not carry with it any interest or estate in the lien therein created for county purposes. There was, therefore, no vesting of any lesser estate, held in the same right or otherwise, through which a merger could be said to result. The plaintiff, when it acquired this land, took it subject to the lien for county purposes to the same extent as would a private purchaser.

The question presented as to the inability of the city to prevent a sale through payment of the taxes need not be considered, in view of the fact that in this case the funds have been provided and a sale thereby obviated.

The judgment should be reversed, and it is so ordered.

We concur: JAMES, J.; SHAW, J.

15 Cal. App. 714

EVALINA GOLD MINING CO. v. YOSEMITE GOLD MIN. & MILL CO. et al.
(Civ. 797.)

(District Court of Appeal, Third District, California. March 24, 1911. Rehearing Denied by Supreme Court May 23, 1911.)

1. MINES AND MINERALS (§ 23*)—ASSESSMENT WORK—DELINQUENT INTERESTS—NOTICE.

Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426), provides that, on the failure of any one of several co-owners to contribute his proportion of the expenditure for assessment work on a mining claim for any year, the co-owners who have performed the labor or made the improvements at the expiration of the year may give the delinquents personal notice in writing that, if the delinquent fails or refuses

to contribute his proportion required within ninety days after the notice, his interest will become the property of his co-owners who have made the required expenditures. *Held*, that where notice to contribute for annual assessment work was addressed personally to the individuals supposed to be the co-owners in default and was personally served on them, and was delivered immediately to their grantee under a prior unrecorded deed, it was sufficient to forfeit the rights of their grantee; the co-owners serving the notice having neither actual nor constructive notice of the conveyance.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 51-59, 114; Dec. Dig. § 23.*]

2. MINES AND MINERALS (§ 23*)—"ASSESSMENT WORK"—DRAINAGE.

Work done on a mining claim to withdraw water from the mine so that it could be examined by a prospective purchaser, not operating to develop or improve the mine, or to enable the co-owners performing the work to work the mine, was not assessment work required by Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426), to preserve the co-owners' right to the claim.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 51-59, 114; Dec. Dig. § 23.*]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by the Evalina Gold Mining Company against the Yosemite Gold Mining & Milling Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Will M. Beggs, W. C. Kennedy, and F. W. Street, for appellants. J. P. O'Brien and Crittenden Hampton, for respondent.

CHIPMAN, P. J. This is an action to quiet the title to a certain mining claim known as the Slap Jack mine, situated in Tuolumne county. The original complaint was filed in 1899, and its object was to quiet the title of all the alleged owners as against the adverse claims of one R. S. McWhirter. The case, in some of its phases, has been twice before the Supreme Court, once before this court and once before the United States Supreme Court on writ of error. *Emerson v. McWhirter*, 133 Cal. 510, 65 Pac. 1036; *Emerson v. Yosemite Gold Mining & Milling Co.*, 149 Cal. 50, 85 Pac. 122; *Wemple v. Yosemite Gold Mining Co.*, 4 Cal. App. 78, 87 Pac. 280; *Yosemite G. M. & M. Co. v. Emerson*, 208 U. S. 31, 28 Sup. Ct. 196, 52 L. Ed. 374. At the first trial, *E. L. Emerson, Mrs. A. L. Emerson, F. F. Britton, and Jacob Miller* (predecessors in estate of plaintiff) and *Harry Argall and F. L. Argall* (predecessors in estate of defendant, Yosemite Gold Mining and Milling Company) were owners of the said mine, the former group owning eleven-twentieths and the Argalls nine-twentieths. The results of prior litigation, as found by the court (finding 5), settled "all questions involved in this case, except the question of the ownership of the nine-twentieths interest, which was for-

merly owned by the defendants, *Harry Argall and F. L. Argall*," now claimed by plaintiff company and defendant company, as against each other. So far as the conveyances of the disputed nine-twentieths affect the questions now here, the court found the facts as follows: The Argalls executed and delivered to Yosemite Gold Mining Company their deed on May 31, 1899, but it was not recorded until January 12, 1900. On May 30, 1900, the Yosemite Gold Mining Company executed and delivered to the Yosemite Gold Mining & Milling Company (defendant) its deed to the Argall interest, which was recorded September 28, 1900. On February 15, 1904, the Emersons, Britton, and Miller executed and delivered their deed to plaintiff conveying all their interest in said mine, which said deed was recorded February 29, 1904.

Two issues of fact were presented and the findings thereon constitute the basis of the judgment in plaintiff's favor, from which and from the order denying their motion for a new trial, defendants appeal. These two issues of fact were: First, that the Argall interest passed to the Emerson group of co-owners by reason of their having done the assessment work on the mine for the year 1898 and the failure of the Argalls to contribute their share thereof, in consequence of which they were "advertised out" under the act of Congress (Revised Statutes, § 2324 [U. S. Comp. St. 1901, p. 1426], and hence passed to plaintiff by virtue of the deed to it executed February 4, 1904; and, second, that the Argall interest was foreclosed under mortgage sale and plaintiff redeemed the property and thus became the owner.

First. The court found that the Emersons, Britton, and Miller performed the annual labor upon said mine for the year 1898, as required by the acts of Congress and the laws of this state (finding 7); and that the Argalls failed to perform any labor on the mine during that year and failed to contribute or pay to their co-owners their proportion of the said annual labor. (Finding 8.) The court further found that "after the expiration of the year 1898, and on or about December 20, 1899," the Emersons, Britton, and Miller, plaintiff's predecessors in interest, "gave the said defendants *Harry Argall and F. L. Argall*, and each of them, personal notice in writing requiring them, and each of them, to contribute and pay to the said" Emersons, Britton, and Miller, "within the time required by law, their proportion of the expenditure made by said" Emersons, Britton, and Miller, "and notifying them and each of them that if they, or either of them failed or refused, within the time required by law, to contribute and pay to the predecessors in interest of the plaintiff herein, their or either of their proportion of such

expenditures, that then, and in that event, their interest in said Slap Jack mining claim, or the interest of the one so failing or refusing to contribute and pay his proportion of such expenditures, would thereupon belong to and become the property of their co-owners, the said" Emersons, Britton, and Miller. (Finding 9.) The court next finds (finding 10) that "immediately after said notice was served upon said defendants Harry Argall and F. L. Argall, and on or about December 20, 1899, they delivered the same to the officers, agents, and representatives of the Yosemite Gold Mining Company, and also to the officers, agents, and representatives of the Yosemite Gold Mining & Milling Company, and that at all times thereafter each of said companies had full and actual knowledge of the contents of said notice" and full and actual knowledge that the Emersons, Britton, and Miller had performed the annual labor upon said mine in 1898, as aforesaid, and that the Argalls had not performed their part of said labor, and had not contributed to its cost as above stated, and said companies also had full and actual knowledge that the Argall interest would be forfeited to the co-owners who had paid for said labor. It is next found that neither of the Argalls nor either of said companies ever contributed towards said expenditures, "and that by reason thereof and of the statute in such cases made and provided the said" Argalls and said companies "forfeited to the said" Emersons, Britton, and Miller, plaintiff's predecessors, "all of their and each of their right, title and interest of, in and to the said Slap Jack mining claim, and the nine-twentieths interest therein which was formerly owned by the said" Argalls, "and the same is now the property of plaintiff herein." (Finding 11.) The court also found that the Emersons, Britton, and Miller "did not know and had no notice, constructive or otherwise, of the execution or delivery of the deed which was made by the defendants Harry Argall and F. L. Argall to the Yosemite Gold Mining Company, or of the deed to the Yosemite Gold Mining and Milling Company, until the said deeds were recorded."

[1] The section of the Revised Statutes, supra, among other things, provides as follows: "Upon the failure of any one of several co-owners to contribute his proportion of the expenditure required thereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owners personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication, such delinquent shall fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property

of his co-owners who have made the required expenditures." In the present case the notice was directed—"To Harry Argall and F. L. Argall." In all other respects it is conceded to have been sufficient. The claim of defendants is stated in their brief as follows: "The circumstance that the notice was in fact delivered to the officers of the Yosemite Company does not alter the case. It was not such a notice as would require the Yosemite Company to pay any attention to it. It was not addressed to the then holder of the nine-twentieths interest, nor was it addressed to the assigns of the former holder, and this we take to be a fatal defect."

It is claimed, and may at once be conceded, that the statute must be strictly construed, being one imposing a forfeiture. The statute does not prescribe the form of the notice or how the persons to whom it is addressed, or whom it is intended to notify, should be designated. The courts have dealt with the question in cases of publication in a newspaper. In *Elder v. Horseshoe Min. & Mill. Co.*, 149 U. S. 248, 24 Sup. Ct. 643, 48 L. Ed. 960, the notice was addressed "To Rufus Wilsey, his heirs, administrators, and to all whom it may concern." Wilsey was dead, and there was no administrator. It was contended that the heirs should have been named. It was held that, where by the local law title vested in the heirs and the administrator has but a lien on the real estate for administrative purposes, "it was not necessary that the notice should specifically name the heirs of the deceased owner."

In the case here, the notice was addressed to the Argalls and no others, and was served on them December 20, 1899, and by them immediately turned over to the Yosemite Gold Mining Company. It is true that on May 31, 1899, the Argalls had conveyed their interest to this company, but the court found, and the evidence was, that the co-owners did not know this fact, and the deed was not recorded, so as to give constructive notice until January 12, 1900; and it was in the following May that this company deeded the Argall interest to defendant company, which latter deed was not recorded until the following September. It seems to us that the service of notice by the Emerson group of co-owners upon the Argalls who had for a long time been their co-owners, and whom they still believed to be their co-owners and knew nothing to the contrary, was sufficient. If the notice had been made by publication there would be some reason in holding, as the cases seem to hold, that, in order to bind unknown owners, the notice should not only be directed to the ostensible or supposed co-owners, but to their heirs, administrators, and assigns. But, where the notice is addressed to and personally served upon the only known co-owners, it would be idle to further address the notice, for there would be no known persons upon whom to serve it.

So far as the Yosemite Gold Mining & Milling Company is concerned, it had no interest in the property until in May, 1900, and it is immaterial whether it was served. As to the Yosemite Gold Mining Company, it was served with the notice, for the evidence is that the Argalls passed it over immediately to the president of that company, and it therefore had, as the court found, full knowledge of its grantors' delinquency and that, unless their proportion of the assessment work for 1898 was paid, their interest would be forfeited to their co-owners. Before we could sustain defendants' contention, we should have to hold that a co-owner, who has done all the assessment work for a given year, could not "advertise out" his apparent co-owner by serving upon him the required written notice, but he must also give notice by publication addressed in the manner above pointed out in order to forfeit any interest some unknown person might have through an unrecorded deed from such co-owner. We cannot believe that the statute requires such course to be taken. However this may be, the co-owner did, in fact, receive the notice by which every fact required by the statute to be given in the notice was made known to it. The Yosemite Gold Mining Company thus had the opportunity to protect itself from the forfeiture, and cannot now be heard to complain of consequences produced by its own neglect.

Of the general purpose of the law of Congress, the Supreme Court said, in the case cited: "We are of opinion that the publication of notice was sufficient, although there was no administrator at the time of publication. It is unnecessary under this statute to publish notice to lienors. We agree with the Supreme Court of the state that the evident purpose and object of the law section 2324) were to encourage the exploration and development of the mineral lands of the United States, and the sale of the same, and that all the provisions of the law having been framed with that object in view, if the required work is not performed, after the expiration of the year, and notice of contribution properly served or sufficiently published, the rights of delinquents are absolutely cut off, though the failure to do the work may have been caused by the death of the locator or locators during the year. When a notice has been rightfully published under the statute, it becomes effective in cutting off the claims of all parties, and the title is thus kept clear and free from uncertainty and doubt."

Appellants claim that the Yosemite Gold Mining Company was in possession of the mine in 1899, and did a large amount of work on it, and that in October of that year it mortgaged the Argall interest which had been conveyed to it, and that from these facts it must be inferred that the Emersons had notice of the company's interest. The fact is that the possession of the company,

whatever it was, was based upon the title claimed by McWhirter on what he called the Jim Blaine mine, which was McWhirter's attempted relocation of the property afterwards determined to be without validity. The history of that litigation appears in former appeals, but does not appear in this record; neither does it here appear that the Yosemite Company, in 1899, did the work now claimed. It appeared without conflict that the Emersons knew nothing of any transfer by the Argalls to the Yosemite Company, or that it claimed under them, until the deed was recorded.

[2] It is also contended that the Argalls did more than their proportion of work on the mine in 1899. It appears from the testimony of the Argalls that the work done by them was for the sole purpose of unwatering the mine, so that it could be examined by a prospective purchaser. This work was not done for the development or improvement of the mine, nor was it done to enable the Argalls to perform work on the mine. They testified that it was not done as assessment work, nor was it intended to be so considered. Under such circumstances, we are satisfied that the work was not such as is contemplated by the United States statute.

Second. It appeared from the findings that on October 25, 1899, the Yosemite Gold Mining Company mortgaged certain mining property, "including among others the said undivided nine-twentieths interest of, in, and to the Slap Jack mining claim aforesaid to one Marsden to secure the payment of a certain promissory note"; that on December 9, 1901, Marsden assigned said note and mortgage to one Wemple; that on July 24, 1902, Wemple commenced an action to foreclose said mortgage, in which said action a decree of foreclosure was duly entered, and on September 17, 1906, an order of sale was made by the court and the interest of defendant in said nine-twentieths in said Slap Jack mine was sold to the assignee of plaintiff in the action, the said Wemple, for the sum of \$4,000 and certificate of sale was duly issued to him; that within 12 months thereafter, to wit, on October 11, 1907, "the Evalina Gold Mining Company, plaintiff herein, as the successor in interest of the defendants and judgment debtors in said action, redeemed said nine-twentieths interest in said Slap Jack mining claim from said sale, and on said day tendered to and paid to the said Fred Sutton, commissioner, as aforesaid, the amount necessary to redeem said nine-twentieths interest in said Slap Jack mining claim from said sale, to wit, the sum of \$4,480," and thereupon said commissioner delivered to plaintiff herein his certificate of redemption "showing said payment on redemption," and said commissioner thereupon paid said moneys received by him from the plaintiff upon said redemption to the said E. H. Wemple, who accepted and retained the same in full redemption of said nine-twentieths of said

claim and "ratified and acquiesced in said redemption."

No question is made by defendants as to the regularity of these proceedings by which plaintiff redeemed from this foreclosure sale. Defendants' contention now is that, "unless the advertising-out process was good, plaintiff derived no benefit from the redemption"; that, under the decision in *Wemple v. Yosemite Gold Mining Co.*, 4 Cal. App. 78, 87 Pac. 280, "when a redemption from a foreclosure sale is effected, its only operation is to discharge the mortgage debt, and leaves the property in the same status in which it stood before the mortgage was executed." Hence, it is claimed, as stated in the brief: "When the property was redeemed from the mortgage, the title reverted to the parties, just as it stood before the mortgage was given, so, in this case, if the Argalls had no interest in the property at the time the mortgage was given, when the property was redeemed from the foreclosure sale, the nineteenth interest in controversy reverted to the successors in interest of the Argalls."

Respondent contends that, as the successor in interest of the defendants in the *Wemple* foreclosure case, it redeemed said nineteenth interest from said sale, and paid said commissioner the sum of \$4,480, and took an assignment of the certificate of purchase, and was thus subrogated to all the rights which *Wemple* acquired under the foreclosure sale, and respondents' right to redeem cannot now be questioned. Attention is called to numerous cases holding that, where redemption is made by one disqualified as a redemptioner, still, if the purchaser at the sale accepts redemption, he will not be heard to question it (*White v. Costigan*, 134 Cal. 37, 66 Pac. 78); that under section 700 of the Code of Civil Procedure the purchaser at the sale "is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto," the effect of which is to pass "the legal title to the land, subject to defeasance by the happening of the condition subsequent"—i. e., the right of redemption by the mortgagor (*Pollard v. Harlow*, 138 Cal. 390, 71 Pac. 454, 648)—that the assignee of the purchaser stands in the latter's shoes, and, on failure of the judgment debtor to redeem within the statutory period, title passes without a sheriff's or commissioner's deed, which latter is but evidence of the title which vested by virtue of the sale, and that redemption is virtually a transfer of the certificate of sale. In short, it is contended that, the Yosemite Gold Mining Company having failed to redeem, respondent paid its indebtedness un-

der the statutory provisions as to redemption, and now holds whatever title that company had in the mortgaged premises through the operation of section 700 of the Code of Civil Procedure, and is entitled to all the rights given by law to any redemptioner.

We have stated the respective claims of the parties upon this second proposition on which the lower court held with the plaintiff. But, as we are clearly of the opinion that the judgment may safely rest upon the first question discussed, we do not deem it necessary to express an opinion upon the second point.

Third. Certain two alleged errors in the rulings of the trial court are assigned as prejudicial. F. L. Argall was a witness for plaintiff. He testified: "I delivered the notice [the notice served by the Emersons] to Mr. Berg [president of the Yosemite company] the same evening it was delivered to me. It was at the residence of Mr. Beggs [attorney for the Yosemite company] and Mr. Berg in San Jose. Q. What, if anything, was said to you at the time about the notice?" Defendants objected as immaterial and irrelevant, and the objection was overruled. "A. Mr. Beggs paid no attention to it. Mr. Berg was present at that time." Later Mr. Beggs was called as a witness for defendants. He had testified that he had been attorney for the Yosemite Gold Mining Company and the other company also. "Immediately after the notice to contribute was served upon Dr. Argall in the latter part of December, 1899, Dr. Argall handed the notice to me. Q. What did he [Dr. Argall] say to you at the time he handed you the paper? Mr. O'Brien: I object on the ground that it is incompetent, irrelevant and immaterial. I submit any declaration made by Dr. Argall cannot be binding upon the other party. It would be a conversation between Dr. Argall and his own attorney." The court sustained the objection. There was no answer to the first question. If anything was said to Dr. Argall, he does not state it. The answer that Mr. Beggs paid no attention to it (the notice) would not justify inquiry as to what Argall said at the time. He was not one of the plaintiffs and could not bind the plaintiff by his declarations. Furthermore, it could not be said to be rebuttal of testimony given by Argall, for he did not answer the question. He merely said that Mr. Beggs paid no attention to the notice. We discover neither error nor prejudice in the rulings.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

15 Cal. App. 751

PORTERS BAR DREDGING CO. v. BEAUDRY. (Civ. 790.)

(District Court of Appeal, Third District, California. April 3, 1911.)

1. APPEAL AND ERROR (§ 954*)—INJUNCTION (§ 135*)—INJUNCTION PENDENTE LITE—DISCRETION—REVIEW.

Whether an injunction pendente lite should be granted or refused rests largely in the discretion of the trial court, which will not be interfered with on appeal, unless abuse of discretion is shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818-3821; Dec. Dig. § 954; * Injunction, Cent. Dig. § 304; Dec. Dig. § 135.*]

2. INJUNCTION (§ 144*)—PRELIMINARY INJUNCTION—COMPLAINT—EVIDENCE.

Under Code Civ. Proc. § 527, providing that an injunction may be granted before judgment on a verified complaint, or on affidavits if the complaint or affidavits show satisfactory and sufficient grounds therefor, the complaint alone, though alleging ultimate, as distinguished from evidentiary, facts sufficient to justify injunctive relief, may authorize the issuance of a preliminary injunction, though not supported by affidavit or other proof.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 316; Dec. Dig. § 144.*]

3. APPEAL AND ERROR (§ 920*)—REVIEW—PRESUMPTIONS—PRELIMINARY INJUNCTION.

Where a preliminary injunction is granted by the trial court on a verified complaint alone, as authorized by Code Civ. Proc. § 527, it will be presumed on appeal from such order that it was satisfactorily shown to the court that grounds existed for such relief, and that in granting the same the court acted with due caution in regard to the rights of the opposing party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3717; Dec. Dig. § 920.*]

4. INJUNCTION (§ 144*)—PRELIMINARY INJUNCTION—VERIFIED COMPLAINT.

Under Code Civ. Proc. § 527, authorizing the granting of a preliminary injunction on a verified complaint alone, a complaint for injunctive relief need not allege evidentiary as distinguished from ultimate facts averred according to the ordinary rules of pleading.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 316; Dec. Dig. § 144.*]

5. WATERS AND WATER COURSES (§ 85*)—DIVERSION—PRELIMINARY INJUNCTION.

A verified complaint to enjoin defendant's obstruction of a water course alleged complainant's right to use the water by appropriation and also as a riparian owner, that such use was necessary for its purposes in the prosecution of its mining enterprises, and that by reason of defendant's acts in diverting the water of the river and its tributaries at a point above complainant's riparian land, complainant had been deprived and would be deprived by the continuance of such diversion of the use of the water, and would be and had been compelled to suspend its mining operations whereby defendant had inflicted on complainant a serious injury, and that the continuance of defendant's diversion of the water and the consequent continued suspension of complainant's mining operations would cause complainant irreparable injury. *Held*, that the complaint, without more, stated facts justifying the issuance of an injunction pendente lite.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 84-90; Dec. Dig. § 85.*]

6. WATERS AND WATER COURSES (§ 87*)—DIVERSION—PRELIMINARY INJUNCTION—VERIFIED COMPLAINT—INCONSISTENT ALLEGATIONS.

Under Code Civ. Proc. § 527, authorizing the issuance of an injunction pendente lite on a verified complaint, it was no objection to such an injunction in an action to restrain defendant from diverting the water of a stream that the complaint alleged that complainant was entitled to the unobstructed flow of the stream as the riparian owner, and also as an appropriator, in that such averments were inconsistent and contradictory; there being no fatal inconsistency between complainant's claim to a riparian right and the claim by appropriation.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 79; Dec. Dig. § 87.*]

7. WATERS AND WATER COURSES (§ 78*)—RIPARIAN PROPRIETOR—USE OF WATER.

It was no defense to an action by a riparian owner using the water of a stream for mining purposes to restrain defendant from diverting the water above the point of complainant's use that such use was not a riparian use, the rights of a riparian proprietor not being tested by the use or uses to which he puts the water or whether he uses it at all; he being entitled to restrain the diversion by others than riparian owners of water which, if unobstructed, would flow past his land, though no injury might be done to his present use of the water.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 67-69; Dec. Dig. § 78.*]

8. WATERS AND WATER COURSES (§ 87*)—DIVERSION—INJUNCTION—COMPLAINT.

Where a complaint by a riparian proprietor to restrain defendant from diverting the water of a river by taking water from a creek above complainant's riparian lands alleged that the creek was a tributary of the river, and that defendant diverted from the creek 150 inches of water, thereby lessening the flow of water in the river and depriving complainant of the flow to which it was entitled as a riparianist, an injunction pendente lite issued on such complaint was not objectionable because it was not proved by other evidence that complainant was either entitled to the flow of the water of the creek in a natural and usual channel through complainant's land, and that its land was riparian to the water of the creek, or that complainant was an appropriator of a water right with the particulars as to the means and method of complainant's diversion or appropriation and continuance of its use.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 79; Dec. Dig. § 87.*]

Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Suit by the Porters Bar Dredging Company against Fred Beaudry. From an order granting complainant's application for a preliminary injunction, defendant appeals. *Affirmed*.

Reed & Dozier and Jas. R. Tapscott, for appellant. O'Neill & Butler, Taylor & Tebbe, and A. R. Baldwin, for respondent.

HART, J. The plaintiff made an application to the court below for an injunction pendente lite in this action, and, after a hearing on an order to show cause why said application should not be allowed, an order granting a preliminary injunction was made

by the court. From the order granting said injunction this appeal is presented.

The evidence upon which the order appealed from was made consisted of the verified complaint of the plaintiff and two affidavits, filed by defendant, in opposition to the application for the provisional relief asked for. The purpose of the action is to secure a decree adjudging the plaintiff the owner of the lands described in the complaint and that they are riparian to the South fork of Scott river, in Siskiyou county; that the plaintiff is the owner and entitled to the possession of 3,500 inches, measured under a 4-inch pressure, of the waters of the said South fork of Scott river and the tributaries thereof, etc.; that the defendant be perpetually enjoined "from erecting and maintaining or erecting or maintaining any dam in the South fork of Scott river, or any of the tributaries thereof above the lands of plaintiff and that he may be enjoined and restrained from interfering with the flow of the waters of the said South fork of Scott river and its tributaries above the lands of plaintiff in any manner when there is only thirty-five hundred inches or less of water therein measured under a four-inch pressure"; that defendant pending this suit be enjoined from interfering in any manner with the flow of the waters of said river or its tributaries, etc., above plaintiff's lands.

[1] Whether in a given case an injunction pendente lite should be granted or refused is a matter resting largely in the discretion of the trial court, to which the application for such an order is presented. This proposition is well settled in this state. In *Raub v. Los Angeles T. Ry. Co.*, 103 Cal. 473, 37 Pac. 374, it is said: "The dissolution or continuance of a preliminary injunction is a matter largely within the discretion of the trial court, and, unless it appears from the records in the case that the discretion has been abused, the action of the court will not be disturbed on appeal"—citing the following cases: *Rogers v. Tennant*, 45 Cal. 184; *Patterson v. Board of Supervisors*, 50 Cal. 344; *Parrott v. Floyd*, 54 Cal. 534; *White v. Nunan*, 60 Cal. 406. In *Marks v. Weinstock, Lubin & Co.*, 121 Cal. 53, 53 Pac. 362, the rule as thus stated is reaffirmed.

Again, in the comparatively late case of *Miller & Lux v. Madera Canal, etc., Co.*, 155 Cal. 62, 99 Pac. 511, 22 L. R. A. (N. S.) 391, the court thus restated the rule: "This is an appeal from an order granting a temporary injunction. It would be superfluous to cite authorities to show that the granting or refusing of a preliminary injunction is a matter resting largely in the discretion of the trial court. Where there is a substantial conflict in the evidence regarding an issue which may affect the discretion of the court in passing upon the application for such injunction, the order will not on appeal be overthrown merely because there may be considerable or even preponderating evidence,

which, if believed, would have led to a contrary conclusion. The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that pending a trial on the merits the defendant should or that he should not be restrained from exercising the rights claimed by him. When the cause is finally tried, it may be found that the facts require a decision against the party prevailing on the preliminary injunction." Testing the record before us by the principles declared in the foregoing, we are unable to say that the trial court abused the discretion committed to it in a proceeding of this character by allowing the preliminary injunction.

The complaint avers that the plaintiff "is now, and for a period of three years or more last past has been, a corporation duly organized and existing under the laws of the state of New York, and has been, during said time, conducting a mining business and mining operations in the county of Siskiyou, state of California, and that it has fully complied with all the laws of said state so as to entitle it to exercise all its corporate functions therein"; that plaintiff "is now the owner, in possession of, and entitled to the possession of, and plaintiff and its predecessors in interest have been for a period of 25 years or more last past the owners of, in the possession of and entitled to the possession of, that certain real estate, in the county of Siskiyou, state of California, described as follows." Following this averment is a description of the lands from which, it is asserted, defendant has wrongfully so diverted the waters of Scott river and tributaries as to deprive plaintiff of the full flow or quantity of waters to which it is entitled, either as a riparianist or an appropriator. The complaint, in the first count thereof, then proceeds to allege: "That the South fork of Scott river is a natural stream of water which in its natural channels flows through the lands of plaintiff above described, and during all the times above mentioned has so flowed through and over said lands, except as hereinafter stated, and all of said lands are riparian to said South fork of Scott river; that on or about the 11th day of August, 1908, defendant wrongfully and unlawfully and against the will and without the consent of plaintiff, by means of a dam placed in Jackson creek which is tributary to said South fork of Scott river, diverted away from said tributary about 150 inches of the waters thereof, and carried the same away from said Jackson creek at a point above the said lands of plaintiff herein, and thereby deprived said lands of plaintiff of the natural flow of the said South fork of Scott river to the extent of 150 inches measured under a 4-inch pressure." In the second count of the complaint it is alleged: "That during all the time that plaintiff and

its predecessors in interest have owned their said lands it has diverted, used, and appropriated 3,500 inches measured under a 4-inch pressure of the waters of the said South fork of Scott river when there was as much as 3,500 inches measured under a 4-inch pressure flowing in said stream, and it has appropriated, diverted and used all of the waters therein when there was less than 3,500 inches measured under a 4-inch pressure flowing therein, and during all of said times it and its predecessors in interest have, by means of ditches, conveyed said waters to said lands and there used the same for mining purposes; that the said lands of plaintiff hereinbefore described and all of said lands are placer mining lands and chiefly valuable for the deposits of gold contained therein, and, in order to profitably work and operate said lands as a mine, it is necessary to have 3,500 inches of water for mining purposes and said water is necessary therefor and beneficial for such purpose; that on or about the 11th day of August, 1908, and while plaintiff was engaged in its mining operations and at a time when there was not 3,500 inches of water measured under a 4-inch pressure flowing in the said South fork of Scott river and its tributaries, defendant wrongfully and unlawfully and without the consent of plaintiff, by means of a dam which he wrongfully and unlawfully placed in Jackson creek, which is a tributary of said South fork of Scott river, diverted away from said Jackson creek and away from said South fork of said Scott river about 150 inches of water measured under a 4-inch pressure; that said water so diverted by defendant was so used by him as to wholly deprive plaintiff thereof; that on or about the 16th day of August, 1908, plaintiff broke the dam of said defendant so erected in Jackson creek as aforesaid and restored the waters so that they would flow down said Jackson creek and into the South fork of Scott river, and thus be available for plaintiff's use, but said defendant ignoring plaintiff's right in the premises again constructed said dam and again diverted the waters of said Jackson creek away from said creek, and deprived plaintiff thereof, and defendant prevented by force the employés of plaintiff from removing said dam and restoring said waters again to their natural channel, and since said last-mentioned day has maintained said dam, diverted said waters, and threatens to continue so to do; that by reason of said acts of defendant and the diversion by him of said waters of the South fork of Scott river and its tributaries, plaintiff has been compelled to entirely suspend its mining operations and has thereby suffered great injury, and has been damaged in the sum of \$4,500, and that such damage will continue at the rate of \$300 for each and every day that defendant hereafter maintains said dam, diverts said waters, and deprives said plaintiff of the use thereof; that the said acts of defendant, if continued,

will cause plaintiff irreparable injury, and tend to lessen the value of its said mining lands, and, unless restrained by order of this court, defendant will gain as against plaintiff herein a prescriptive right to the said waters of Jackson creek, the said tributary of said South fork of Scott river, and said waters will be wholly lost to plaintiff herein; that the use of plaintiff and its predecessors in interest of the said waters of the said South fork of Scott river and its tributaries during all the time they have used the same have been peaceable, quiet, open, notorious, continuous, and exclusive, except for the interference made by defendant as hereinbefore set forth and under a claim of right and title thereto and such use has been adverse to all the world."

It will be observed that the complaint declares upon two different and distinct claims of title to the use of the water flowing in said Scott river to which plaintiff alleges that it is entitled: (1) That the lands described in the complaint are riparian to said South fork of Scott river; (2) that plaintiff is entitled to the right to use the quantity of said waters stated in the complaint by appropriation.

The affidavit of the defendant himself consists largely of specific denials, in the language of the complaint itself, of the facts set forth in the latter. There are some allegations contained in said affidavit of a right, acquired by appropriation, in defendant to the use of the waters referred to in the complaint for mining, agricultural, domestic, and irrigation purposes. But most, if not all, these last-mentioned allegations involve, at best, only legal conclusions or conclusions of the affiant. It is unnecessary to reproduce these averments or the substance thereof here, for it is sufficient to say that, even if they involved the statement of probative facts, it would, under the authorities to which we have referred, still rest with the trial court to decide, upon the whole record as made upon the preliminary issue, whether an injunction pendente lite should or should not be granted.

The affidavit of one Hayden, filed on behalf of the defendant, merely declares "that the statements contained in the said affidavit of said defendant" concerning all the important matters respecting which said defendant deposes "are true and correct," and manifestly such an affidavit can have no greater force than to corroborate the conclusions contained in the defendant's affidavit.

[2] But it is objected that the complaint itself is insufficient, as evidence, to sustain the order of the court granting the injunction, since its averments are of ultimate rather than of probative facts. Section 527 of the Code of Civil Procedure provides that "an injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits, if the complaint in the one

case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor. * * * We are fully mindful of the general rules which are laid down for the guidance of the courts in the matter of applications for an injunction pending the litigation, and before the cause in which such temporary relief is sought is heard upon the merits. As is said by Mr. Joyce, in his work on Injunctions, "an injunction of this character [temporary] is said to be an act of extraordinary power on the part of the court, in behalf of either party to an action before trial, is always cautiously granted, and it must fairly appear upon all the papers presented, before such injunction is granted, that the plaintiff will suffer irreparable injury if it be not issued, or that it is necessary to preserve the estates of the parties, or some sufficient cause showing the need of hasty action exists." As seen, our Code provides that a preliminary injunction may be granted if it is satisfactorily shown by the complaint or the affidavits, if any be filed, that sufficient grounds exist therefor.

[3] Obviously the question whether it is satisfactorily shown by the verified complaint or the affidavits that grounds exist for the granting of an interlocutory injunction must be determined by the court to which such application is submitted in the first instance. If, as here, it be granted on the verified complaint alone, and the facts stated are sufficient to warrant the granting of the temporary relief so sought, and the same has been granted, this court is bound to assume that it has thus been satisfactorily shown to the court that grounds exist for such relief, and that in granting the same the court has acted with due caution and regard for the rights of the opposing party.

[4] Nor can this court say, merely because the complaint contains the statement of none but ultimate facts, that the trial court abused its discretion in granting the injunction. The statute, as seen, expressly provides that a preliminary injunction may be granted on a verified complaint, and it is not for a moment supposable that the Legislature intended that the complaint which may be used for that purpose should be any different, in the character of its averments, from any other complaint in a civil action, or from a complaint whose sole purpose is to subserve the office of a pleading. In other words, we do not understand the phrase, "verified complaint," as used in the section of the Code of Civil Procedure authorizing a court to grant a preliminary injunction upon the averments thereof, means that such complaint shall allege, for the purposes of the application for the order, probative as distinguished from ultimate facts. If the ultimate facts pleaded warrant the granting of the injunction, then, in the absence of such a countershowing as would fully overcome or impeach the effect of the averments of

the complaint, or as would produce serious doubt whether the right to the temporary relief claimed by the complaint should be granted, it would be the duty of the court to grant such relief. And, as stated, whether the showing made by the complaint is sufficiently negatived by the opposite party to compel the refusal of the temporary injunction, is a matter the determination of which rests in the sound discretion of the trial court, and with which discretion interference by an appellate court is not justified unless it clearly appears, from the whole record, that there has been an abuse thereof.

Of course, the allegations of the complaint should disclose a clear right to an injunction pendente lite by showing that the plaintiff is entitled to the exclusive enjoyment as against defendant of the right with which it is alleged the defendant is wrongfully interfering and threatens to continue to so interfere. The allegations should, by appropriate averments, clearly show that irreparable injury to plaintiff would follow the refusal of the court to allow the temporary relief, and that such injury could not adequately be repaired or redressed by way of pecuniary compensation or damages.

[5] The complaint in this action, it will be observed, alleges plaintiff's right to use the waters in dispute by appropriation and the right to the same as a riparian owner; that the use of said waters is necessary for its purposes in the prosecution of its mining enterprises; that, by reason of the acts of defendant in diverting the waters of Scott river and its tributaries, at a point above the lands of plaintiff riparian to said river and its tributaries, and to a certain quantity of which waters plaintiff also claims the right by appropriation, the rights of said plaintiff, as a riparianist, have been and will be interfered with, and that, as an appropriator, it has been and will be deprived of the use of the waters of said streams necessary for its aforesaid purposes; that, by reason of the said acts of defendant in so diverting said waters, the plaintiff has been compelled and is still compelled to suspend its aforesaid mining operations, and that thereby the defendant has inflicted upon plaintiff serious injury, and that the continued diversion of said waters by defendant and the consequent continued suspension of such mining operations by plaintiff will cause plaintiff irreparable injury. Assuming that other points against the sufficiency of the complaint to justify the order granting the preliminary injunction, to which points we shall later refer, are without merit, the averments of the complaint, uncontradicted, are sufficient, in our opinion, to warrant and sustain the action of the court in granting the injunction. At any rate, said averments are of such a character as to justly forestall a declaration by this court that the court below abused its discretion in the matter. The

question then arises whether the showing made by the defendant in rebuttal of the averments of the complaint is such as to so overcome the force of the latter as to warrant this court in declaring that the granting of the order was an abuse of the discretion vested in the trial court. It is obvious that we cannot so declare unless we are prepared to say that the court below should have accepted as true the denials and conclusions contained in the defendant's affidavits in preference to the averments of the complaint, or that the denials and allegations contained in said defendant's affidavits were of a character to create so much doubt as to plaintiff's showing or claim of right, either as a riparianist or an appropriator, to the temporary remedy granted as to make it clear to this court that the trial court exceeded the bounds of a sound discretion in allowing the order. We cannot say that the record presents such a situation to our minds.

As before stated, the statute contemplates and intends, of course, that the showing for a preliminary injunction must satisfy the court to which the application therefor is made and not a court of review. The latter can interfere only where it may be said from the record as a matter of law that the showing made is not sufficient to satisfy the court below that grounds for the injunction existed, or such as to clearly indicate that the action of the trial court in granting the injunction was arbitrary rather than the result of the exercise of a sound discretion. It is very clear that some power must be left to the trial judge to determine whether the countershowning made by the defendant is of sufficient force to overcome the effect of the affirmative showing by the plaintiff, and where, as here, the ultimate facts upon which plaintiff bases its claim for the protection and preservation of its alleged rights against the acts of defendant until the main question to be tried shall be finally adjudicated are met by a reply consisting likewise of the statement of ultimate facts, in so far as such reply undertakes to affirmatively disclose that the acts charged against the defendant are only in the exercise of his own rights, then we cannot perceive how a court of review may be justified in saying that the decision of the trial court on such a record involves an abuse of discretion, particularly when we keep in mind the fact that the Code expressly provides that a preliminary injunction may be granted on a verified complaint.

[6] But counsel point out some alleged inconsistencies and defects in the complaint which, it is contended, disclose such inherent weakness in the evidence as thus presented as to make it clearly appear that the court was wholly unwarranted in granting the application for the temporary injunction. In this regard, the point is first made that while, as a pleading, the complaint is not subject to criticism because there are unit-

ed therein two separate and distinct causes of action for practically the same purpose, which causes of action are, in certain particulars, antagonistic to each other, yet, where, as here, the averments of such pleading are used as evidence or for the purpose of establishing the fact in issue, such averments must not be inconsistent or contradictory in any material respect, otherwise the effect of the averments of the one cause of action will be to impeach the averments of the other. Or, to adopt the language of the brief, "it would be unconscionable to permit the party to introduce contradictory evidence or proof upon any subject involved in the action. When evidence upon which the party relies is introduced, it must be harmonious and consistent throughout all its parts." We think there are several answers to the foregoing proposition. First, as we have seen, the plaintiff, having upon the filing of its complaint and upon an order to show cause why a temporary injunction should not be granted, was entitled to the temporary relief upon its verified complaint, assuming that the latter makes a proper case. Section 527, Code Civ. Proc.; *Falkenburg v. Lucy*, 35 Cal. 60, 95 Am. Dec. 76. If the complaint is sufficient as a pleading, it is then, by virtue of the provisions of the Code to which we have referred, sufficient as the predicate of an order granting the preliminary injunction or as evidence for that purpose. If there be united in the complaint two different causes of action, both seeking practically the attainment of the same ultimate object, it does not follow, merely because certain averments of the one cause of action so pleaded may be in some material particulars contradictory to or inconsistent with those of the other cause stated, that the temporary injunction should be refused, if either or both causes disclose a reason for the granting of such temporary relief.

Nor do we understand it to be or to have ever been the rule that evidence addressed to the proof of a particular fact, to be of any value, "must be harmonious and consistent throughout all its parts." The general rule is that it is for the trier of the facts to determine the value, the weight, and the effect of evidence, from whatever source it may come. Indeed, if it were the rule that a party could not prevail unless the evidence he produced to establish his case or his defense was "harmonious and consistent throughout all its parts," there could seldom ever be success in an attempt to prove an ultimate fact or to establish a defense.

But we can perceive no inconsistency, fatal to plaintiff's right, if it shows any at all, to the preliminary injunction, between its claim to a riparian right to the waters of the streams mentioned in the complaint and a claim to such waters by appropriation. We know of no reason why a party may not acquire by appropriation a right to the use of the water of a stream to which his lands

are riparian. And, in such case, where another, without right, diverts the water of such stream at a point above the lands of such riparianist and appropriator and thus wrongfully so obstructs the customary flow of the stream as to deprive the latter of the full use of the water to which he is entitled, either as a riparian proprietor or an appropriator, then we can see no impropriety in the injured party pleading and proving, if he can, such wrongful interruption of his right to the water both as a riparianist and as an appropriator. Indeed, the proposition here we conceive to be practically no different from a case where a plaintiff might allege and so be allowed to prove a conventional title to land and at the same time allege and be allowed to show, if found necessary, that he had acquired title thereto by adverse possession. In the case here, it may happen that the plaintiff may utterly fail to establish in himself riparian ownership of the waters of the South fork of Scott river and its tributaries, yet may have ample proof to establish his right to use such waters as an appropriator, or vice versa. If, in either case, as is the charge, the defendant is wrongfully interrupting plaintiff in the full exercise of the right to the water from either source—i. e., either as a riparian owner or an appropriator—then certainly it would be entitled to the prohibitory relief for which it prays. In other words, the fact that plaintiff might not be able to sustain by proof one cause of action stated in the complaint would not constitute any reason for denying to it relief as to the other cause of action, if the latter be supported by sufficient evidence.

[7] As against the right of plaintiff to be protected in the enjoyment of its riparian rights, there is no merit in the suggestion that the complaint in the first alleged cause of action stated therein discloses that the purpose for which plaintiff has used and intends to use the water from the South fork of Scott river is and will not be a riparian use thereof, and that, therefore, said cause of action fails to show that plaintiff has been or will be injured by the alleged wrongful acts of defendant. The rights of a riparian proprietor as such are not to be tested by the use or uses to which he puts the riparian waters, or whether he uses them at all or not. If one's lands are riparian to a stream of water, the owner of the lands cannot be divested of his rights as a riparianist merely because he may either put the waters flowing in such stream to other than a riparian use or not use them for any purpose at all. Nor would a nonriparian owner of the waters of the same stream for such reason alone be permitted to divert the waters of such stream. The right of riparian proprietors, says the Supreme Court, in *Huffner v. Sawday*, 153 Cal. 91, 94 Pac. 426, "to restrain the diversion, by others than riparian owners, of water which would, if undisturbed, flow past their lands, does not rest upon

the extent to which they have used the water, nor upon the injury which might be done to their present use. Even if these plaintiffs had never made any use of the water flowing past their land, they had the right to have it continue in its customary flow, subject to such diminution as might result from reasonable use by other riparian proprietors. This is a right of property, 'a part and parcel' of the land itself (*Duckworth v. Watsonville W. & L. Co.*, 150 Cal. 520 [89 Pac. 338]), and plaintiffs are entitled to have restrained any act which would infringe upon this right."

[8] But it is further objected against the order appealed from that the averments of the complaint should have been fortified by evidence in the form of an affidavit that either the plaintiff "was entitled to the flow of the waters of Jackson creek through a usual or natural channel through plaintiff's land, and that the lands claimed to be owned by plaintiff were in some form riparian to the waters of Jackson creek, or such evidence should have been furnished by plaintiff showing or tending to show that plaintiff was an appropriator of the water right claimed by the complaint, together with the particulars as to the means and method of the diversion or appropriation by plaintiff and the continuation of its use and the necessity therefor." As seen, there was either one of two ways, pointed out by the Code, by which plaintiff was entitled to ask for and receive, if its showing was satisfactory to the court, the interlocutory injunction: (1) By and on the complaint; (2) by and on affidavits. Plaintiff adopted the first course, and, if the allegations of the complaint were sufficient, the court was authorized to grant the order on said complaint, in which it is alleged that Jackson creek is a tributary of the South fork of Scott river; that defendant diverted away from said Jackson creek 150 inches of water, thus and thereby lessening the flow of water in Scott river, and therefore necessarily depriving plaintiff of the flow in the latter to which it was entitled as a riparianist. These averments were sufficient to show plaintiff's riparian right to the flow of water in any creek or stream tributary to and emptying its waters into said river. It is hardly necessary to suggest that no one has a right to interfere with riparian rights by diverting the waters of a stream which is a tributary of the stream to which the lands of a party are riparian any more than to interfere with such rights by diverting the flow from the main stream itself. It would be only commonplace to say that interference with or diversion of the sources from which a creek or river obtains its supply of water is an interference with or diversion of the waters of the stream itself.

As to the objection to the complaint on the ground that it fails to state, or is unsupported by an affidavit that does state, the par-

ticulars or the circumstances by which plaintiff acquired the water right claimed by it by appropriation, we need only repeat that the complaint itself is sufficient in this regard without an affidavit, and that the statute requires no affidavit where the application is made on the complaint. In such case, the application must stand or fall on the averment of ultimate facts. Whatever may be required in affidavits where they are used on such application—whether they must or must not state, as is usual in such documents, probative facts—the statute does not require the complaint in such a case to be more than a pleading. The pleading of the particular acts required to be done in order to acquire a water right by appropriation would amount to nothing less than the pleading of probative facts. If the Legislature had intended that, where an application for a preliminary injunction is made upon the complaint, the latter should, for that purpose, set forth probative facts, or that the complaint, for that purpose, should be in the nature of an affidavit or a deposition, or that it should be supported by an affidavit, it would certainly have said so in plain terms. The Legislature not having so declared, we take it that it was intended that the complaint upon which such an order might be made need be no more than a pleading, containing, of course, a sufficient statement of the ultimate facts to satisfy the court that there exist grounds for the temporary relief.

We cannot say from the record before us that the trial court abused its discretion in granting the order from which this appeal is prosecuted.

The order is therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

15 Cal. App. 603

HOTCHKISS v. HANSBERGER et al.
(Civ. 760.)

(District Court of Appeal, Third District, California. March 15, 1911.)

1. TAXATION (§ 667*)—TAX SALES—SALE FOR EXCESSIVE AMOUNT—DEEDS—VALIDITY.

A tax deed which contains an itemized statement of the taxes, penalties, and costs, and which shows on its face that the amount for which the land was sold was in excess of the actual taxes, penalties, and costs due, is void, and this is true, though the excess is but \$1.40.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1350; Dec. Dig. § 667.*]

2. TAXATION (§ 667*)—TAX SALES—DEEDS—VALIDITY.

The maxim de minimis has no application to delinquent tax sales, but the law must be strictly followed.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 667.*]

3. TAXATION (§ 665*)—SPECIAL SCHOOL TAX—PENALTIES—COSTS.

A special school tax is a part of a tax levy, and cannot be included in penalties or costs accruing on the tax.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 665.*]

4. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—ERRONEOUS EXCLUSION OF EVIDENCE.

In a suit to quiet title by the removal of a tax deed, which shows on its face a sale for a sum in excess of the amount actually due for taxes, penalties, and costs, the error, if any, in excluding the assessment book and delinquent list, not showing that the amount of the penalties and costs recited in the deed was legally computed, was not prejudicial to defendant claiming under the tax deed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1056.*]

5. TAXATION (§ 800*)—TAX SALES—SUIT TO REMOVE VOID TAX DEED—TENDER OF TAXES AND PENALTIES.

An owner suing to quiet title by the removal of a tax deed void on its face need not as a condition precedent pay to defendant, claiming under the deed, the amount of the taxes, penalties, and costs paid by him for the property at the tax sale; the payment being voluntary.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1586; Dec. Dig. § 800.*]

Burnett, J., dissenting in part.

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by O. E. Hotchkiss against L. J. Hansberger and others. From a judgment for plaintiff and from an order denying a new trial, defendants appeal. Affirmed.

S. L. Strother and J. R. Webb, for appellants. Snow & Freeman, for respondent.

HART, J. The object of this action is to secure a decree quieting plaintiff's title to certain property which is described in the complaint. The court awarded to plaintiff judgment as prayed for, and it is on an appeal from said judgment and also from the order refusing defendants a new trial that the cause is brought to this court.

The property involved in this controversy consists of a large number of town lots situated in the town of Selma and in additions thereto, in Fresno county. Defendants claim title to said lots through a sale thereof and a deed executed thereupon by the tax collector of Fresno county to satisfy the taxes levied on a mortgage subsisting on said lots. It was in fact stipulated by the parties "that the plaintiff was at the commencement of this action, and is now, the owner of the property in controversy, unless the title thereto was divested by a deed from the tax collector of Fresno county, dated the 18th day of July, 1900, to the state of California, and by a deed from the state of California, dated the 26th day of October, 1903, to the defendant herein, L. J. Hansberger."

There are but two important points discussed in the briefs and upon which the appellants insist that they are entitled to a de-

cision by this court, viz.: (1) That the court erred in excluding as evidence the deed from the tax collector to the state and the deed from the state to the defendant, L. J. Hansberger. (2) That the plaintiff is obliged to refund the taxes paid by defendant as a condition precedent to his right to a decree quieting his title, and that, the plaintiff having failed to perform this equitable prerequisite, the judgment cannot therefore stand. On the 3d day of July, 1895, the property was sold by the tax collector to the state for taxes delinquent for the year 1894 on a mortgage subsisting thereon, and, no redemption having been made by the owner of the property within five years from the date of said sale to the state, the tax collector thereupon, in obedience to the terms of section 3785 of the Political Code, executed to the state a deed thereto. The ground upon which the court refused to receive in evidence the deed from the tax collector to the state was that said deed itself upon its face shows that it is illegal and void for the reason that it appears therefrom that the amount for which the lots were sold to the state is in excess of the amount of the taxes levied on and the penalties and costs which accrued thereon by reason of the default in the payment of said tax against said property. The rejection of the deed from the state to Hansberger was based upon the ground that the state, having no title, could, of course, convey none, and that said deed was therefore without any probative value. The last-stated proposition is obviously correct if the objection to the admission of the deed to the state be sound, to the consideration of which proposition we will now address ourselves.

[1] In the outset it may be stated that it is not contended by counsel for respondent that it is necessary for the tax collector to recite in tax deeds the items constituting the total of the penalties, costs, and charges. To the contrary, it is conceded by counsel that nothing more is required by the law in this regard than the insertion in such deeds of a statement of the total amount of the taxes, penalties, costs, etc. But it is claimed by respondent that where a tax deed does contain an itemized statement of the taxes, penalties, and costs—that is, a segregation of the several items, together with a designation of the amount of each, going to make up the total sum for which the property has been sold to satisfy the tax lien—and it therefrom appears that the amount for which the property has been sold is in excess of the actual taxes, penalties, and costs due thereon, such deed thus discloses upon its face that it is void under the authorities bearing upon that proposition. That this contention involves a correct view of the law is no longer an open question. *Treadwell v. Patterson*, 51 Cal. 639, and cases therein cited; *Harper v. Rowe*, 53 Cal. 233; *Axtell v. Gerlach*, 67 Cal. 483, 8 Pac. 34; *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485, 8 Pac. 22; *Knox v. Higby*, 76 Cal.

264, 18 Pac. 381; *Simmons v. McCarthy*, 118 Cal. 622, 50 Pac. 761; *Miller v. Williams*, 135 Cal. 183, 67 Pac. 788. The deed to the state contains the following recital: "That the amount of the tax so levied on said property was the sum of \$26.13 as follows: For county purposes the sum of \$16.52; for state purposes, the sum of \$9.61. That the amount of said tax was segregated into installments in accordance with law, and the costs and charges which have since accrued thereon amount to the further sum of \$5.15." The property was therefore sold to the state for the total sum of \$31.28. Section 3731 of the Political Code provides that "the auditor must compute, and enter in a separate money column in the assessment book, the respective sums, in dollars and cents, rejecting fractions of a cent, to be paid as a tax on the property therein enumerated, and segregate and place in the proper columns of the book the respective amounts due in installments. * * *" It is provided by section 3756 of said Code that, in case the first installment of the taxes is not paid on the last Monday in November of each year at 6 o'clock p. m., such taxes are delinquent, and that thereupon the tax collector must add to such taxes, and thereafter collect, for the use of the county, the sum of fifteen per cent. thereon, and, if such taxes be not paid "before the last Monday in April next succeeding, at 6 o'clock p. m.," there shall be collected by the tax collector an addition of 5 per cent. thereon. It is further provided by said section that, if the second installment of taxes is not paid on the last Monday in April, then 5 per cent. is added to such second installment.

Section 3770, Id., provides: "The tax collector must collect, in addition to the taxes due on the delinquent list, together with the penalties for delinquency, fifty cents on each lot, piece, or tract of land separately assessed," etc. Under the foregoing provisions of the Political Code, the amount which should have been added by the tax collector to the amount of the tax, \$26.13, would be as follows, rejecting, as section 3731 of said Code authorizes to be done, fractions of a cent:

15 per cent. of first installment (one-half) of said tax.....	\$ 1.95
5 per cent. of \$13.06.....	.65
5 per cent. of second instalment, \$13.06.....	.65
Amount required by section 3770, Political Code.....	.50
Total to be added to tax.....	\$ 3.75
Add tax	26.13
Total, tax and penalties, etc.....	\$29.88

The deed recites, it will be recalled, that the amount of the costs and charges added to the tax was the sum of \$5.15, bringing the amount for which the land was sold up to the sum of \$31.28, which sum is larger than the amount for which the tax collector was authorized to sell the property by the sum of \$1.40. In other words, the difference between the amount of the costs and charges

added to the tax by the tax collector and the amount which the law authorized him to add to said tax for costs and charges is the sum of \$1.40.

[2] Under this showing the sale of the property involved to the state was void. In *Simmons v. McCarthy*, 118 Cal. 625, 50 Pac. 762, it is said: "It is not enough to say that the difference is trifling. The maxim 'de minimis' has no application in proceedings to transfer title by virtue of statutory proceedings for the enforcement of a tax." And all the cases heretofore cited so hold. The reason of the rule is that, where it is sought to divest a person of his title to property for delinquency in the payment of a tax in invitum imposed upon such property, the law authorizing the tax must be followed with substantial strictness, and in the sale of such property to satisfy the tax lien a more flagrant violation of the taxpayer's rights can hardly be imagined than in imposing upon his right of redemption a greater burden than the law anywhere authorizes. If the tax collector may be allowed to add an excess of \$1.40 to the amount actually due for penalties and costs, he may, with equal reason, add a greater sum. The principle would be the same in both cases. But, as stated, he has no authority to add to the tax and sell the property for any sum, however small, in excess of the amount actually due. In the case of *Simmons v. McCarthy*, supra, the excess was only three cents, and the court held the sale void for that reason. It is very clear that the tax collector sold the property in the case at bar to the state for a larger sum than that to which the tax, penalties, and costs amounted, and that said sale was for that reason absolutely void. Said sale being void, the deed executed by the tax collector to Hansberger was of necessity without force and conveyed no title. Both instruments were therefore without the slightest probative value as supporting defendant's claim of title to the land in dispute, and it necessarily follows that the court's ruling excluding them as evidence for that purpose was proper.

[3] But the defendants contended in the court below and contend here that the assessment book and the delinquent list, if allowed in evidence, would have disclosed that the property sold for no more than the precise total amount of the taxes, penalties, costs, and charges, and that the court erred by its refusal to allow those records to be received in evidence. It appears from the assessment book that, in addition to the state and county taxes, amounting to \$26.13, levied on the property, there was, at the same time, levied thereon a special school tax of \$1.37. This last amount was evidently included in the sum of \$5.15, which the deed recites constituted the "costs and charges which have since accrued" on the amount of the tax, \$26.13.

Obviously the said special tax could not properly be counted as or included in the

penalties, costs, etc., accruing on the tax. It constituted a part of the tax levy itself on the land, and therefore the amount of the tax for the year of 1894 on said land should have been, in lieu of the sum of \$26.13, the sum of \$27.50, on which basis the penalties, etc., should have been computed. And, computing the penalties and charges upon said sum of \$27.50, it will be seen that the property was sold to the defendant for 14 cents less than the amount actually due, as the following will show:

First installment	\$13.75
15 per cent. of said sum	2.06
5 per cent. of said sum	.68
Second installment	13.75
5 per cent. of said sum	.68
Costs	.50
Total, penalties, and costs	\$ 3.92
Tax	27.50
Total tax, penalties, etc.	\$31.42
Property sold for	\$31.28

[4] It is thus to be observed that from whatever viewpoint the assessment book may be considered there is not disclosed thereby any evidence tending to show that the amount of the penalties and costs, as recited in the deed, was legally made up or computed upon a legal basis. On the one hand, said book shows, if anything at all, that the amount of penalties, etc., as indicated by the deed, was erroneously computed by reason of the unauthorized inclusion therein of the item of \$1.37 for the special school tax. As before stated, it was the plain duty of the auditor to have added the special tax to the general tax, and upon the total thereof the duty of the tax collector to make the computation of penalties, costs, etc. But, having without legal right included the special tax in the amount of costs and penalties, it follows that said tax was in legal effect entirely omitted from consideration for any purpose, thus leaving as the sole basis for the computation of penalties and costs the general tax in the sum of \$26.13. And, as we have shown, the amount of the penalties and costs thus computed would be the sum of \$3.75, in lieu of the sum of \$5.15, as recited in the deed.

On the other hand, as seen, the assessment book discloses that, if the auditor had properly done his duty and so added to the general tax the item of \$1.37 for the special school tax, the result of the computation of the penalties and costs accruing thereon would be an excess of 14 cents in the total for which the property should have been sold over the total for which it was sold. It is thus very plainly to be seen that the assessment book would not in any view have aided in the slightest degree in affording any legal justification for the excess in the amount of the penalties and costs, as recited in the deed, over the amount actually authorized on the amount of the tax as indicated by said deed. The ruling of the court

rejecting the assessment book, and the delinquent list was therefore not erroneous—at any rate it was clearly without prejudice.

We may parenthetically observe that no authorities have come to our attention as to the precise legal effect upon the sale of property for less than the total amount of the tax and accruing costs and penalties. The Code requires that the sale shall be for the amount of the tax, penalties, and costs, and it is, of course, very clear that the tax collector has absolutely no more authority to sell it for less than for more than that amount. Upon principle, we should say, if it were necessary to decide the question here, that a sale for less than the total amount due the state for taxes, penalties, and costs would be void, since it would not be a sale according to law, and, besides, it is very clear that the state would thus be defrauded of its just dues.

[5] The point that the court erred in rendering judgment in favor of plaintiff without compelling the latter to first pay to defendant the amount of the taxes, penalties, and costs paid by him for the property in dispute at the tax sale cannot be maintained. In other words, defendant is not in a position to demand the application here of the equitable maxim that he who seeks aid from equity must do so prepared and willing to do equity. All the cases to which our attention has been called bearing upon this proposition, except that of *Flannigan v. Towle*, 8 Cal. App. 230, 96 Pac. 507, have been where the owner of the property has proceeded against the tax collector or other officer concerned with the levy of the assessment or the enforcement of the tax, and attempted to enjoin or otherwise invalidate the sale of the property for the taxes levied upon it. See *Weber v. City of S. F.*, 1 Cal. 457; *S. J. G. Co. v. January*, 57 Cal. 614; *County of Los Angeles v. Ballerino*, 99 Cal. 597, 32 Pac. 581, 34 Pac. 329; *Esterbrook v. O'Brien*, 98 Cal. 673, 33 Pac. 765; *Ellis v. Witmer*, 134 Cal. 253, 66 Pac. 301; *Couts v. Cornell*, 147 Cal. 561, 82 Pac. 194, 109 Am. St. Rep. 168; *Steele v. County of San Luis Obispo*, 152 Cal. 785, 93 Pac. 1020; *San Diego Realty Co. v. Cornell*, 150 Cal. 637, 89 Pac. 603; *San Diego Realty Co. v. Cornell*, 151 Cal. 200, 90 Pac. 1130. In those cases it is held that the owner of the property is not entitled to equitable relief unless he comes prepared to do equity and so pay the taxes justly due against the property as to which he has asked relief. Of course, a more appropriate application of the equitable maxim in question could not be met with than in those cases where the owner of the property is attempting to have his property relieved from the lien of the tax, justly due the state whether properly levied or not, by some proceeding against the state or its fiscal agents. Every owner of property owes this debt to the state in any event. He must bear his just proportion of the burdens of govern-

ment, and equity will not permit him to escape payment of his taxes, in a suit against the tax collector or assessor, by which he attempts to avoid it on account of the omission of some legal requisite in the proceedings leading to the assessment or sale or in the assessment or sale itself, even though such omission be sufficient to invalidate the assessment or sale.

The principle at the bottom of this proposition is that no one should be aided by a court of equity in an attempt to escape the consequences of a just and honest obligation, even if there exists some legal ground on which it could be avoided. The owner of the property, as stated, still owes the debt to the state whether the lien which attaches to his property to secure its payment has been legally so attached or not, and it would be contrary to every consideration of reason and justice to say that as against the state he could secure relief from a court of equity that would entirely release his property from the just and necessary burden of taxation, and he thus escape the performance of one of the most important duties resting upon a property owner. Indeed, in many cases this principle prevails and may be invoked as to transactions between private individuals, where one seeks equitable aid to be discharged from the consequences of a legal obligation, for some reason nonenforceable, as, for instance, in a case where there is a bar to a legal recovery by the statute of limitations, and, a fortiori, should the rule be applied in those cases wherein the owner of property seeks to prevent the state from collecting a just tax upon his property.

But, in cases by the owner of property against the purchaser at a void tax sale, obviously no such reason exists for the application of the equitable doctrine we are considering as applies and controls in the case wherein the owner of the property proceeds against the state. It may be that in a case where the sole claim of plaintiff is some irregularity in the proceedings leading to the sale or in the sale itself, and where there is no ground for holding the sale void, the defendant would be entitled to reimbursement before plaintiff would be entitled to a decree. And there is no doubt but that the Legislature could, as we understand has been done in some jurisdictions, require reimbursement under any circumstances in a case in which the owner asks for a decree quieting his title as against the tax title of the purchaser. But the case here, as seen, is not one wherein mere irregularity in the proceedings or the sale is charged, but is a case in which the sale was absolutely void, and therefore no title vested in the purchaser by reason thereof. Nor has our Legislature authorized reimbursement in a case of this character where the sale is void.

As is said in *Campbell v. Canty* (No. 758)¹ the opinion in which has been filed this day,

¹ Rehearing granted by Supreme Court.

the policy of the state, as clearly indicated by its revenue legislation, is to give to a delinquent taxpayer every reasonable opportunity, compatible with the rights of the state in the premises, to redeem his property before it is finally sold by the state to an individual. The notice of such sale is addressed to the owner of the property as well as to the public. He is in effect then notified that, unless he comes forward and pays the taxes and accruing penalties and costs and so redeem his property by a certain designated time, the property will be sold for the purpose of satisfying the tax, etc. The purchaser appears at the tax sale hedged about by the doctrine of caveat emptor, and, thus buying the property and receiving the tax collector's deed, he is charged with notice of the defects, if any, in the title thus acquired. If the sale is void for any reason, he is not only charged with knowledge of that fact, but he thus acquires no rights to the property which either a court of law or of equity can enforce. *Greenwood v. Adams*, 80 Cal. 74, 21 Pac. 1134. In other words, if the sale is absolutely void, as here, "the payment of the tax by the purchaser stands on the footing of a voluntary payment, not made at the request of the owner of the land, and which he is under no obligation to refund." *Harper v. Rowe*, 53 Cal. 233, 238; *Greenwood v. Adams*, supra; *Dranga v. Rowe*, 127 Cal. 506, 59 Pac. 944; *Preston v. Hirsch*, 5 Cal. App. 485, 90 Pac. 965.

The case of *Flannigan v. Towle*, supra, appears to hold a different view upon this proposition from that expressed here. But it is to be said with reference to that case that the briefs therein disclose that very little resistance was offered by appellants to the contention of respondent that they should have offered to do equity by reimbursing defendants for the money they expended in purchasing at the tax sale the property to which plaintiffs claimed title. In truth, no reply brief was filed by plaintiffs after the point was urged in the brief of respondents, and the proposition was practically not argued here except from the viewpoint of defendants. But we are constrained to here hold that, if there is anything in *Flannigan v. Towle* inconsistent with the views herein expressed upon the point under review, the same must be overruled.

Of course, it must be understood that plaintiff's immunity from reimbursing defendants does not relieve him of the duty of paying the taxes, penalties, etc., due the state. If, in other words, there is any legal way, either by virtue of section 3804 of the Political Code or otherwise, by which defendants may have restored to them the amount they have expended in purchasing the property and in the payment of the taxes on the same subsequently to the execu-

tion to them of a deed by the tax collector, and they should successfully assert their rights in that regard, the land would nevertheless still be subject to the lien of the state for such taxes, etc., since the action here is not against the state, and therefore its rights herein have not been adjudicated, and consequently cannot be concluded by the decree.

It may here properly be observed that the plaintiff, before the institution of this suit, offered to repay defendants the tax, penalties, and costs paid by them for the land, but that the latter refused the same. Their position with regard to the equity which they now demand is very little different from that of the defendant in *Campbell v. Canty*, supra. The only difference is that in the latter case the defendants not only refused to accept reimbursement before the suit was brought but failed to plead or demand the equity in their answer, while here the defendants have pleaded and thus demanded it. But we are of the opinion, founded both upon principle and authority, that, the sale being absolutely void, the defendants are not under any circumstances entitled to the equity here claimed by them.

For the reasons set forth herein, the judgment and order are affirmed.

CHIPMAN, P. J. I concur.

BURNETT, J. I concur in the judgment. Upon further reflection, I think that *Flannigan v. Towle* goes too far in the statement of the rule as to the reimbursement of the purchaser at a tax sale. As I conceive it now, where the tax is legally assessed and is justly due and the property is sold to a purchaser in good faith, and the deed is not void upon its face, the purchaser has a claim in equity for reimbursement. This should be presented, however, in his answer, if a suit be brought against him by the owner to quiet his title. In the case at bar, since the plaintiff offered to reimburse the purchaser, I can see no equity in requiring the former to pay the latter, as a condition precedent to judgment, something that the defendant declined to accept and thereby made it necessary for plaintiff to incur the expense of a trial. In other respects I agree with the opinion of Justice HART.

15 Cal. App. 634

COWELL et al. v. SNYDER et al. (Civ. 906.)
(District Court of Appeal, Second District, California. March 20, 1911.)

1. LANDLORD AND TENANT (§ 200*)—HOLDING OVER—EFFECT.

Where a landlord seasonably notifies his tenant for years that the lease as to the rental will be changed if the tenant holds over, and the tenant does not refuse to be bound by such new terms, by his silence he will be deemed to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

have acquiesced in the changed contract and become bound by it; but otherwise if the tenant refuses to accept such new terms.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 794-797; Dec. Dig. § 200.*]

2. LANDLORD AND TENANT (§ 200*)—HOLDING OVER—TENANT AS TRESPASSER.

A tenant for years, holding over and refusing to pay an increased rental of which he was seasonably notified, becomes a trespasser, and liable for reasonable rental value as damages.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 200.*]

3. LANDLORD AND TENANT (§ 114*)—HOLDING OVER—ACQUIESCENCE BY LANDLORD.

By accepting rent after expiration of a term, though the tenants refused to pay an increased rental demanded by the landlord, the latter bound himself for another year.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 373-381; Dec. Dig. § 114.*]

4. LANDLORD AND TENANT (§ 55*)—ENJOYMENT OF PREMISES—QUARRIES.

Under Civ. Code, § 819, a tenant of agricultural lands for years or at will can work quarries opened, in the absence of contrary provision in the lease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 136-150; Dec. Dig. § 55.*]

5. SALES (§ 75*)—PRICE—AGREEMENT UPON.

Sellers of lime, on being notified by the buyer that the account would be adjusted at a specified price, became bound by that price, where they made no objection thereto.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 204; Dec. Dig. § 75.*]

Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by Ernest V. Cowell and others against Ferd Snyder and another, partners as Ferd Snyder & Son, and as Snyder Lime Company. From a judgment for defendants, and from an order denying a new trial, plaintiffs appeal. Reversed.

Olney, Pringle & Mannon, for appellants.
Leonard B. Slosson, for respondents.

JAMES, J. Plaintiffs appeal from a judgment in favor of defendants entered against them for the principal sum of \$1,673.30, and from an order denying their motion for a new trial.

In the year 1904 defendants leased from plaintiffs certain land situated at Tehachapi, in Kern county, for the term of one year, ending on the 1st day of December, 1905. The yearly rental stipulated to be paid therefor was the sum of \$300. The lease was in writing, and further provided that the land was rented for farming purposes, but that the defendants were to have the right to quarry limerock on said lands for the purpose of manufacturing lime therefrom, for which privilege they were to pay an additional sum of five cents per barrel for all lime so manufactured from said rock. Defendants entered into possession of the land and manufactured lime from the rock taken

therefrom up to the 1st day of December, 1907. Upon the expiration of the term during which the lease provided the defendants should hold and use the land, plaintiffs notified defendants that, if they continued thereon thereafter, and continued to quarry limerock from the land and manufacture lime, the annual rental would be the sum of \$500, and that the additional sum to be paid for the limerock taken from the quarry would be 10 cents per barrel for all lime manufactured. Plaintiffs by their action sought to recover a balance of \$3,613.80, alleged to be due them on account of rental and lime manufactured by defendants during the years 1906 and 1907, claiming that during these years the defendants held under the lease contract as modified, by which the compensation to be paid to plaintiffs was increased as before mentioned. Defendants by their answer denied that they ever acquiesced in or agreed to the changed terms of the lease contract, and asserted that during the time that they held possession of the land and used the same their holding was under the original lease and all the terms thereof, and not otherwise; and by way of counterclaim set up a cause of action for lime furnished to plaintiffs. The finding of the court was in favor of the contention of defendants that there had been no change made in the lease contract as to money to be paid by them for the use of the property. There was but slight controversy at the trial as to the quantity of lime furnished by defendants to plaintiffs, which was made the subject of the counterclaim; the dispute being, mainly, upon the question as to the amount to be paid by the plaintiffs therefor, plaintiffs contending that they were to pay \$9 per ton f. o. b. Tehachapi for all of the lime so furnished, while defendants maintained, and the court found, that plaintiffs were liable for the reasonable value of all lime furnished in excess of three car loads. The amount of the judgment was arrived at by crediting upon the rental account, according to the terms of the original lease, the value of so much of the lime as was sufficient to extinguish that account, and providing that defendants should recover from plaintiffs the excess, which, as before stated, amounted to the sum of \$1,673.30.

In the bill of exceptions is set out a great deal of the correspondence which was carried on between the plaintiffs and defendants during the years 1906 and 1907. In these letters, commencing early in the year 1906, were statements addressed to the defendants by plaintiffs, notifying the former that their lease on the Tehachapi ground had expired, and that if they wished to make arrangements for the ensuing year they should adjust their account for the preceding year, which was then overdue and upon which they were in arrears. In several of these letters written by the plaintiffs, defendants

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

were distinctly notified not to take any more rock from the ground, and that, if they did so and continued in possession of the property, it would be at the new rate of compensation, to wit, \$500 per year, and 10 cents per barrel for all lime manufactured. Notwithstanding these letters, the defendants continued in possession and manufactured lime, not only during the year 1906, but during 1907, also, and up to the 1st day of December of that year. It would appear that plaintiffs had great difficulty in procuring a settlement of their account held against the defendants, and as late as August, 1906, defendants were still in arrears on account of money provided to be paid under their lease, which should have been paid during the year 1905. It is the contention of plaintiffs that, after receiving notice of the changed terms of the lease, by continuing in possession of the land and working the quarry, defendants manifested their acquiescence in those new terms and became bound to make payment as compensation for the use of the real property and the limerock taken therefrom at the new rate. The court expressly found that defendants did not acquiesce in the proposal of plaintiffs to change the terms of the hiring of the property, and this finding is evidently made upon the testimony of the defendants, who testified that in 1906 they notified plaintiffs that they would not make payment according to the new rate as demanded.

[1] The text-writers agree, and it seems to be settled by the authorities, that where a landlord seasonably gives notice to his tenant for years that the terms of the lease with respect to the amount of rental will be changed in the event the tenant continues to occupy the property beyond the expiration of his term, and the tenant does so continue to occupy the property, and does not manifest his refusal to be bound by such new terms, that by his silence he will be deemed to have acquiesced in the changed contract and become bound by it. But the cases also hold that where a tenant, holding over beyond the expiration of his term, announces that he will not accept the new terms proposed by his landlord, no agreement results, and therefore no contract by which the new terms become operative between the parties.

[2] In such a case, where the landlord does not receive the rental from the tenant, the tenant becomes, in effect, a trespasser and liable to the landlord for the reasonable rental value of the premises so occupied by him to be collected as damages. This is the general rule. "A tenant for years who holds over after the expiration of his term, without paying rent or otherwise acknowledging a continuance of the tenancy, becomes either a trespasser or a tenant, at the option of the landlord. Very slight acts on the part of the landlord, or a short lapse of time, are sufficient to conclude his election and make the occupant his tenant. But the tenant has no

such election; his mere continuance in possession fixes him as tenant for another year, if the landlord so elects, although the tenant has refused to renew the lease and given notice that he has hired other premises.

* * * He remains a trespasser, and can only become a tenant by mutual agreement. A holding over, after a notice from the landlord that if the tenant remains it will be at certain terms, is an acceptance of those terms. * * * Notice being given to the tenant that if he occupied beyond the subsisting term he must pay an increased rent, naming the sum, the tenant, although he held over, was held not bound to pay the increased rent unless he assented. But such assent may be inferred if he holds over and remains silent." *Taylor's Landlord & Tenant*, § 22. "The holding over may be upon a rent different from that before reserved, though otherwise the terms are the same. A contract for a different rent has been held to arise when the landlord notifies the tenant that if he holds over he must pay an increased rent, and the tenant makes no reply and does hold over; this being regarded as an acceptance of the landlord's proposition. If, however, the tenant protests against such increase, there can, by the cases generally, be no implication of assent by him, and no greater rent can be demanded than before. Occasional decisions and dicta to the effect that, even if the tenant objects to the payment of the increased rent, he will be liable therefor so long as he retains possession, are objectionable, as in effect imputing to the tenant an intention which he expressly disclaimed, and as enabling the landlord to fix a penalty of any amount for the wrongful holding over by the tenant. It might indeed be questioned whether, in the ordinary case, the tenant, by retaining possession even without objection to the proposed increase of rent, intends to indicate assent to such increase. The courts have, however, assumed that he does so intend." *Tiffany on Landlord & Tenant*, § 210; *Jones on Landlord & Tenant*, § 202, and cases cited therein.

[3] A statement of account set out in the bill of exceptions, which was furnished by the plaintiffs to the defendants in January, 1907, shows that at the close of the year 1905 defendants were indebted to plaintiffs in the sum of \$1,165 on the old account, or the account for the year 1905. On February 2, 1906, the sum of \$500 was credited to defendants, and on May 14th an additional sum of \$500 was so credited, and on August 20th the sum of \$1,000 was credited. It will be noticed, therefore, that a part of the sum of \$1,000 paid by defendants on August 20th was made to apply upon the new account commencing December 1, 1905. The court having found that prior to that time the defendants had protested against the injection of any new terms into the contract of hiring, and there was some evidence upon which to found this finding, it then appears that plain-

tiffs accepted money which they applied on the rental account in the face of notice from defendants that they would not be bound by the proposed new terms in the lease contract. Up to this time, no doubt plaintiffs had the right to treat the defendants as trespassers, if they so elected to do, and oust them from the premises and recover from them the reasonable value of the use of the land during the period that the defendants had so held over. By the acceptance of money paid on account of rental, however, the plaintiffs must be held to have themselves elected to treat the defendants as tenants for the then current year, and, having once so elected, that election would bind them for the remainder of that term, or until the 1st day of December, 1906. The occupancy by defendants of the land during the year 1907 appears to have been had under similar circumstances. In December, 1906, defendants wrote to plaintiffs a letter containing the following paragraph: "Do you want to lease us your farming land at Tehachapi for the coming season? If so, how much do you want for it? The land is in good condition to plow now, and we are ready to begin plowing at once." On January 22d following, plaintiffs wrote to defendants as follows: "On December 27th we wrote you again and have received no reply. The same day you wrote us about leasing the land. We have not replied to this letter, as we have been waiting to hear from you in reply to our letter. We certainly could make no arrangements to lease the land until our pending matters are straightened up." No agreement was reached respecting the rental of the land for the year 1907, and in the letters written by defendants to plaintiffs there is a continued objection expressed to paying according to the new terms sought to be imposed by the plaintiffs. In a letter of August 10th, written by defendants to plaintiffs, is found this phrase: "No one knows better than yourselves that no man can pay you ten cents per barrel for your stone very long and live." Again, in a letter dated October 24th, defendants wrote: "Please tell us how we or any one else could afford to pay you ten cents per barrel for stone and live. * * *

We are willing to pay you full value and as much as any one else will pay you for whatever business we do with you, but when you want more than that it is not in the cloth." It may be properly said that the conduct of defendants throughout their relations with the plaintiffs with respect to the leasing of this property and the payment of rental therefor was not such as deserves any particular commendation. The whole course of action on the part of defendants seems to have been in the direction of temporizing, and in the face of the continued and repeated notification to them by the plaintiffs to either vacate the property, stop taking limerock therefrom, or settle up their accounts, they continued to occupy and use the land, to manufacture lime therefrom, and dispose of it in

the market. On the other hand, plaintiffs, had they so desired, could have ejected defendants under proper process from their ground, or brought an action at any time to recover the reasonable value of the use of their property. This they failed to do, but continued to accept money and lime, which they placed to the credit of the defendants, and by so doing they adopted defendants as continuing tenants and estopped themselves from asserting any change in the lease contract. The conclusion of the trial court upon that branch of the case, upon the record as presented to us, must be sustained. We cannot adopt the view, suggested by appellants, that the contract should not be treated as one for the leasing of lands, and therefore not subject to rules applicable to the relation of landlord and tenant.

[4] In the absence of a special limiting agreement, a lessee of lands for years or at will has the right to the product of the soil and also to work any quarries open at the commencement of his tenancy. Civ. Code, § 819. And the plaintiffs expressly alleged in their complaint that the land was leased for farming purposes, and that defendants were to have the right to quarry limerock on said lands. This latter right, so given defendants, was an incident to the main contract of leasing, and one which, under the Code provision cited, would have resulted in defendants' favor, even though the contract had been silent as to it.

[5] We think the court erred, however, in determining that a portion of the lime furnished by defendants to plaintiffs, and on which account the counterclaim is based, was to be paid for by plaintiffs according to the reasonable value thereof. This finding does not appear to be sustained by the evidence. It was admitted by all parties that, for the first three car loads furnished, the price was to be \$9 per ton f. o. b. Tehachapi. Six other car loads of lime were furnished subsequently. After the first three had been furnished, plaintiffs wrote to defendants as follows: "We would request that you bill us the lime at \$12, delivered San Francisco, instead of \$9 f. o. b. Tehachapi. The reason for that is that it keeps our books straight, as we are charging you the freight and sending you the expense bill." Following this letter, and on March 22, 1907, a telegram was sent by plaintiffs to defendants worded as follows: "Send at least five car loads of lime at once. When will they be shipped?" Defendants replied that they would ship all the lime wanted, but it would be some time before they could ship much. In the course of this letter written by them they made the statement that they were offered \$11 and \$12 per ton for lime at Tehachapi, and that \$10 per ton would govern until further notice. At the time a car load was shipped on April 20, 1907, to the plaintiffs, defendants wrote as follows: "We have been besieged with offers from San Francisco for the past two months for all the

lime we can make at \$12 per ton f. o. b. Tehachapi. We presume you will allow us the prevailing San Francisco price for our lime, viz., \$12." To this letter plaintiffs made reply as follows: "Referring to your remarks about prices, beg to advise you to read our letter of January 31st, and to remember that you arranged with Mr. Cowell to ship us all your surplus output this season at \$12 per ton delivered San Francisco. This we consider a contract, and shall adjust accounts accordingly." To this assertion as to the understanding had between the parties, defendants made no dissent, so far as the record discloses, either in the correspondence or in their oral testimony, and they proceeded to ship the lime to plaintiffs as requested. We think that defendants, when notified by plaintiffs that the account for lime furnished would be adjusted at the rate of \$12 per ton delivered San Francisco (which was the same as \$9 per ton f. o. b. Tehachapi, by deducting freight charges), and made no objection thereto or protest of any kind, became bound to accept payment at the rate stated.

For the reasons last given, the judgment and order must be reversed; and it is so ordered.

We concur: ALLEN, P. J.; SHAW, J.

15 Cal. App. 517

SHEEHAN v. LAPIQUE. (Civ. 954.)

(District Court of Appeal, Second District, California. March 1, 1911.)

APPEAL AND ERROR (§ 356*)—DISMISSAL.

A judgment was entered by default, and motions made to set aside the default and vacate the judgment, which motions were denied. *Held*, that an appeal from the judgment, made long after the lapse of time within which it could be made, would be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1926, 1927; Dec. Dig. § 356.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Lizzie Sheehan against John Lapique. Judgment for plaintiff, and defendant appeals. Dismissed, and rehearing denied.

J. Lapique, in pro. per. H. H. Heath, for respondent.

PER CURIAM. The record discloses that the judgment in this case was entered July 15, 1908; that thereafter motions were made to set aside default and vacate the judgment, which were finally denied June 13, 1910. The notice of appeal is from the judgment. While the order refusing to set aside the default and vacate the judgment is an appealable order, there was no appeal therefrom. The notice of appeal was from the judgment, made long after the lapse of time within which the same could be made.

Rehearing denied.

15 Cal. App. 746

BONDY v. AMERICAN TRANSFER CO.

(Civ. 914.)

(District Court of Appeal, Second District, California. April 1, 1911.)

1. TROVER AND CONVERSION (§ 32*)—COMPLAINT.

The complaint having set forth the facts, making it essentially one for conversion, notwithstanding unnecessary allegations as to the manner in which the property was acquired, which may be treated as surplusage, it was not error to refuse to strike out a paragraph thereof in terms alleging the wrongful conversion and disposal of the property.

[Ed. Note.—For other cases, see Trover and Conversion, Dec. Dig. § 32.*]

2. HUSBAND AND WIFE (§ 210*)—ACTION—PARTIES.

The husband need not join his wife in her action for conversion of goods acquired for her business, the profits and risks thereof being, under her antenuptial agreement, her separate property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 774-782; Dec. Dig. § 210.*]

3. BAILMENT (§ 27*)—CONVERSION BY BAILEE—SETTING UP TITLE OF THIRD PERSON—ESTOPPEL.

The bailee sued by the bailor for conversion of the property cannot set up title of a third person thereto, except by authorization of that person.

[Ed. Note.—For other cases, see Bailment, Dec. Dig. § 27.*]

4. CORPORATIONS (§ 388*)—CORPORATE POWERS—ESTOPPEL.

A corporation authorized by its articles of association to do all acts necessary to carry into force and effect any of the purposes for which it was formed, having assumed that one of these acts was to take and receive on storage property then held by it as common carrier, is estopped, when sued for conversion of the property, to assert that such act of receiving property on storage was not so necessary.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1556-1567; Dec. Dig. § 388.*]

5. CARRIERS (§ 140*)—CARRIER AS WAREHOUSEMAN—CHANGE OF RELATION.

To change the relation of a corporation to a trunk, which it has transported and still holds under its contract of carriage, from that of carrier to that of one holding it on storage, it is enough that it contracts for storage thereof; delivery thereof by it under its first contract, and then redelivery to it under its second contract, not being necessary.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 609-616; Dec. Dig. § 140.*]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Jennie Bondy against the American Transfer Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Frank W. Burnett, for appellant. H. T. Morrow, for respondent.

ALLEN, P. J. The action was brought on account of an alleged conversion by defendant of property belonging to plaintiff. It appears from the findings that defendant was a common carrier and in connection with such business carried on a storage business in the city of Los Angeles and kept and maintain-

ed a place used by it for the storage of goods for hire; that one Madam Yovin, engaged in business in New York, was the owner of certain robes and laces of great value; that she entered into a contract with plaintiff through which plaintiff was to take such goods to Los Angeles, open a place of business and sell the same, and out of the proceeds as sold to pay to Madam Yovin a stipulated price, and that all profits should be the property of plaintiff. Plaintiff at the time of making such contract was a married woman, the wife of one Leon Bondy, with whom, however, she had made an antenuptial contract, through which it was agreed that all earnings or profits earned by plaintiff in any occupation at any time during the marriage should be the property of plaintiff. Plaintiff pursuant to her agreement with Madam Yovin, accepted from the latter a trunk containing the robes, laces, etc., which trunk, with four others containing personal belongings of plaintiff and her husband, was carried by the railroads from New York to Los Angeles as baggage; that after the arrival of said trunks at Los Angeles plaintiff removed the four containing her personal belongings, but the trunk containing the property of Madam Yovin was stored with defendant for an indefinite time at a fixed compensation, payable upon delivery of the trunk. At the time of the storage plaintiff notified the defendant that the trunk was a business trunk and was very valuable; that after receiving said trunk in storage defendant, on the 23d day of May, 1908, and within five months after its receipt, without any notice of any kind or character to plaintiff, other than a published notice in a newspaper which was never seen by plaintiff, sold the trunk of plaintiff and the same was lost to plaintiff. At the time of such sale the trunk and contents were of the value of \$2,794.78; that the contents of said trunk were not baggage nor perishable property. Defendant knew that said trunk contained merchandise and not baggage, and at the time of sale, the right to which defendant claimed on account of default in payment of storage charges, there were no storage charges due or payable under the terms of the contract of storage. Upon these facts the court rendered its judgment in favor of plaintiff, from which defendant appeals upon a bill of exceptions.

[1] We see no error in the first point made by appellant with reference to the refusal of the court to strike out paragraph 7 of the complaint. The complaint, having set forth the facts as narrated by the findings, alleged in terms by paragraph 7 the wrongful conversion and disposal of said trunk and its contents. We regard the complaint as essentially one for conversion. While it may be true that the complaint was more specific in its statement of facts than would be required in an ordinary action for conversion, these allegations with reference to the man-

ner in which the property was acquired may be treated as surplusage.

[2] It is next claimed that plaintiff was not a proper party plaintiff, not being the real party in interest, and that the husband should have been made a party plaintiff. We do not recognize any merit in these contentions. Under the terms of the antenuptial contract, the profits and risks in this business venture were the separate property of plaintiff. *Wren v. Wren*, 100 Cal. 276, 34 Pac. 775, 38 Am. St. Rep. 287; *Kaltschmidt v. Weber*, 145 Cal. 596, 79 Pac. 272.

[3] That the plaintiff was a bailor is determined by the findings, which have support in the evidence, and in an action by a bailor against a bailee the latter cannot set up the title of a third person, except by authorization of that person (*Palmtag v. Doutrick*, 59 Cal. 168, 43 Am. Rep. 245; *Dodge v. Meyer*, 61 Cal. 423; *Wetherly v. Straus*, 93 Cal. 287, 28 Pac. 1045); and this estoppel applies as well to the title of the owner who had intrusted the goods to plaintiff, as to the husband on account of any community interest which he might have. Plaintiff as bailor had a special interest in this property as her own separate estate, and was therefore the real party in interest.

[4] We attach no importance whatever to the baggage checks given to the husband by the railroad company, or any acts of his in connection with their transportation to Los Angeles. Sufficient it is to say, that the contract with reference to storage, as distinguished from any liability as a common carrier, was a contract made between plaintiff and defendant and a contract which defendant had a right and authority to make. If its liability were to be tested by the authority given it under its articles of association, they provide in terms that the defendant is authorized to do all acts that may be necessary in order to carry into force and effect any of the purposes for which the corporation is formed. It assumed in this instance that one of these acts was to take and receive the property then held by it as a common carrier upon storage. Having made such contract, it should not be heard to say that such act was not necessary to carry into effect the purposes for which the corporation was formed.

[5] It is further claimed by appellant that the defendant never received possession of the trunk under the contract of storage, because it already held possession under a contract as a common carrier. It is not necessary in order to change the relation that there should be a physical delivery to plaintiff of the trunk then in their possession. This is recognized by section 2121 of the Civil Code, through which a common carrier, by giving notice after the arrival, can, without the acquiescence of the other party, change such relation and substitute others in the new relation. The contract for storage

had the effect to change the relation as much as though the property had formally been delivered by defendant as a common carrier and then received independently as a warehouseman. The limitation of liability in the common carrier's receipt has nothing whatever to do with the liability which ensued by virtue of the independent contract as a warehouseman.

While the complaint did not disclose that plaintiff was a married woman, that fact was alleged in the answer, and under the evidence, it being established that plaintiff's special property in the converted goods was her separate estate, under section 370, Code of Civil Procedure, she is permitted to maintain the action without her husband being joined.

An examination of the record discloses no prejudicial error, and the judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

16 Cal. App. 12

PEOPLE v. JONES. (Cr. 283.)

(District Court of Appeal, First District, California. April 7, 1911.)

CRIMINAL LAW (§ 1130*)—APPEAL AND ERROR
—BRIEFS—AFFIRMANCE OR REVERSAL.

Where an examination of the record on appeal discloses no error, and defendant has filed no brief, the judgment will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2965-2970; Dec. Dig. § 1130.*]

Appeal from Superior Court, Alameda County; E. J. Brown, Judge.

J. A. Jones was convicted of an offense, and he appeals. Affirmed.

J. J. Van Hovenberg, for appellant. Attorney General Webb, for the People.

LENNON, P. J. Defendant was convicted of the crime of rape, and, upon judgment being pronounced, took an appeal to this court.

The cause was upon the calendar of this court for argument last September, and was then continued for the term. It was again called for argument on January 23d of this year. No argument was made on behalf of appellant, and, there being no brief on file, appellant was given 20 days in which to file a brief. No brief has since been filed, and no extension of time has been asked. We have nevertheless examined the record, but have discovered no reason why the judgment and order should not be affirmed.

The judgment and order are therefore affirmed.

15 Cal. App. 732

PEOPLE v. WOLFROM. (Cr. 247.)

(District Court of Appeal, First District, California. March 30, 1911. Rehearing Denied April 29, 1911; Denied by Supreme Court May 29, 1911.)

1. CHATTEL MORTGAGES (§ 230*)—CRIMINAL RESPONSIBILITY—INDICTMENT OR INFORMATION—STATUTORY PROVISIONS.

Pen. Code, § 538, provides that every person who, after mortgaging any of the property mentioned in Civ. Code, § 2955, during the existence of such mortgage, with intent to defraud the mortgagee, sells the mortgaged property, or any part thereof, is guilty of larceny, unless at the time of such sale the mortgagor informs the person to whom such sale is made of the existence of the prior mortgage, and also informs the prior mortgagee of the intended sale in writing, by giving the name and place of the residence of the party to whom the sale or incumbrance is made. *Held*, that the statute was intended not only to protect the mortgagee, but was designed to safeguard subsequent purchasers and hence whoever sells such mortgaged property without notifying the buyer of the existence of the mortgage is guilty of a violation of the statute.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 489-493; Dec. Dig. § 230.*]

2. CHATTEL MORTGAGES (§ 232*)—CRIMINAL RESPONSIBILITY—INDICTMENT OR INFORMATION—SUFFICIENCY TO SUPPORT VERDICT—STATUTORY PROVISIONS.

Under Pen. Code, § 538, providing that every person who, after mortgaging any of the property mentioned in Civ. Code, § 2955, during the existence of such mortgage, with intent to defraud the mortgagee, sells the mortgaged property, or any part thereof, is guilty of larceny, unless at the time of such sale the mortgagor informs the person to whom such sale is made of the existence of the prior mortgage, and also informs the prior mortgagee of the intended sale in writing by giving the name and place of the residence of the party to whom the sale is made, an information charging that while a mortgage was unsatisfied, the defendant, with intent to defraud the mortgagee, sold an interest in the mortgaged property, without informing the purchaser of the existence of the mortgage and without informing the mortgagee of the sale in writing, by giving the name and place of residence of the purchaser, sufficiently charges the defendant with fraud as to the buyer as well as to the mortgagee.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 484-487; Dec. Dig. § 232.*]

3. INDICTMENT AND INFORMATION (§§ 125, 168*)—DUPLICITY—MATTERS TO BE PROVED.

Where a statute forbids several acts, and a commission of one or all of them constitutes the offense defined, it is permissible in one

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

count of an information or indictment to charge all the acts, and the proof of any one of them will support a verdict of guilty.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400, 534; Dec. Dig. §§ 125, 168.*]

4. INDICTMENT AND INFORMATION (§ 110*)—ELEMENTS OF OFFENSE—INTENT.

Where the statute does not make the intent with which mortgaged chattels are sold an element of the offense, it is sufficient to charge the offense in the language of the statute, and it is not necessary to allege that the sale was done with intent to defraud the purchaser.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.*]

5. CHATTEL MORTGAGES (§ 230*)—CRIMINAL RESPONSIBILITY—STATUTORY PROVISIONS.

Pen. Code, § 538, provides that every person who, after mortgaging any of the property mentioned in Civ. Code, § 2955, with intent to defraud the mortgagee, takes or removes the mortgaged property, or any part thereof, from the county where it was situate when mortgaged, without the consent of the mortgagee, or who sells or incumbers the mortgaged property, is guilty of larceny, unless at or before the time of making such sale or incumbrance, such mortgagor informs the person to whom such sale or incumbrance is made, of the existence of the prior mortgage, and also informs the prior mortgagee of the intended sale or incumbrance in writing by giving the name and place of residence of the party to whom the sale or incumbrance is made. *Held*, that the words "with intent to defraud," found in the first part of section 538, apply and qualify that part of the section which forbids the removal of property but do not limit or qualify the other part of the section, and hence an intent to defraud is not an essential element of the offense of selling mortgaged property, and this conclusion finds support from the fact that the subject-matter of section 538 formerly constituted two sections of St. 1893, c. 102, one of which related to the sale of mortgaged chattels, and did not make intent an ingredient of the offense.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 489-493; Dec. Dig. § 230.*]

6. CRIMINAL LAW (§ 24*) — ELEMENTS OF CRIME—INTENT—ALLEGATIONS AND PROOF.

When the intent is not made an affirmative element of a crime, the law imputes that the act knowingly done was with criminal intent, and it need not be alleged nor proven.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 26, 27; Dec. Dig. § 24.*]

7. CHATTEL MORTGAGES (§ 234*)—PROSECUTION FOR SALE OF MORTGAGED PROPERTY—VERDICT.

Pen. Code, § 538, makes it grand larceny for a mortgagor of chattels to remove the same from the county with intent to defraud the mortgagee, or to sell the mortgaged property without informing the purchaser that the property is mortgaged, and notifying the mortgagee of the intended sale, but does not make the latter offense dependent on the existence of an intent to defraud. An information charged that a mortgagor of chattels "willfully, unlawfully, feloniously, and with intent to defraud," sold the mortgaged chattels without informing the purchaser of the existence of the mortgage, and without notifying the mortgagee of the sale. The verdict found defendant guilty of "grand larceny, as defined by section 538 of Penal Code as charged in the information."

The court instructed the jury that there was no evidence showing that defendant intended to defraud the mortgagee, and that the allegation of intent in the information should be disregarded. There was no evidence that the property was removed from the county. *Held*, that a contention that the verdict was uncertain as to the offense for which defendant was found guilty was untenable.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 495; Dec. Dig. § 234.*]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Fred D. Wolfrom was convicted of grand larceny, and he appeals. Affirmed.

H. C. McPike, Joseph P. Lucey, and Hiram G. Davis, for appellant. Attorney General Webb, for the People.

KERRIGAN, J. Defendant was convicted of grand larceny under the provisions of section 538 of the Penal Code. This is an appeal from the judgment and from an order denying him a new trial. The facts of the case are that, early in the year 1907, the defendant purchased about \$5,000 worth of furniture from the Eastern Outfitting Company, a corporation, to furnish a large lodging house of which he had become the lessee. He paid \$1,000 on account, and gave to the vendor a mortgage for the balance. Subsequently, with the oral consent of the mortgagee, he sold a one-fifth interest in the furniture and lodging-house business to one Matilda Bradford for \$3,600. The only disputed question of fact in the case is as to whether the defendant had informed Matilda Bradford of the existence of the chattel mortgage at or prior to the sale to her of the said interest. As to this phase of the case it is sufficient to say, however, that the evidence fully supports the verdict.

The information was drawn under section 538 of the Penal Code, and charges that while the said mortgage "was in existence and unsatisfied" the defendant did "willfully, unlawfully, feloniously and with intent to defraud the said Eastern Outfitting Company * * * sell, transfer and cause to be sold and transferred an undivided one-fifth interest in and to the said personal property * * * to one Matilda Bradford, for and in consideration of the sum of thirty-six hundred dollars * * * without informing the said Matilda Bradford of the existence of said mortgage, and without informing the said Eastern Outfitting Company of the said sale and transfer of said one-fifth undivided interest in and to said personal property, or of any intended sale of same, in writing, by giving the name and place of residence of said Matilda Bradford, the person to whom the sale and transfer was made."

Section 538 of said Code reads as follows:

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"Every person who, after mortgaging any of the property mentioned in section 2955 of the Civil Code * * * during the existence of such mortgage, with intent to defraud the mortgagee * * * takes, drives, carries away, or otherwise removes * * * the mortgaged property, or any part thereof, from the county where it was situate when mortgaged, without the written consent of the mortgagee, or who sells, transfers, or in any manner further incumbers the said mortgaged property, or any part thereof, * * * is guilty of larceny, and is punishable accordingly; unless at or before the time of making such sale, transfer or incumbrance, such mortgagor informs the person to whom such sale, transfer or incumbrance is made, of the existence of the prior mortgage, and also informs the prior mortgagee of the intended sale, transfer, or incumbrance, in writing, by giving the name and place of residence of the party to whom the sale, transfer, or incumbrance is to be made."

[1] It is not claimed here, nor was it contended at the trial of the case, that the defendant was guilty of any wrong so far as the mortgagee was concerned. The case was tried from the beginning to the end on the theory that a fraud had been practiced on Mrs. Bradford by the defendant. We do not doubt that section 538 was intended not only to protect the mortgagee of personal property, but, like the statutes in most of the states (Cobbey on Chattel Mortgages, vol. 2, § 797 et seq.; Jones on Mortgages, § 601 et seq.), was designed to safeguard subsequent purchasers, transferees and incumbrancers thereof; that therefore, whoever sells mortgaged property of the description covered by said section, without notifying the buyer at or before the sale of the existence of the mortgage, is guilty of a violation of the section.

[2, 3] We think also that the information sufficiently charged the commission of the act of which the defendant was convicted. From the allegations of the information it is not as clear as might be desired that the prosecution intended to charge the defendant with fraud as to the buyer as well as with fraud as to the mortgagee. Nevertheless, as no demurrer was interposed to the information, and as it does in so many words accuse the defendant with having violated the terms of section 538 so far as the buyer of the property was concerned, it must be held sufficient. It charges in one count that the defendant committed each of two of the acts forbidden by the section; and as this may be done, it follows that the information supports the judgment of conviction. Where a statute forbids, as this one does, several acts, and the commission of one or all of them constitutes the offense defined, it is permissible in one count of an information or indictment to charge all the acts, and

the proof of any one of them will support a verdict of guilty. *People v. Frank*, 28 Cal. 507; *Bishop's New Crim. Proc.*, § 336; *People v. Leyshon*, 108 Cal. 442, 41 Pac. 480.

[4, 5] This brings us to defendant's contention that the portion of the information relied upon is insufficient, in that it does not allege that the act complained of was done with the intent to defraud Mrs. Bradford. But this part of the section does not make the intent with which the act is done an indispensable element of the offense, and as it is sufficient to charge a violation of a statute in the language of the statute, it necessarily follows that there is no merit in defendant's contention in this behalf. The words "with intent to defraud" found in the first part of section 538 apply and qualify that part of the section which forbids the removal of property from the county where it was situated when the mortgage was given. They do not grammatically limit or qualify the other part of the section. This view finds support in the history of the section. Formerly the subject-matter of this section constituted two sections (Stats. 1893, p. 119), of which that part of section 538 which is the basis of the judgment here was one, and such section did not make the intent with which the act was done an essential ingredient of the offense.

[6] When the intent is not made an affirmative element of the crime the law imputes that the act knowingly done was with criminal intent, and it need not be alleged nor proven.

In *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45, the defendant had altered a public record, apparently to make it speak the truth; in any event it was admitted by the Attorney General that the evidence failed to show any fraudulent intent on the part of the defendant. Nevertheless the court held that, inasmuch as the section defining the crime there in question did not make the intent with which the act was done an essential element of the crime, it was unnecessary to show that the defendant had acted with such intent. In that case the question is elaborately discussed, and a number of cases are cited and quoted from. The conclusion of the court on this point—which is correctly stated in the syllabus—is: "It is not necessary, in making out the offense of altering a public record, to prove any fraudulent intention upon the part of the defendant; nor is ignorance of the law and innocence of any intent to violate its terms any excuse for a violation thereof. When an act in general terms is made indictable, a criminal intent need not be shown, unless from the language or effects of the law a purpose to require the existence of such intent can be discovered." The court also quotes with approval the following language from the case of *State v. McBrayer*, 93 N. C. 623, 2 S. E. 756: "It is a mistaken notion that positive, willful in-

tent to violate the criminal law is an essential ingredient in every criminal offense, and that where there is an absence of such intent there is no offense; this is especially so as to statutory offenses. When the statute plainly forbids an act to be done, and it is done by some person, the law implies conclusively the guilty intent, although the offender was honestly mistaken as to the meaning of the law he violates. When the language is plain and positive, and the offense is not made to depend upon the positive willful intent and purpose, nothing is left to interpretation."

In *People v. Hartman*, 130 Cal. 489, 62 Pac. 823, speaking to the facts of that case, the court said that the honest belief of the defendant that his first marriage was invalid was a matter of no consequence, because it was the act of marrying the second time that constituted the crime. So in *Commonwealth v. Cutler*, 153 Mass. 252, 26 N. E. 855, the defendant was charged with an offense similar to the one with which the defendant is charged here; and there it was held that it need not be shown that the sale of the mortgaged property was made with intent to defraud; that such an intent would be inferred from the mortgagor's intentional sale.

It is true that in those cases the question arose on the sufficiency of the evidence; but still they are in point, for if it is unnecessary to prove the fraudulent intent, it necessarily follows that it is not imperative to allege it.

Defendant complains of one of the court's instructions; but as his objection is based on the erroneous theory that the information does not charge an offense as to Mrs. Bradford, it must be held that the contention is without merit.

[7] The defendant also challenges the form of the verdict, but his position in this regard is also untenable. The court very carefully and fully instructed the jury that there was no evidence showing that the defendant intended to defraud the mortgagee, and told them "to ignore and disregard the allegation in the information" in this regard. There was no pretense that the property was removed from the city and county of San Francisco; so when the jury found the defendant guilty of "grand larceny as defined by section 538 of the Penal Code, as charged in the information," it is perfectly plain that they found him guilty of committing the particular act for which he was prosecuted; i. e., of having sold the one-fifth interest in the mortgaged property to Mrs. Bradford without having informed her at or prior to the sale of the existence of the mortgage.

The judgment and order are affirmed.

We concur: LENNON, P. J.; HALL, J.

15 Cal. App. 679

WESTERN UNION TELEGRAPH CO. et al.
v. SUPERIOR COURT OF SACRAMENTO COUNTY et al. (Civ. 817.)

(District Court of Appeal, Third District, California. March 23, 1911. Rehearing Denied by Supreme Court May 22, 1911.)

1. CORPORATIONS (§ 29*)—RIGHT TO DO BUSINESS—COLLATERAL ATTACK.

Where the existence of a corporation, whether de jure or de facto, appears, its right to transact business may not be inquired into or questioned except in a direct proceeding, in the nature of quo warranto, instituted and prosecuted by the state itself in which such corporation so attempts to do business.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 77-79; Dec. Dig. § 29.*]

2. TELEGRAPHS AND TELEPHONES (§ 4*)—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Rev. St. U. S. § 5263 (U. S. Comp. St. 1901, p. 3579), provides that any telegraph company now or hereafter organized under the laws of any state may construct and operate telegraph lines through any portion of the public domain, or over any of the military or post roads, or over the navigable streams of the United States. Section 3964 (U. S. Comp. St. 1901, p. 2707) provides that all railroads or parts thereof are post roads. Section 5266 (page 3580) provides that telegrams between the several departments of the government and their agents in transmission over the lines of any telegraph company to which has been given the right of way, etc., of the public domain, shall have priority over other business at rates to be annually fixed by the Postmaster General. Section 5268 (page 3581) provides that, before any telegraph company shall exercise any of the powers conferred by law, it shall file its written acceptance with the Postmaster General. *Held*, that the right of telegraph companies accepting the restrictions and obligations upon them prescribed by Congress is solely in the acts of Congress, and no state can exclude such corporations from carrying on business within the state, on public lands, military or post roads or navigable rivers.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 2; Dec. Dig. § 4.*]

3. TELEGRAPHS AND TELEPHONES (§ 7½*)—ESTABLISHMENT—CONSTITUTIONAL AND STATUTORY PROVISIONS—FOREIGN CORPORATIONS.

Civ. Code, § 291, provides that articles of incorporation of any telegraph organization must state the kind of telegraph to be constructed; the places where it is to run; the estimated length of the line; that at least 10 per cent. of the capital stock has been paid in. Section 293 provides that each such intended corporation before filing articles must have subscribed \$100 per mile of lines. Section 294 provides that, before such articles of incorporation are filed, there must be paid to the treasurer 10 per cent. of the amount subscribed. Section 295 provides that, before the certificate is issued, there must be filed in the office of the Secretary of State an affidavit that the required amount of capital stock has been subscribed and 10 per cent. paid in. *Held*, that Const. art. 12, § 15, providing that no corporation organized outside the limits of this state shall be allowed to transact business in this state on more favorable conditions than are prescribed by law to similar corporations under the laws of this state, has no application to conditions required by the above sections, but refers solely to transactions of business after the corporation is established, and that under section 408 a foreign corporation may do business by filing

with the Secretary of the State a certified copy of its articles or its charter or the statute creating it.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 1, 2; Dec. Dig. § 7½.*]

4. EMINENT DOMAIN (§ 10*)—RIGHT OF FOREIGN CORPORATION.

Civ. Code, § 407, added by Laws 1905, c. 471, provides that every railway or other corporation organized for carrying freight or passengers under the laws of the United States or of any state or territory may exercise the right of eminent domain. Section 1001, enacted in 1872, provides that any person may acquire private property for any use specified in Code Civ. Proc. § 1238, also enacted in 1872, which provides that the right of eminent domain may be exercised in behalf of telegraph and telephone lines. *Held*, that there was nothing in section 407 to show that the Legislature attempted or intended to deprive foreign telegraph companies, duly authorized to transact business in this state, of the power of eminent domain.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 36; Dec. Dig. § 10.*]

5. STATUTES (§ 178*)—CONSTRUCTION—STATUTORY RULES—"PERSONS."

Under Civ. Code, § 14, the word "person," as used in the statutes, includes a corporation as well as a natural person.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 257; Dec. Dig. § 178.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5322-5335; vol. 8, p. 7752.]

6. EMINENT DOMAIN (§ 10*)—INTERFERENCE WITH FEDERAL LAW—FOREIGN CORPORATIONS.

If it was the intention of the Legislature to exclude from the right of condemning property under the power of eminent domain all other foreign corporations than those of the class mentioned therein, the statute in effect contravenes the laws of Congress with respect to foreign telegraph corporations, which have subscribed to the restrictions and obligations imposed upon such corporations by Congress, and therefore to the extent that it attempts to preclude such corporations authorized to carry on their business in this state from the exercise of such right is invalid.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 10.*]

Prohibition by the Western Union Telegraph Company and others against the Superior Court of Sacramento County and Hon. C. N. Post, Judge thereof, to prevent further proceeding in an action by the Postal Telegraph-Cable Company to condemn lands. Writ discharged.

Transfer of cause for rehearing in the Supreme Court denied. 115 Pac. 1100.

Beverly L. Hodghead and W. H. Devlin, for petitioners. L. T. Hatfield and O. W. Powers, for respondents.

HART, J. The Postal Telegraph-Cable Company, a corporation organized and existing under and by authority of the laws of the state of New York, commenced an action in the superior court in and for the county of Sacramento on the 26th day of June, 1909, for the purpose of obtaining a judgment condemning a portion of the property of said petitioners, Southern Pacific Company and

the Central Pacific Railway Company, situated in the county of Sacramento, "for the construction, maintenance and operation of a telegraph line, by the erection of poles and the stringing of telegraph wires thereon." Said company claims, as is manifest from the fact of having instituted said proceeding, that, under the laws of California, it has the right to exercise the power of eminent domain in this state.

Contending, however, that foreign telegraph corporations are not authorized by the laws of California to exercise the right of eminent domain, the petitioners have applied to this court for a writ of prohibition to prevent the respondents from taking further proceedings in said action and to compel them to refrain and desist from further entertaining the same. To the petition a demurrer and a return or answer have been interposed by the respondents, and in reviewing the questions presented we shall consider both said demurrer and return, if deemed necessary.

The specific contention of petitioners as to the alleged want of jurisdiction in respondents to hear and determine the issues raised by the complaint in said action is that if, as is the contention, there is no authority vested by the laws of California in foreign telegraph corporations to exercise the right of eminent domain, then a cause of action in behalf of said Postal Telegraph Company for the attainment of the object of said action could not, by any possibility, be stated, in which case the respondents could not, of course, acquire jurisdiction of an action instituted by said company for such purpose. Obviously the proposition thus stated is true if the premise of which it is predicated be sound.

With respect to the question as to the right of the Postal Company to exercise the power of eminent domain in California, the contention is that the right in foreign corporations to exercise that power in this state is limited, by the terms of section 407 of the Civil Code, passed by the Legislature of 1905 (St. 1905, p. 631), to "railway or other corporations organized for the purpose of carrying freight or passengers." In other words, the position of petitioners is that, having by said section expressly granted to such foreign corporations only as are engaged in the business of carrying freight or passengers, the Legislature intended to exclude all other foreign corporations not expressly named in said section from the right to exercise that power. This contention manifestly follows from the application to section 407 of the Civil Code of the familiar canon of construction, "Expressio unius est exclusio alterius."

The further contention is made by the petitioners that, because said Postal Company has not complied with sections 291, 293, 294, and 295 of the Civil Code of California,

said corporation is doing business in this state in violation of section 15 of article 12 of the Constitution. Said section reads: "No corporation organized outside the limits of this state shall be allowed to transact business within this state on more favorable conditions than are prescribed by law to similar corporations under the laws of this state." The sections of the Civil Code referred to apply to "domestic corporations." The argument constructed around this proposition is that, if the statute of this state authorizing the condemnation of property for certain specified public uses is susceptible of being so construed as to permit foreign corporations to exercise the right of eminent domain, then said statute, in so far as it may apply to such corporations, is, in this case, violative of the Constitution, in that it would allow a foreign telegraph company "to transact business within the state of California on more favorable conditions" than is permitted to home or domestic corporations.

[1] It may be well to here say, in connection with this constitutional question, which involves, as we have shown, the right of the Postal Telegraph Company to transact business in California, that the point made by counsel for respondents that said question cannot be raised in a proceeding instituted for the purpose of condemning property for a public use possesses much force. Such a proceeding is in its nature collateral, so far as said question is concerned, and the rule is that where the existence of a corporation, whether de jure or de facto, appears, its right to transact business may not be inquired into or questioned except in a direct proceeding, in the nature of quo warranto, instituted and prosecuted by the state itself in which such corporation so attempts to do business. The Postal Telegraph Company is shown by the undenied averments of its complaint in the condemnation proceedings complained of here (said complaint appearing here as a part of the petition) to be at least a de facto corporation; and, if we preferred to rest our decision of the constitutional question raised here on that point, we should be inclined to hold that the position of respondents thereon is well taken. See Cook on Corporations (6th Ed.) § 637; Postal Tel., etc., Company v. Oregon, etc., R. R. Company, 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705.

But the questions involving the merits of this controversy are of unusual importance and, to some extent, novel, and we agree with counsel on both sides that a decision involving the merits of the questions submitted for determination is to be preferred to an adjudication which would still leave undecided points of the most vital importance to foreign telegraph companies and particularly at this time to the Postal Telegraph Company.

It will perhaps be the more orderly to first consider and dispose of the question whether

the Postal Telegraph Company is, as alleged, doing business in California without authority for doing so. Manifestly, if this proposition were maintainable, said corporation would have no right to institute and prosecute proceedings in our local courts for the condemnation of property in this state for its uses as a quasi public corporation. If we find, as we think we can show, that this point is untenable, we shall then take up for consideration and decision the question whether section 407 of the Civil Code is capable of the construction to which counsel for petitioners would subject it.

[2] As vitally bearing upon, and, we think, largely determinative of, all the questions which we are here called upon to consider, it may be well first to briefly inquire into and ascertain the status of telegraph companies with respect to their relation to the general government, and consequently the attitude which the state governments must bear toward them. This will, of course, necessitate a brief review of some of the congressional legislation pertaining to such corporations.

Section 5263 of the Revised Statutes (U. S. Comp. St. 1901, p. 3579) provides: "Any telegraph company now organized or which may hereafter be organized, under the laws of any state, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which may have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads." Section 3964 of said statutes (U. S. Comp. St. 1901, p. 2707) provides that "all railroads or parts of railroads which are now or may hereafter be in operation" are post roads. Section 5266, Id. (page 3580), provides: "Telegrams between the several departments of the government and their officers and agents, in their transmission over the lines of any telegraph company to which has been given the right of way, timber, or station demands from the public domain shall have priority over all other business, at such rates as the Postmaster General shall annually fix. * * *" Section 5268, Id. (page 3581), reads: "Before any telegraph company shall exercise any of the powers or privileges conferred by law such company shall file their written acceptance with the Postmaster General of the restrictions and obligations required by law." It is asserted and not denied here that the Postal Telegraph Company has filed with the Postmaster General its written acceptance, etc., as required by the foregoing section.

The effect and scope of the congressional

legislation with respect to telegraph companies which have complied with section 5268 of the United States Revised Statutes are clearly and fully explained and expounded in the case of *Pensacola Telegraph Company v. Western Union Telegraph Company*, 96 U. S. 1, 24 L. Ed. 708. The principles enunciated in that case have never been, so far as has been disclosed by our examination of the federal cases on the subject, receded from or modified in the slightest particular in their application to the questions involved in said case and here. We therefore conceive that it will be sufficient to present here an excerpt from that case alone, without referring to or quoting from other cases, to illustrate the status of telegraph corporations to the federal government, where such corporations have accepted the restrictions and obligations imposed upon them by the laws of Congress. In that case the *Pensacola Telegraph Company* was granted by the Legislature of Florida "the sole and exclusive privilege and right of establishing and maintaining lines of electric telegraph in the counties of Escambia and Santa Rosa, either from different points within said counties, or connecting with lines coming into said counties, or either of them, from any point in this (Florida) or any other state." Said company was granted the further right to locate and erect its lines "along and upon any public road or highway, or across any water, or upon any railroad or private property for which permission shall first have been obtained from the proprietors thereof." In the year 1872, and after the granting of said rights and privileges, the Alabama & Florida Railroad Company, including its right of way and railroad, was transferred to the *Pensacola & Louisville Railroad Company*, and by an act passed in 1873 and amended in 1874 the Legislature authorized said telegraph company to construct, maintain, and operate a telegraph line "from the Bay of Pensacola along the line of the said railroad as now located, or as it may hereafter be located, and along connecting roads in said county to the boundary lines of the state of Alabama," etc. In June, 1874, said railroad company granted to the *Western Union Telegraph Company* "the right to erect a telegraph line upon its right of way, and also the rights and privileges conferred by the acts of February, 1873, and 1874." The *Western Union Company* thereupon commenced the erection of the line; but, before its completion, the *Pensacola Company* filed a bill in the United States Circuit Court for the purpose of enjoining said *Western Union Company* from continuing or completing the work or using said line, upon the ground of the alleged exclusive right of the *Pensacola Company* to maintain and operate a telegraph line on and over the right of way of said railroad company and the charter

granted to said *Pensacola Company* by the Florida Legislature. Disavowing the power of a state to interfere with the right of a telegraph company that has accepted the restrictions and obligations imposed by the government on such corporations to do business within the borders of such state, in which there are military and post roads, the Supreme Court of the United States, speaking through Chief Justice Waite, says, *inter alia*: "Congress has power 'to regulate commerce with foreign nations and among the several states' (Const. art. 1, § 8, par. 3); and 'to establish post offices and post roads' (Const. art. 1, § 8, par. 7). The Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land. Article 6, par. 2. A law of Congress made in pursuance of the Constitution suspends or overrides all state statutes with which it is in conflict. Since the case of *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post offices and post roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national government. The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stagecoach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they are intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the states and the transmission of intelligence are not obstructed or unnecessarily incumbered by state legislation. * * * It is not only important to the people, but to the government. By means of it the heads of the departments in Washington are kept in close communication with all their various agencies at home and abroad, and can know at almost any hour, by inquiry, what is transpiring anywhere that affects the interest they have in charge. Under such circumstances, it cannot for a moment be doubted that this powerful agency of commerce and intercommunication comes within the controlling power of Congress, certainly as

against hostile state legislation. In fact, from the beginning, it seems to have been assumed that Congress might aid in developing the system; for the first telegraph line of any considerable extent ever erected was built between Washington and Baltimore, only a little more than 30 years ago, with money appropriated by Congress for that purpose (Act March 3, 1843, c. 84, 5 Stat. 618), and large donations of land and money have since been made to aid in the construction of other lines (Act July 1, 1862, c. 120, 12 Stat. 489; Act March 3, 1863, c. 98, 12 Stat. 772; Act July 2, 1864, c. 217, 13 Stat. 365; Act July 27, 1866, c. 278, 14 Stat. 292). It is not necessary now to inquire whether Congress may assume the telegraph as part of the postal service and exclude all others from its use. The present case is satisfied if we find that Congress has power, by appropriate legislation, to prevent the states from placing obstructions in the way of its usefulness. The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by state lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all."

From the principles as thus affirmed, these incontrovertible propositions flow: (1) That telegraph corporations that have accepted the restrictions and obligations prescribed as to such corporations by Congress are not primarily beholden to any state for their right to transact a telegraph business therein; that the sole source of their authority to enter any of the states or territories of the United States, where there are military and post roads and government waterways, for the purpose of doing business therein is in the acts of the federal Congress. (2) That no state has the power, under the indicated circumstances, to exclude such corporations from the right or privilege of carrying on the business for which they are formed within its borders; that, while the state may impose upon such corporations, as it may upon all corporations of whatever kind or nature, organized and existing under the laws of another state, reasonable regulations, and to that end prescribe and require certain reasonable prerequisites to the exercise of the authority conferred on them by Congress to do business in such state, yet no state will be permitted, whether under the guise of regulation or otherwise, to enact any legislation the effect of which would or might practically be to prevent them from doing business in such state, or in effect result in an attempt on the part of such state to regulate commercial intercourse between its citizens and those of other states, or to control the transmission of all telegraphic correspondence within its own jurisdiction. In other words, any state legislation hostile

to the right of such foreign telegraph corporations to do business in a state in which they are authorized to do business by Congress would be in direct conflict with the laws of Congress, and therefore void. By the light of these well-established propositions, we shall consider the questions submitted for determination by this proceeding.

[3] 1. As to the constitutional proposition urged upon us by the petitioners, we think that a brief examination here of the Code sections themselves, even unaided by the very few decisions involving a construction of the effect and scope of section 15 of article 12 of the Constitution to be found in our own reports, will be all that will be required to show the utter untenableness of the contention of counsel for petitioners. It may be remarked that, while the constitutional provision in question has been considered by our Supreme Court in some of the cases, there has not been cited by counsel on either side any case which may be said with strictness to be directly in point here; yet there are expressions in some of the opinions which, if bearing upon the precise question here at all, sustain the contention of the respondents. But, as stated, the Code sections themselves are in language which, it seems to us, clearly discloses that by no possible construction can the things therein required to be done be counted as among the functions of the corporations to which they refer. Section 290 points out in detail the matters which must be set forth in articles of incorporation. Section 291 provides that the articles of incorporation of any railroad, wagon road, or telegraph organization must state (1) the kind of road or telegraph intended to be constructed; (2) the place from and to which it is intended to be run, and all the intermediate branches; (3) the estimated length of the road or telegraph line; (4) that at least 10 per cent. of the capital stock subscribed has been paid in to the treasurer of the intended corporation. Section 293 reads: "Each intended corporation named in section two hundred and ninety-one, before filing articles of incorporation, must have actually subscribed to its capital stock, for each mile of the contemplated work, the following amounts, to wit: (1) One thousand dollars per mile of railroads; (2) one hundred dollars per mile of telegraph lines; (3) three hundred dollars per mile of wagon roads." Section 294 provides: "Before the articles of incorporation referred to in the preceding section are filed, there must be paid for the benefit of the corporation, to a treasurer elected by the subscribers, ten per cent. of the amount subscribed." By section 295 it is provided that "before the Secretary of State issues to any such corporation a certificate of the filing of articles of incorporation, there must be filed in his office an affidavit of the president, secretary, or treasurer named in the articles, that the required amount of the capital stock thereof has been actually subscribed, and ten per cent. there-

of actually paid to a treasurer for the benefit of the corporation."

It is obvious that the foregoing sections are designed only to prescribe the requisites essential to the formation or organization of domestic corporations. In other words, it appears very plain that the sole purpose of said sections is to point out or prescribe the mode or manner of bringing into existence in this state, as creatures of our own laws, or as corporate entities, capable of performing corporate functions, the kinds of corporations to which said sections apply. Indeed, we do not understand counsel for petitioners to gainsay this proposition or to undertake to deny that the sole object of said sections is as we have declared it to be. This being true, it necessarily follows that, in order to justify us in sustaining the contention of the petitioners that said sections have the effect of imposing upon such corporations restrictions and obligations in the transaction of their business to which like foreign corporations doing business in this state are not subjected, or, in other words, that the effect of said sections is to permit certain foreign corporations to transact business in this state upon more favorable conditions than are thus accorded to similar domestic corporations, we are compelled to declare that the preliminary requisites which said sections prescribe shall be observed for the formation or organization of such domestic corporations constitute a part of the "business" of such corporations, within the meaning of that term as it is employed in section 15 of article 12 of the Constitution. It is very clear that we cannot so hold without doing violence to the plain, natural meaning of language. To say, with counsel for petitioners, as we must say if we would accept their interpretation of section 15 of article 12 of the Constitution, that the things required by said sections of the Civil Code to be done in order to legally form or organize any of the several classes of corporations to which those sections apply are a necessary part of the "business" or functions for the specific carrying on or execution of which such corporations may through said sections be brought into existence, would, of course, be to hold that such corporations may perform a part of their corporate functions before they have acquired legal capacity to do business at all.

Counsel for petitioners refer to the case of *Gen'l Conf. of Free Baptists v. Berkey*, reported in the 36th Cal. Dec. p. 330, wherein some expressions are used with regard to the scope of the section of the Constitution in question. There is nothing in the opinion of Mr. Justice Shaw in that case which lends the slightest support to the position of petitioners here. On the contrary, there is language in said opinion which upholds the proposition, contended for by respondents here, that the constitutional provision has no reference or application to the prerequisites prescribed by said sections of the Civil Code to

be observed in the formation of the classes of corporations to which those sections apply. It is therein said, among other things: "Alabama has a similar constitutional provision, and this case comes within the rule adopted in that state, where the court holds that, in order to constitute a violation thereof, 'there must be a doing of some of the work, or an exercise of some of the functions for which the corporation was created'"—citing *Beard v. Union, etc., Co.*, 71 Ala. 60, and *International, etc., Co. v. Wheelock*, 124 Ala. 367, 27 South. 517.

The said case of *Free Baptists, etc., v. Berkey* was subsequently reheard by the Supreme Court and the former judgment of that court was overruled; but in the later decision in that case by Mr. Justice Sloss (156 Cal. 466, 105 Pac. 411) there is nothing said indicating any different view by the court upon the general object and scope of the constitutional provision from that expressed by Judge Shaw in the original opinion or at variance with the view expressed in the Alabama cases referred to therein and mentioned here. The difference between the first and later decisions in that case was in the respective constructions given in the opinions therein of the effect of the holding by corporations organized for religious purposes of land on which to erect and maintain houses of worship and the selling of said land after there was no further use for it for such purpose by such corporations. By the first decision, it was held that thus holding and selling land by such corporations was doing or transacting business within the purview of the constitutional provision under consideration. By the later decision, the conclusion was reached that the holding and selling of land, as stated, by a corporation organized for religious purposes, constituted a mere incidental power of such corporation—i. e., that such holding and selling did not constitute "one of the ends for which it is organized, but merely a means to enable it to accomplish those ends." But, as before stated, by neither of those decisions is it intimated that the preliminary acts necessary to form or organize a corporation of any kind constitute any part of the business or functions for which such corporation may be organized. Indeed, it is very properly held in the later opinion that, even after corporations are formed for the purposes designated in their articles of incorporation, they may exercise a variety of powers in order to enable them to execute their main purpose. This is, of course, only a statement of the rule which necessarily applies in all cases of a grant of powers; that the body clothed with such powers may exercise, additionally, such implied or incidental powers as may be found necessary to enable it to execute its express powers, or, in other words, to properly and fully carry out its main purposes.

But the position of petitioners, if tenable, would in effect amount to a requirement that foreign telegraph companies reincorporate in

California before they would be authorized to do business in this state. Clearly no such requirement or intention is contemplated by any provision of the law of California bearing upon the question of quasi public corporations of the class to which the Postal Company belongs. The Legislature could, of course, if it so elected, require corporations organized under the laws of another state or country to reincorporate under the laws of this state as a condition precedent to their right to do business here. But it has not done so, and, therefore those cases cited by counsel for petitioners from other jurisdictions, where reincorporation by foreign corporations under the local laws is required before they can do business within such jurisdictions, are not in point.

We have perhaps given the point under present review more consideration than it really deserves, for it appears to us that no proposition could be clearer than that the sections of the Civil Code, to whose provisions it is contended obedience by foreign corporations of the classes therein named should be compelled in order that they may not be amenable to the charge that they are, where allowed to do so, doing business in California on more favorable conditions than are permitted to similar domestic corporations, cannot by any conceivably reasonable construction be held to treat or deal with any of the functions or the elements of business for which such corporations may be formed. This we say deferentially to counsel for petitioners, to whom must be conceded the legal right to make and urge upon the courts any point which, in their judgment, may operate as a legal barrier or obstruction to the asserted right of the Postal Telegraph Company and other like foreign corporations to transact in California the business coming within the legitimate scope of the powers granted to them. But, the point having been made, it must, of course, be decided, and it seems to us (to briefly recapitulate and sum up the views heretofore expressed) that there is absolutely no escape from the conclusion that the section of the Constitution referred to has no application to conditions with which compliance is made necessary by those sections in order that an aggregation or association of individuals may constitute themselves a corporation in California, but refers solely (to borrow the language of one of the briefs) "to the transaction of business after the corporation is born," or, in other words, after a corporation of any one of the classes referred to by said sections is established through the instrumentality thereof; that a foreign corporation, to legally do business or maintain an office in California, is authorized to do so after filing with our Secretary of State "a certified copy of its articles of incorporation, or of its charter, or of the statute or statutes, or legislative or executive or governmental act or acts creating it, in cases where it had been created by charter, or stat-

ute, or legislative, or executive, or governmental act, duly certified by the Secretary of State, or other officer authorized by the law of the jurisdiction under which such corporation is formed to certify such copy," etc. Section 408, Civ. Code. It is admitted here that the Postal Telegraph-Cable Company has fully complied with said section of the Civil Code, and it therefore follows that it is authorized to transact within the limits of this state the business for which it was incorporated under and by the authority of the laws of the state of New York.

2. We are now brought to the consideration of the second question presented by this proceeding. This point, to restate it, involves the proposition whether, by the enactment of section 407 of the Civil Code, the Legislature intended to limit the right to the exercise of the power of eminent domain in this state by foreign corporations to "railway or other corporations organized for the purpose of carrying freight or passengers."

[4] As to this point, we may, without impropriety, in the outset of the consideration thereof, state that the conclusion at which we have arrived is: (1) That the Legislature did not, by the enactment of section 407 of the Civil Code, design or intend to exclude from the right to exercise the power of eminent domain all foreign corporations other than those of the class mentioned in said section; (2) that, if such was the intention of the Legislature or may be said would be the effect of the provision, if valid, said section, at least in so far as are concerned telegraph corporations that have accepted the restrictions and obligations imposed by Congress upon such corporations, is void, as being directly antagonistic to rights granted and guaranteed by the "supreme law of the land"—i. e., by the acts of Congress from which, as we have seen, telegraph corporations which have duly accepted the restrictions and obligations prescribed as to them by the general government derive their right to transact business within any of the states and territories of the Union over, in or through which traverse "post or military roads," within the meaning of that phrase as used in the act of Congress. Section 1001 of the Civil Code, enacted in the year 1872, reads: "Any person may, without further legislative action, acquire private property for any use specified in section twelve hundred and thirty-eight of the Code of Civil Procedure either by consent of the owner or by proceedings had under the provisions of title seven, part three, of the Code of Civil Procedure; and any person seeking to acquire property for any of the uses mentioned in such title is 'an agent of the state,' or a 'person in charge of such use,' within the meaning of those terms as used in such title. This section shall be in force from and after the fourth day of April, eighteen hundred and seventy-two." Section 1238 of the Code of Civil Procedure, among other provisions,

contains the following: "Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following uses: * * * Telegraph and telephone lines." That section, in so far as it relates to telegraph lines, was, like section 1001 of the Civil Code, enacted in the year 1872 at the time of the adoption of all our laws in codified form.

[5] It must be conceded that the word "person," as used in our state laws, "includes a corporation as well as a natural person." Section 14, Civ. Code; *Lux v. Haggin*, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604; *City of Los Angeles v. Leavis*, 119 Cal. 164, 51 Pac. 34; *Robinson v. S. Cal. Ry. Co.*, 129 Cal. 8, 61 Pac. 947. Speaking of section 1238 of the Code of Civil Procedure, *supra*, the Supreme Court says: "A corporation, whether private or public, is a person. Civ. Code, § 14. It follows, therefore, that, under this general law—general in the widest and fullest sense of the term—any public or private corporation, or any natural person, may, for any of the uses defined in section 1238 of the Code of Civil Procedure acquire private property without the consent of the owner, by means of the proceedings prescribed in part 3, title 7, of said Code (sections 1237 to 1263)." *Pasadena v. Stimson*, *supra*. It will be noted that for over 30 years before the enactment of section 407 of the Civil Code section 1001 of said Code existed, in its present form, as a part of our local system of jurisprudence; and we apprehend that prior to the enactment of section 407 of the Civil Code by the Legislature of 1905 no one could be found who, for a moment, would undertake to maintain that any corporation, whether private or public, could not, under the terms of section 1001 of the Civil Code and the provisions of the Code of Civil Procedure prescribing the remedy therefor, exercise the power of eminent domain for the uses for which such power is authorized by law to be invoked in this state.

The important questions here, then, as stated, are: Was it the intention of the Legislature that section 407 of the Civil Code should operate, except as to those corporations expressly named in said section, to abrogate the right of eminent domain with which all foreign corporations were undoubtedly invested by section 1001 of the Civil Code, and, if so, is not said section, to the extent that it was so designed to destroy that right, void? An examination of the statutes of 1905 (page 631 *et seq.*) will show that the Legislature, at the time it passed section 407, and by the same act, enacted sections 405, 406, 408, 409, and 410 of said Code. Each of these sections relates to corporations organized under the laws of other states, territories, and countries, and, with the exception of section 407, all involve mere regulations to which such corporations are required to conform in order to authorize them

to do business in this state or to maintain or defend actions or suits in the courts of this state. In other words, section 407 is the only one of the several sections embraced within that act of the Legislature which purports to invest any particular class of foreign corporations with any substantive right. Said section reads: "Every railway or other corporation organized for the purpose of carrying freight or passengers under or by virtue of the laws of the United States, or of any state or territory thereof, may build railroads, exercise the right of eminent domain, and transact any other business which it might do if it were created and organized under or by virtue of the laws of this state, and has the same rights, privileges, and immunities, and is subject to the same laws, penalties, obligations, and burdens as if created or organized under and by virtue of the laws of this state. Nothing contained in this section shall be construed to exempt any corporation from any duty or liability imposed upon it by any of the provisions of this chapter."

It may be remarked that, if the act of 1905, embracing among others, said section 407, constituted the pioneer in legislation upon the subject of foreign corporations, the courts would doubtless be compelled to hold under the doctrine of construction, "*Expressio unius est exclusio alterius*," that, so far as a state Legislature would have the power to effect that result, the right to exercise the power of eminent domain was by said section 407 intended to be restricted to that class of foreign corporations expressly mentioned in said section. But, as we have shown, for a period of over 30 years antedating the enactment of said section 407, the established, accepted, unquestioned, and unquestionable rule in this state was that, subject to any reasonable regulations which the state might deem proper to prescribe to such corporations, any foreign corporation authorized to do business in this state was clothed equally like domestic corporations with the right to exercise, whenever necessary to do so for carrying on their legitimate business, the power of eminent domain. Now, it may be declared as a matter of common knowledge that the right in telegraph or other corporations organized for cognate purposes to exercise the power of eminent domain is absolutely, indeed, indispensably, essential to the carrying on of their business, for obviously, without such right, they could very easily be prevented from doing business at all. If, as may often happen and as perhaps has often happened, such corporations should be unable to secure, with the consent of the owner thereof, upon just compensation being offered therefor, rights of way over privately owned lands, it is very plain to be seen that, if petitioners' construction of section 407 be sound and the legislation therein, as so construed, the result only of a valid exercise of legislative power, they would thus be be-

reft of all power to extend their business as the exigencies thereof might require and thereby placed at the mercy of, if not in a position to be destroyed by, competing lines organized under the laws of our own state, and, besides, greatly impaired, if not destroyed, as governmental agencies.

In the ascertainment of the legislative intent at the base of a statute, the effect of which is, as would be the case here, if the theory of petitioners as to section 407 is supportable, to bring about a radical change in the matter of the enjoyment of substantive rights, we must search for and, if it can be discovered, look to the reason which appears to underlie or has inspired the amendment. We have in vain examined the provisions of section 407 to find some substantial reason why the Legislature should have attempted and intended to deprive foreign telegraph companies, duly authorized to transact business in California, of the exercise of a right without the enjoyment of which they might practically be prevented from doing business in the state at all. While the fact of the absence of any sound reason for the construction of the Code section claimed for it by petitioners may itself be counted as a reason why the Legislature did not intend by the enactment of said section to deny to foreign telegraph companies, lawfully prosecuting their business in this state the right, on appropriate occasions, to condemn property for their necessary uses as such corporations, still there are other considerations, significant and potent, which support the position that such was not the intention of the lawmaking department in the enactment of said section. The trend of modern legislation, both national and state, has been and is to discourage, and, indeed, to destroy, monopolies of every kind and description. The policy of our governments, if it has not always been, is certainly now to encourage and promote free and unhampered competition in all classes of business and in the sale of all sorts of commodities, particularly the necessities of life. To this end, there has been added to our statutes, federal and state, a variety of wholesome laws whose aim is to prevent or destroy and punish penally what have been colloquially, but in many instances justly, characterized as predatory trusts and combinations—in other words, monopolies which could control the markets of the world in their lines of activity, and thus impose upon the consumers the most outrageous and even unbearable burdens. At this deplorable condition, we say, modern legislation, sustained by a powerful and unmistakable common sentiment, has aimed its well-charged batteries. In view of these considerations, as well as others already and to be hereafter suggested, it is hardly conceivable that the Legislature of California, so late as the year 1905, would ingraft upon the statute books a law intended to so cripple foreign telegraph corporations authorized to

do business in this state, and desiring manifestly to make transcontinental connections here, as to result in preventing them from carrying out, the most advantageously to the public and to our governments, the purposes for which they are formed. Again, it is highly probable that, the right in foreign telegraph corporations to condemn property under the power of eminent domain having existed for many years prior to the passage and approval of section 407, the Legislature, if it intended by said section to interdict that right, would therein have expressly so declared. Moreover, had it intended to take from such corporations the rights conferred upon them by section 1001 of the Civil Code, then it seems to us the act of 1905, within which section 407 is embraced, would have contained, as it does not contain, a clause repealing all laws then in existence in conflict with the terms of said section.

We do not know, nor have we, after viewing the statute from every conceivable angle, been able to discover, what precise reason prompted its enactment, for manifestly it confers on foreign railroad corporations, authorized to do business in this state, no greater rights than they already had or could have exercised prior to the passage of said section. This fact, it may be conceded, might itself furnish the foundation for a persuasive, if not conclusive, argument in support of the construction given the section by counsel for petitioners if we were to overlook the other considerations, to which we have referred, conclusively proving, we think, that such construction cannot be maintained upon any reasonable theory.

[6] But, as declared, if in fact it was the intention of the Legislature, by the enactment of said section, to exclude from the right of condemning property under the power of eminent domain all other foreign corporations than those of the class mentioned therein, the section in effect contravenes the laws of Congress with respect to foreign telegraph corporations which have subscribed to the restrictions and obligations imposed upon such corporations by Congress, and therefore to the extent that it attempts to preclude such corporations authorized to carry on their business in California from the exercise of such right, is invalid.

It is conceded that the property sought to be condemned by the Postal Telegraph-Cable Company in the proceeding pending before respondents is embraced within a "post road" as established and defined by the act of Congress. We have already seen that the right in telegraph corporations which have accepted the restrictions and obligations imposed upon them by the federal government to establish their lines within the limits of a state or territory where there exist "post roads" within the purview of the act of Congress establishing such "roads" comes, primarily, through the authority of Congress; that such right cannot be divested, nor interfered with, by state legislation.

Telegraph lines are now esteemed to be and are among the most potent agencies through which interstate communication and the highest welfare of our people and our governments, both federal and state, may be promoted and maintained. Indeed, they are, in our present civilization, absolutely essential to the full and proper transaction of the business of the general government. Such agencies therefore come within the proper, in truth, the peculiar, province of the federal government to foster and protect, in order that they may subserve the ends of said government. The acts of Congress with respect to such agencies of government are therefore paramount to state laws. The principle announced by Mr. Justice Harlan of the United States Supreme Court, in a very recent case (Chicago, Indianapolis & Louisville Ry. Co. v. United States, 219 U. S. 486, 31 Sup. Ct. 272, 55 L. Ed. —), is applicable here, that "no state enactment can be of any avail when the subject of such transactions has been covered by an act of Congress, acting within the limits of its constitutional powers." In other words, it is thoroughly established that, when "an act of the Legislature of a state prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the state law must give way, and this without regard to the source of power whence the state Legislature derived its enactment." *Sinnot v. Davenport*, 22 How. 227, 16 L. Ed. 243; *M., K. & T. R. Co. v. Haber*, 169 U. S. 613, 626, 18 Sup. Ct. 488, 42 L. Ed. 878; *Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108.

The legislation complained of here involves more than a mere regulation. It involves the substance of right. As before stated, the deprivation of the right in such corporations to condemn property for their uses, whenever necessary, might deprive them of the right to do business at all, as would, to a large extent, be the effect of a denial of that right in the present case. The legislation involved in said section is therefore hostile to the right guaranteed to such corporations by the federal government, and for this reason, if for no other, it cannot be sustained. The federal reports contain many cases sustaining this view. Counsel on both sides have, with commendable industry and ability, reviewed and analyzed those and many state cases in the elaborate briefs filed herein for our enlightenment upon the important questions involved in this controversy. It would be inconvenient—indeed, impossible—to review here all the cases cited without almost interminably extending this opinion. But it will be sufficient to say that we have carefully read the voluminous and instructive briefs filed in this cause and the cases therein cited, and we feel persuaded that the final conclusion at which we

have arrived fully harmonizes with both principle and precedent.

It follows from the foregoing that the order to show cause or the alternative writ of prohibition herein issued must be discharged, and such is the order.

We concur: CHIPMAN, P. J.; BURNETT, J.

15 Cal. App. 679

WESTERN UNION TELEGRAPH CO. et al.
v. SUPERIOR COURT OF SACRAMENTO COUNTY et al. (Sac. 1,913.)

(Supreme Court of California. May 22, 1911.)

PROHIBITION (§ 3*)—SCOPE OF REMEDY.

Prohibition will not lie to prevent the superior court from hearing an application by a foreign corporation to condemn private property for a public use upon the ground that the superior court has no jurisdiction to listen to such an application; the right of such corporation to exercise the power of eminent domain being a question of law within the jurisdiction of that court and properly reviewable by appeal.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4-19; Dec. Dig. § 3.*]

In Bank. On petition for rehearing. Rehearing denied.

For former opinion, see 115 Pac. 1091.

PER CURIAM. The petition for a transfer of this cause for rehearing in the Supreme Court after decision in the District Court of Appeal is denied without regard to the merits of the controversy between the real parties in interest, and upon the sole ground that in our opinion the remedy by prohibition is not available to the petitioners. It is sought by this proceeding to prohibit the superior court from hearing an application by a foreign corporation to condemn private property for a public use upon the ground that the superior court has no jurisdiction to listen to such an application by such a party.

It is true that the capacity of a foreign corporation to exercise the power of eminent domain in this state is purely a question of law, but it is a question as much within the jurisdiction of the superior court as other questions of law arising in similar cases which are held to be reviewable here only on appeal.

We have deemed it proper to make this explicit statement of our reasons for refusing to transfer the cause to this court for a further hearing, in order to guard against the assumption that the decision of the District Court of Appeal upon the questions therein so fully discussed is a precedent binding upon this court or the trial court; the question being one as to which we prefer to reserve our opinion until after more mature consideration than we have been able to give it.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

159 Cal. 783

PEOPLE v. BURK. (Cr. 1,639.)

(Supreme Court of California. May 24, 1911.)

HOMICIDE (§ 327*)—APPEAL AND ERROR—
GROUNDS OF REVIEW—BRIEFS AND ARGUMENTS.

While it is its practice, in an appeal from a conviction for a capital offense, to search the record, even though no effort to point out any error has been made, and where defendant, after conviction for murder in the first degree, files no bill of exceptions, and presents no brief or oral argument, but files a transcript or copy of the judgment roll, as defined by Pen. Code, § 1207, the court, if it finds no error therein, will affirm the judgment.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 695; Dec. Dig. § 327.*]

In Bank. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

William Burk was convicted of murder in the first degree, and he appeals. Affirmed.

W. R. Andrews and E. E. Capps, for appellant. U. S. Webb, Atty. Gen., and Lewis R. Kirby, Dist. Atty., for the People.

SLOSS, J. Having been brought to trial in the superior court of San Diego county upon an information charging him with murder, the defendant was found guilty of murder in the first degree, and the penalty of death was imposed upon him by judgment rendered September 1, 1908. He took his appeal from this judgment on November 19, 1908. The record on appeal was not filed in this court until October 6, 1910. No brief has been presented on behalf of appellant, nor have counsel appeared to orally argue his appeal. In the absence of such appearance, the cause was continued until the calling of the calendar at Los Angeles in April last, and was then ordered submitted. In ordinary cases, an appeal which is not supported by oral or written argument will be given little or no attention by this court; but, where the judgment appealed from condemns a human being to death, we have always made it a practice to search the record to ascertain whether prejudicial error has been committed, even though no effort to point out any such error has been made.

The evidence is not brought up by means of a bill of exceptions or otherwise. The transcript consists simply of a copy of the judgment roll. Pen. Code, § 1207. A thorough scrutiny of the papers included in such roll has satisfied us that the proceedings against the defendant, in so far as they appear in the transcript, were regularly had in accordance with the requirements of law. The information is in proper form, and charges the offense of murder. The minutes show that the various steps leading up to the verdict of the jury were duly followed. The judgment was rendered as provided by our statutes. All of the instructions requested by the defendant were given, with the exception of one which the court rightly modi-

fied by striking out an incorrect and misleading clause, and one the substance of which was contained in the charge given by the court of its own motion. This charge, as a whole, defined with clearness and accuracy the propositions of law necessary for the guidance of the jury, and contained nothing which we can regard as error affecting the substantial rights of the appellant. We see no ground which would justify us in overturning the verdict and the judgment rendered thereon.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

CALIFORNIA REPORTER

116 PACIFIC REPORTER

(159 Cal. 785)

CONKLIN v. BENSON et al. (Sac. 1,804.)
(Supreme Court of California. May 24, 1911.
Rehearing Denied June 23, 1911.)

1. DEEDS (§ 68*)—VALIDITY—FORGERY—CHAR-
ACTER OF INSTRUMENT—MISTAKE—PROCURE-
MENT BY FRAUD.

Where complainant signed deeds and powers of attorney conveying forest reserve land, intending to convey her interest in the land, the papers to be deposited in escrow, so that lieu land applied for in exchange for the forest reserve land might be sold and the proceeds deposited in escrow for her benefit, and that of her cotenant, and the papers taken from escrow and the money paid over, but by the fraud of her attorney the conveyances were not deposited in escrow but were delivered to the grantee who was an agent for the sale of the lieu land, without payment of the price as intended, her failure to personally receive full payment for the lieu land by the default of her attorney could not make the papers forgeries.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 68.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. PRINCIPAL AND AGENT (§ 158*)—FRAUD OF AGENT.

Where a landowner holds out her agent as having full power to dispose of the property, either as owner or agent, holding the indicia of title, an innocent purchaser from such agent will be protected as against the agent's fraud, adversely affecting the rights of his principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 589-598; Dec. Dig. § 158.*]

3. PRINCIPAL AND AGENT (§ 158*)—FOREST RESERVE LAND—LIEU LAND—AUTHORITY TO SELL—ATTORNEY'S AGREEMENT—VIOLATION—INNOCENT PURCHASER.

Complainant, the owner of an undivided interest in forest reserve land with her co-owners, agreed to surrender the same to the United States in exchange for lieu land, and to sell the latter, and for this purpose complainant executed deeds of the forest reserve land to the United States with powers of attorney authorizing the attorney in fact to select and apply for lieu lands, or applications for such land and powers of attorney in fact to convey the lieu lands for such a sum as he deemed proper. These deeds and powers of attorney were executed on the belief that they were deeds to the agent to be placed in escrow by her attorney for delivery as the money was paid pursuant to an agreement between such attorney and the agent. Instead of this the attorney delivered the instruments directly to the agent and he recorded the deed to the forest reserve land and sold lieu lands obtained in exchange to innocent purchasers, and paid the money over to complainant's attorney who did not divide the proceeds between complainant and her co-owners as agreed. *Held*, that an innocent purchaser for value of the lieu land could not be deprived of his title thereto by the original owner; having purchased from the agent having all the indicia of title and authority to convey, under the rule that where one of two innocent persons must suffer by the fraud of a third person, he by whose negligence the fraud is made possible must suffer the loss.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 589-598; Dec. Dig. § 158.*]

In Bank. Appeal from Superior Court, Modoc County; John E. Raker, Judge.

Suit by Mollie Conklin against John A. Benson and others. Decree for complainant, and defendant Thomas B. Walker and C. L. Hovey appeal. Reversed.

A. E. Bolton, for appellants. E. M. Gibson and N. E. Conklin, for respondent.

ANGELLOTTI, J. Plaintiff, claiming to be the owner of an undivided one-half interest in 200 acres of land situate in Modoc county, brought this action against defendants to obtain a decree adjudging that they have no interest therein, and adjudging that a certain deed and certain powers of attorney under which defendant Walker claims to be the owner of such land are void. This land has been granted by United States patent to plaintiff and the legal representatives of the estate of Patrick Reddy, deceased, in lieu of a portion of certain land owned by them situated within the limits of the Sierra Forest Reserve. Walker claims to have acquired in good faith and for a valuable consideration all of the interest of said patentees

in said land by the deed and powers of attorney sought to be held of no effect, and also their interest in other parcels aggregating 1,760 acres selected in lieu of other lands owned by them and situate within said Forest Reserve. Findings and judgment were in favor of plaintiff upon the issues made by the pleadings, and we have before us an appeal by Walker and Hovey from the judgment, and an appeal by Walker from an order denying his motion for a new trial.

The plaintiff makes many general charges of fraud and conspiracy in the matter of the obtaining of the execution by her of instruments under which Walker claims, and in regard to some of these charges the testimony of plaintiff's witnesses was such that it cannot be held that there was not a substantial conflict in the evidence. But there is no conflict at all in the evidence as to certain facts, which, in our view of the law, establishes the right of Walker to prevail in this action.

In the year 1900 plaintiff was the owner of an undivided one-half of about 9,600 acres of land in Inyo and Tulare counties, known as the "Monache land," which had originally been acquired by her husband from the United States government. Patrick Reddy was the owner of the other undivided one-half which, on his death in the early part of the year 1900, passed, subject to administration, to his widow, Emily M. Reddy, and his brother, Edward A. Reddy. This land was all within the Sierra Forest Reserve, which had been set apart by the president of the United States prior to the year 1900. Under an act of Congress, the owners of the land so situated were authorized to relinquish the same to the government, and select in lieu thereof land open to settlement situated elsewhere. To accomplish such a substitution it was essential that the owners convey the reserve land, termed in such transactions the forest reserve base or base land, to the United States by a deed recorded in the proper county recorder's office, and file such deed, with an abstract of title showing title in the government, in the local land office, with an application for other specifically described land in lieu thereof, the land so selected being termed in such transactions lieu land. Under the law, if the land so selected is found to be open to location and the application is approved by the local land office, the papers are forwarded to the General Land Office, and, if there approved, a patent is issued to the original owner by the government for the selected or lieu land. Plaintiff and the Reddys were desirous of selling their Monache land. In July or August, 1900, a meeting was held in the private office of J. C. Campbell of the law firm of Campbell, Metson & Campbell, for the purpose of determining what should be done in the matter of these lands. There

were present, among others, Mr. Campbell, Mr. John A. Benson, one of the defendants, plaintiff and Mrs. Reddy. Mr. Campbell was one of the attorneys for the Reddys, and, as must be assumed in view of the findings, he was also an attorney for Mrs. Conklin in this matter. She claims, and it is not susceptible of serious doubt, that he had her absolute trust and confidence. It was decided at this meeting that the land should be disposed of by sale. It was claimed by plaintiff and one of her witnesses who was present at the meeting that the parol understanding was that Benson should buy the base land outright for \$3.80 per acre, and that deeds therefor were to be executed and placed in escrow, where or with whom or by whom not being expressly specified, but it appears to have been understood by plaintiff that Mr. Campbell was to see to this, and it was alleged in plaintiff's complaint that the agreement was that the deeds should be placed in escrow "under the supervision of plaintiff's said attorney, J. C. Campbell." It was further claimed that the understanding was that said deeds should be taken up from time to time as to various parcels thereof upon payment of the purchase price by Benson, all of the land to be so taken within 90 days. It is not disputed that it was contemplated by all parties that Benson was to obtain the money wherewith to pay for the land from persons to whom he should sell it. Subsequently, papers looking to the disposition of the land were prepared by Benson, and, through Mr. Campbell, submitted to plaintiff and the Reddys for execution. They consisted of deeds to the United States of the Monache lands, powers of attorney, authorizing the attorney in fact to select and apply for lieu lands or applications for such lieu lands, and powers of attorney authorizing the attorney in fact to convey the lieu land for such sum or price as he might deem proper. According to the evidence of plaintiff, these papers were sent from the office of Mr. Campbell to her for signature, and she, relying entirely upon him and believing that they were simply deeds to Benson, signed them and returned them to his office. There was no deposit in escrow of any of these papers, and they were apparently all placed in Benson's possession. The deeds to the United States of the base land were recorded in the proper counties. Benson thereupon proceeded in an endeavor to sell such land as might be selected as lieu land. Defendant Hovey was the agent of defendant Walker, who was making large investments in public lands. He had already had dealings with Benson in such transactions, and in the particular transactions as to Monache lands followed a very ordinary course of business in such matters, viz.: Selected lieu land as specified by his principal, Walker, indicated such selection to Benson, and upon the production by Benson of proof of the filing of a proper application

for lieu lands in the local land office and the delivery of a power of attorney of the owners appointing him, Hovey, attorney in fact to convey the land, paid to Benson the agreed price, subsequently conveying to Walker the selected lands. The powers of attorney bore certificates of acknowledgment by the owners before a notary public, but plaintiff testified that she had never appeared before the notary or acknowledged any of the instruments. Both the other principals, Mrs. Reddy and Edward A. Reddy, and the notary public died prior to the trial. The evidence is sufficient to support the conclusion of the trial court that so far as the naming of an attorney in fact is concerned, the powers of attorney were blank at the time of the signing by the owner and the placing of the same in Benson's hands, and that Benson on making a sale would put in such blank the name of such person as attorney in fact as was desired by the purchaser. It is not claimed that the evidence warrants the inference that Hovey had any reason to suspect that Benson was not acting in all respects as authorized by the owners of the land, or any notice whatever as to any infirmity in the papers delivered to him, except that it is claimed that he knew that Benson filed in his, Hovey's, name, as the attorney in fact, in the power of attorney, after such instruments had been signed by the owners and placed in his possession, in other words, that he knew that the owners had executed the powers of attorney in blank so far as the name of the attorney in fact was concerned. It is unnecessary to consider what would be the effect of such knowledge on his part, for we are of the opinion that the evidence furnishes no foundation for any such claim. Fairly considered, the evidence is without conflict upon the proposition that all his knowledge upon the question was consistent with the conclusion that the various powers of attorney delivered to him in the matter of the purchase of plaintiff's lands were signed and acknowledged by the owners after his name had been inserted as attorney in fact, and was inconsistent with any other conclusion. Upon giving to Benson a description of the lieu land he desired to have selected, he would also instruct him as to the name of the person to be designated in the power of attorney as attorney in fact, and when some days or weeks thereafter Benson had obtained the proof of filing the necessary application in the land office and was ready to close the transaction, he delivered to Hovey a power of attorney complete in every respect, purporting to have been acknowledged by the owners thereof before a notary public. So far as we can understand from the record the powers of attorney delivered to Hovey indicated by the date of both instrument and certificate of acknowledgment that both signing and acknowledgment were subsequent to the time when he gave to

Benson a description of the lieu land desired and instructions to have himself specified as the attorney in fact. He had no other information than that afforded by the papers delivered to him by Benson. Walker had no notice of any kind except such as is imputed to him by reason of the knowledge of his agent, Hovey. Hovey paid to Benson from \$3.62 to \$3.75 per acre for 1,960 acres of land selected in lieu of so much of the Monache land, amounting to a little over \$7,000. The price so paid by him was the price ordinarily paid by him for land of the character of that purchased, and was certainly a valuable consideration. The 200-acre tract involved in this action was a part of this. The tract was attempted to be conveyed by Hovey, as attorney in fact for the owners, to Walker, by deed dated December 10, 1901, and recorded in the county recorder's office of Modoc county upon December 12, 1901. It appears that nearly \$11,000 has been paid by Benson to the owners on account of the Monache lands, \$2,750 of which was received by plaintiff from Campbell, and over \$8,000 by the Reddys, and this was much more than the price agreed upon for the 1,960 acres. So far as we can determine from the record, all moneys paid by Benson were delivered by him to Mr. Campbell. It is not shown by the record that any of the Monache land other than the 1,960 acres has been finally disposed of by Benson and thus placed beyond the reach of the owners. It is not shown by the record that the United States ever approved any of the selections of land in lieu of Monache lands except the selections made for Walker. Some time in 1903, plaintiff notified Walker that she revoked the power of attorney given to Hovey, and in the same year commenced a contest in the United States Land Office looking to a rejection of the claims of all persons claiming under papers signed by her. Having first offered to pay to Benson the sum of \$2,750 which she had received, upon the restoration to her of her title to all of the Monache land formerly owned by her, plaintiff commenced this action on December 10, 1904. The owners of the other undivided one-half did not join in the action and were not made parties defendant.

[1] There is no foundation in the facts above set forth for the conclusion that the papers signed by plaintiff were forgeries, and absolutely ineffectual even to serve as a basis for the application of the doctrine of estoppel. The theory of the learned judge of the trial court appears to have been that all of these papers, including the deeds of the Monache lands to the United States, were in effect forgeries and absolutely void. The idea underlying this apparently was that plaintiff was so deceived in the matter of executing these instruments as to bring her within the doctrine of certain cases which substantially hold that where a person who has no intention of selling or in-

cumbering his property is induced by some trick or device to sign a paper having such effect, believing that paper to be a substantially different instrument, the paper so signed is just as much a forgery as it would have been had the signature been forged. These decisions are not such as to sustain plaintiff's claim in this regard. The distinguishing feature between all such cases and the case at bar is that here plaintiff fully understood and believed that she was signing papers which, when delivered, would convey all her interest in the Monache lands. She intended to execute papers having this effect. The difference between the papers she thought she was signing, according to her evidence, and the papers she actually signed, was merely one of detail and in no degree material, one set of papers having precisely the ultimate effect of the other, the conveyance of her interest in this land. Her real and only complaint upon her own testimony was her failure to personally receive full payment for her land claimed to have been occasioned by reason of the failure of her agent to place the papers in escrow, to be taken up as payments were made, and the delivery thereof to Benson without payment first having been made. This failure could not make the papers "forgeries" in any sense of the word. She voluntarily and consciously signed papers effectually disposing of control of such land and delivered them to her attorney for the purpose of ultimate delivery to the purchasers upon payment of the purchase price. An example of the kind of case where an instrument actually signed by the defrauded party is held to be a forgery, notwithstanding the genuineness of the signature, is *Marden v. Dorthy*, 160 N. Y. 39, 54 N. E. 726, 46 L. R. A. 694, where the plaintiff had signed her name to a deed of her premises without any knowledge or information that it was an instrument which in any manner affected her interest therein, and without any intention to execute any instrument affecting such interest, and her signature had been obtained by some trick or device by which she was led to believe that she was signing a paper of altogether different character. Distinguishing the case from others relied on by the parties claiming against her, the court said: "The distinction between these cases and the one at bar is so broad and so plain that it is difficult to see how it could be supposed that they had any application. In all of them it will be seen that the party sought to be charged consciously and voluntarily executed a contract, obligation, or conveyance of some kind or character, and for some purpose. There was an intention to execute, and an actual execution of the instrument, in every case, followed by an actual delivery. There was the assent of the will to the use of the paper or the transfer, as the case may be, though that assent may have been induced by fraud, mistake, or misplaced confidence. In such cases

when the obligation is put in circulation, or when some instrument which clothes another with the indicia of title to property is used by him, the equities of innocent parties must be considered." In *Cornell v. Maltby*, 165 N. Y. 557, 59 N. E. 291, 561, the same court holding that a transfer induced by fraud was not void but only voidable, distinguished the *Marden Case*, saying that it was there found that the signature of Mrs. Marden had been "obtained under circumstances which precluded the assumption that she had ever intended to sign a deed, so that its use for that purpose was in fact a forgery, and this, together with the fact that the alleged acknowledgment of the paper was equally fraudulent, rendered the instrument void ab initio." There is nothing in the law of this state which makes an acknowledgment by plaintiff or a certificate of such acknowledgment essential to the validity of any of the papers actually signed by plaintiff.

[2] Under such circumstances as are disclosed by the record in this case, the rule established by the overwhelming weight of authority is that the equities of innocent purchasers are protected, even if injury be done to the party who has been imposed upon or defrauded by her agent or original grantee. As originally said in *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341, and approvingly quoted in *Woodsum v. Cole*, 69 Cal. 142, 10 Pac. 331, and *Dover v. Pittsburg Oil Co.*, 143 Cal. 501, 77 Pac. 405: "Where the true owner holds out another, or allows him to appear as the owner of or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power, which through negligence, or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance." The same general doctrine was applied in *Schultz v. McLean*, 93 Cal. 329, 356, 23 Pac. 1053, where the fraud occasioning injury was practiced by the plaintiffs' own agent in the matter of the delivery of a deed, the vendee being one in good faith and for value. This court there said: "Where one of two innocent persons must suffer by the fraud or negligence of a third, whichever of the two has accredited him ought to bear the loss." This principle is recognized by section 3543 of the Civil Code, which reads: 'Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer.' * * * In this case, plaintiffs and defendant were both innocent. Neither knew that the fraud was being practiced; but if that fraud was productive of injury, the injury must result to the plaintiffs, for

they placed it in the power of the wrongdoer to perpetrate the fraud. The vendee will not be compelled by a court of equity to lose the benefit of a bargain obtained in all fairness and honesty, because of a fraud practiced upon the vendors by their own agent. Under such circumstances they must bear the consequences; for the loss is chargeable to the trust reposed in their agent—in this case a trust so complete and entire as to cause them to disregard the dictates of ordinary prudence."

[3] In view of what we deem to be shown without conflict in this case, there can be no doubt of the propriety of the application of the doctrine just referred to, so far as Hovey and Walker are concerned. Hovey, who was in effect exclusively Walker's agent, found in the possession of Benson, a well-known agent for the purchase and sale of public lands, complete evidence of his full power of disposition of plaintiff's forest reserve base, and this evidence, consisting of various documents signed by her for the very purpose of enabling the disposition of her land to be made, had been placed in the possession of Benson by her trusted agent. There was in Benson's possession not only the deeds of plaintiff and her co-owners conveying the Monache lands to the United States, which alone would not, of course, apparently authorize any disposition by him of lieu lands, but in addition to these deeds, the only possible object of the execution of which was to obtain lands in lieu of the reserve land, the abstract of title essential to obtain lieu land, either applications for lieu lands executed by plaintiff and her co-owners or powers of attorney authorizing Benson, as their attorney in fact, to apply for such lieu lands, the proof of filing in the land office of the applications for the specific lieu land actually sought to be purchased by Walker, and a power of attorney apparently executed in complete form and acknowledged by plaintiff, authorizing Hovey, for a valuable consideration received from him, as her attorney, to convey the lieu land for such sum or price as he deemed proper. The evidence was without conflict upon the proposition that one of the ordinary methods of buying and selling forest reserve base was for the owner to deed to the United States the base land and obtain the approval by the government of lieu land selected by the purchaser, and give to the purchaser such a power of attorney as was given to Hovey, making the purchaser's agent or the purchaser himself the attorney in fact to make the conveyance. These documents, ready for delivery by Benson to Hovey, certainly made Benson to appear as having full power of disposition over plaintiff's property, and warranted Hovey in relying thereon to the extent of paying a valuable consideration for the land upon the delivery of the papers, including the executed power of attorney. There is absolutely nothing in the evidence to oppose the showing that Hovey acted in

the highest good faith and without the slightest reason to suspect that Benson was not acting in the strictest accord with the arrangement between himself and the owners of the land, and we cannot see that he was at all negligent in so assuming. So acting, he paid a valuable consideration for the land. If injury resulted to plaintiff by reason of any departure by Campbell and Benson from the agreement as she understood it, it was due wholly to the trust reposed by her in her own agents. By reason of that trust, she held out Benson as having full power of disposition over her property, and she is precluded from disputing the execution of such power as against innocent third persons who were thus led into dealing with him.

In addition to this, so far as this record shows, there was no injury resulting to plaintiff by reason of any departure by her agents from the arrangement as she understood it, so far as the lands conveyed to Walker are concerned. We have already adverted to the condition of the record from which it must be assumed that the full agreed price of the lands conveyed to Walker, \$3.80 per acre, was in fact paid by Benson to the agent of the owners. The money so paid to the agent was apparently all delivered to the owners, plaintiff acknowledging that she received from Campbell \$2,750, and it being undisputed that the remainder was delivered to the Reddys. Why the money received was not equally divided by the common agent between the two sets of owners does not appear, but manifestly the receipt of the money by plaintiff's agent was, under the circumstances of this case, receipt by her so far as Walker is concerned. Even under plaintiff's understanding of the agreement, Benson was entitled to take any portion of the land upon payment of \$3.80 per acre therefor, and the complaint and evidence both indicate that she contemplated that Campbell might receive for her moneys paid for the lands as the deeds were taken out of escrow. She alleged in her complaint that she had received "of said Benson, through her attorney, J. C. Campbell, the sum of \$2,750," and that "she understood that said sum was in payment for lands, * * * the deeds for which had been taken out of escrow, and the said money paid into the escrow for the lands described therein." If she has been injured at all, such injury has been wholly caused by the failure of her own agent to pay over her portion of the money received from Benson. That is a matter solely between herself and her agent. So far as the record shows, there was no injury caused plaintiff in the matter of the disposition of the lands conveyed to Walker, by reason of any failure to follow the method of disposition that she claims was agreed upon. Her injury, if any, resulted from an entirely different cause, one in no degree af-

fecting the right of Walker to retain the land.

In view of what we have said, it is unnecessary to discuss any other point made for reversal. Considering, however, that portions of this opinion may be alleged to imply that charges of fraud made by plaintiff against Mr. Campbell are well based, it is only fair to say that the only matters as to which there is any evidence at all to support the conclusion of a departure by him from the agreement as plaintiff understood it, aside from the apparently unequal division between plaintiff and the Reddys of the money received from Benson (a matter as to which the record furnishes no solution whatever), was in approving the papers, which were submitted to her for execution and which were different from those contemplated by her, submitting such papers to her for execution, and failing to place the executed papers in escrow for delivery as the money was paid. Even upon these matters the evidence was sharply conflicting. Wherever the truth lies as to these matters, there was absolutely nothing in the record upon which to found the conclusion that there was any design on Campbell's part to defraud plaintiff, or any collusion with any other party looking to that result, or that the course pursued by him resulted in obtaining any less money for the benefit of the owners than would have been obtained had the method understood by plaintiff to have been agreed upon been followed.

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.

159 Cal. 729

DOYLE v. HAMPTON et al. (L. A. 2,361.)

(Supreme Court of California. May 12, 1911.)

(On Rehearing, June 10, 1911.)

1. PROCESS (§ 45*)—ALIAS WRITS—STATUTES—"IN THE SAME FORM AS THE ORIGINAL."

Code Civ. Proc. § 407, provides that a summons must be directed to the defendant, signed by the clerk and issued under the seal of the court, and must contain the names of the parties, etc., and section 408, providing for the issuance of alias summonses, requires that it shall be "in the same form as the original." *Held*, that section 408 meant that the alias summonses should conform to the requirement of section 407, and did not preclude the insertion therein of the name of a defendant, which through a clerical error had been omitted from the original summonses.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 42-45; Dec. Dig. § 45.*]

2. JUDGMENT (§ 131*)—DEFAULT—ENTRY—PROCEEDINGS TO SUSTAIN JUDGMENT—PRESUMPTIONS.

Where the judgment roll does not show an issuance of an alias summons, but there is an affidavit of publication of an alias summons sufficient in form as to a party defendant and the judgment recites that proof of service upon all

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

defendants has been duly shown, it will be presumed in support of the judgment, in the absence of anything to rebut the recital, that the alias summons in the form set forth in the affidavit of publication was issued prior to the publication.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 160, 245; Dec. Dig. § 131.*]

3. PROCESS (§ 45*)—ISSUANCE—ALIAS WRITS—AFFIDAVITS—MODE AND SUFFICIENCY OF PUBLICATION.

It is not necessary that an alias summons should issue prior to the making of the affidavits for publication, or prior to the making of the order for publication; but it is sufficient that such summons is issued at any time prior to the commencement of the publication service ordered.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 42-45; Dec. Dig. § 45.*]

4. VENDOR AND PURCHASER (§ 239*)—BONA FIDE PURCHASER—RIGHTS ACQUIRED—JUDGMENT.

Where a purchaser acquires land upon the faith of a default judgment, valid on its face, without notice or knowledge of any fact tending to show fraud in obtaining the judgment, the owner of the land prior to the judgment is not entitled to relief as against the rights of the innocent purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 583-600; Dec. Dig. § 239.*]

5. APPEAL AND ERROR (§ 1011*)—REVIEW—VERDICT AND FINDINGS—SUFFICIENCY OF EVIDENCE.

Where findings are supported by evidence legally sufficient, although to some extent conflicting, an appellate court will accept the findings as correct.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

Department 1. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by Thomas Doyle against Thomas J. Hampton, Emanuel Lewis, and another, in which Lewis and the other defendant failed to appear and took judgment by default, and from a judgment for defendant Hampton, plaintiff appeals. Affirmed.

H. E. Storrs and Munson & Barclay, for appellant. Schweitzer & Hutton, for respondent.

ANGELLOTTI, J. This action was brought by plaintiff to have it adjudged that he is the owner of a lot of land in the Lewis tract, Los Angeles county; that the defendants Hampton, Lewis, and Rich have no interest therein; and that a certain judgment in favor of Lewis in an action brought by him against plaintiff and others, adjudging said Lewis to be the owner of said land, be declared void, because fraudulently obtained. The action is similar in character to that upheld in *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007. The defendants Lewis and Rich were duly served with summons, but failed to appear, and their defaults were duly entered. Defendant Hampton served and filed an answer and a cross-complaint, which were

treated in the court below and are treated on this appeal as sufficiently presenting the defense that he purchased the land from Lewis in good faith and without notice of any fraud in the matter of the obtaining of said judgment, after such judgment had become final, and paid a valuable consideration therefor. Hampton's answer has at all times been treated as sufficiently denying the allegations of fraud in the matter of obtaining such judgment. The findings of the trial court were in favor of Hampton, both upon the allegations of fraud and upon the defense of a purchase in good faith for a valuable consideration, and judgment went in his favor declaring him to be the owner of the land. This is an appeal by plaintiff from the judgment and from an order denying his motion for a new trial.

1. The judgment in the action brought by Lewis against Doyle, the plaintiff here, was not void on its face. That action was one to quiet title, commenced May 19, 1899, against Doyle and many other persons, Lewis alleging in the verified complaint therein that he was the owner of a tract of land, including the lot in controversy, and seeking a judgment accordingly. Summons therein was issued on May 19, 1899, but this summons was defective as to Doyle, for the reason that his name was omitted from the specification of persons to whom it was directed; it being directed to all of the defendants except Doyle. This summons was returned and filed in court on July 12, 1899, accompanied by affidavits showing personal service on a large number of defendants, and the inability of the deponents to find other defendants, including Doyle. Upon these affidavits, and also the affidavit of Lewis, made July 11, 1899, which made a sufficient case for an order for service of summons by publication as against Doyle and other defendants, the affidavit of Lewis being filed July 14, 1899, the judge of the trial court on July 14, 1899, made an order that service of summons be made upon Doyle and others by publication for the requisite time in a daily newspaper published in the city of Los Angeles. There was no direction for mailing as to Doyle; his residence not being known. The register of actions in such case shows that an alias summons was issued on July 14, 1899, but this summons is missing from the judgment roll and files. The judgment roll does contain an affidavit of publication in full accord with the order of the court of an alias summons, a printed copy of which alias summons is attached to such affidavit. This printed copy shows the name of Doyle among the names of the persons to whom the summons was directed. Doyle failed to appear, and his default was regularly entered. The judgment, given January 20, 1900, and entered February 1, 1900, recites that proof of service on all of the defendants was duly

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

shown, and that the default of defendant Doyle and other defendants had been duly entered. By the judgment it is substantially decreed that Lewis is the owner of the land in controversy, and that his title is quieted as against all the defendants.

The only points made in support of the claim that the judgment is void on its face relate to the defect in the original summons, the alleged want of showing of the issuance of an alias summons, the form of the alias summons if one is to be held to have been issued, and the time of the issuance of such alias summons.

[1] As to the defect in the original summons, viz., the omission of Doyle's name from the names of those to whom the summons was directed, and the form of the alias summons, a copy of which is attached to the affidavit of publication and shows the inclusion of Doyle's name as one of those to whom the summons was directed, the point is that the law in regard to the issuance of an alias summons (section 408, Code Civ. Proc.) provides that the same shall be "in the same form as the original." Section 407, Code Civ. Proc., provides what shall be the form and contents of a summons, viz., that it must be directed to the defendant, signed by the clerk and issued under the seal of the court, and must contain (1) the names of the parties, the court in which the action is brought, and the county in which the complaint is filed, (2) a direction that defendant appear and answer the complaint within a specified time, and (3) notice that, unless he does so appear and answer, plaintiff will take judgment for the money or damages demanded, or will apply to the court for any other relief demanded in the complaint. The provision of section 408, Code of Civil Procedure, as to the form of the alias summons, means no more than that it shall conform to the requirements of section 407, Code of Civil Procedure, and did not preclude the insertion therein of the name of a defendant, which, through clerical error, had been omitted from the original summons.

[2] As to the failure of the judgment roll to show the issuance of an alias summons, it must be assumed in support of the judgment, in view of the affidavit of publication of an alias summons sufficient in form as to Doyle and the recital in the judgment that proof of service upon all the defendants had been duly shown, and in the absence of anything in the judgment roll tending to rebut the recital of the judgment, that the alias summons, in the form set forth in the affidavit of publication, was issued prior to the publication. *People v. Davis*, 143 Cal. 673, 678, 77 Pac. 651.

[3] It was not necessary that such alias summons should have been issued prior to the making of the affidavits for publication, or prior to the making of the order for publication. It is certainly sufficient that such summons is issued at any time prior to the

commencement of the publication service ordered.

2. There was never any personal service of summons on Doyle in the action against him by Lewis, and the decree against him is based exclusively on the constructive service already shown. Doyle never had any actual notice of such action or the judgment against him therein until some time in the month of June, 1906. He states in his complaint in this action facts tending to show not only that he was the absolute owner of the land in controversy at the time of the commencement of the action by Lewis against him to quiet title, and that he never had any notice or knowledge of the action, but also tending to show that Lewis in his verified complaint in that action, which constituted a part of his showing for an order for publication of summons, and also in his affidavit presented in support of his application for such order for publication, willfully and knowingly made false statements which were material, and that consequently he obtained such order for publication of summons by the practice of fraud. Plaintiff's complaint in this behalf clearly brings him within the doctrine of such cases as *Dunlap v. Steere*, 92 Cal. 344, 28 Pac. 563, 16 L. R. A. 361, 27 Am. St. Rep. 143, and *Parsons v. Weis*, 144 Cal. 419, 77 Pac. 1007, to the effect that an unconscionable judgment, based solely upon constructive service of process, obtained without any knowledge of the action on the part of the defendant and in such a way that no opportunity has ever been given him to be heard in his defense, will be annulled at the suit of such defendant in an action brought in a timely manner for that purpose, when it is made to appear that the plaintiff in such action knowingly and willfully made a false showing as to material facts for the purpose of obtaining the order for service of summons by publication. Such conduct on the part of the person so obtaining the judgment is held to be extrinsic fraud upon the court in procuring the judgment, and a judgment so obtained "is not within the rule declared in *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159, and in similar cases where relief is sought from a judgment charged to have been obtained by false testimony upon a controverted issue, and where the parties have had an opportunity to meet and overcome such testimony. *Parsons v. Weis*, supra.

[4] But assuming that the findings of the trial court negating the charges of such fraud are not altogether sustained by the evidence, as is contended by learned counsel for plaintiff, the difficulty with their case is that the rule declared by the cases above cited and here invoked cannot be applied as against the rights of innocent third parties. See *Hayden v. Hayden*, 46 Cal. 332, 342. Whatever may be plaintiff's rights as against Lewis, we have here involved the rights of defendant Hampton, who is substantially

found by the trial court to have acquired the property upon the faith of a judgment valid upon its face, for a valuable consideration, and without notice or knowledge of any fact tending to show fraud in the matter of obtaining the judgment.

[5] An examination of the record develops very clearly that there was evidence legally sufficient to sustain these findings; the best that can be said for plaintiff in this regard being that there is some conflict in the evidence. Under such circumstances, an appellate court must accept the conclusion of the trial court as correct. The judgment in the former action being valid on its face, those findings entirely dispose of plaintiff's case, and compel an affirmance of the action of the trial court.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J.

On Rehearing.

In Bank.

PER CURIAM. In response to the petition for rehearing, it is proper to say that we fully realize the apparent hardship of the case so far as the plaintiff is concerned. But so far as the defendant Hampton is concerned, we see no force in any of the points made by counsel for plaintiff, all of which are correctly decided in the department opinion. We do not hold that plaintiff is without remedy by way of damages as to defendant Lewis herein, whose default was regularly entered, and as to whom no judgment has been given. Whether or not such relief can now be awarded against him in this action is a question that has never been suggested by counsel either in the lower court or in this court.

The petition for rehearing is denied.

(159 Cal. 797)

GALVIN v. WHITE et al. (S. F. 5,334.)
(Supreme Court of California. May 25, 1911.)

1. ADVERSE POSSESSION (§ 114*)—EVIDENCE.
In an action to quiet title, evidence held to justify a finding that neither plaintiff nor his predecessor in interest acquired title by adverse possession, but that defendant and his predecessor in title acquired title by such possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682-690; Dec. Dig. § 114.*]

2. QUIETING TITLE (§ 10*)—TITLE OF PLAINTIFF—SUFFICIENCY.

Where one claiming title through an unrecorded deed to property within a military reservation relinquished by Act Cong. July 1, 1870, c. 197, 16 Stat. 186, to the city and county of San Francisco, in trust to convey to actual bona fide possessors, did not show the possession of his grantor, he did not show that his grantor was a beneficiary under the act of Congress, and he could not assert title as grantee and attack defendant's title or possession collaterally.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 36-42; Dec. Dig. § 10.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; George H. Buck, Judge.

Action by E. M. Galvin against Julian Leroy White and others. From a judgment for defendant named and from an order denying a new trial, plaintiff appeals. Affirmed.

E. M. Galvin, in pro. per. Pringle & Pringle, for respondent.

MELVIN, J. Appeal from a judgment rendered in favor of the defendant White and from an order denying plaintiff's motion for a new trial. The action was one to quiet title to a 50-vara lot in the city and county of San Francisco.

Plaintiff claimed title through an unrecorded deed from one Thomas Lea, purporting to have been made, executed, and delivered to said Galvin in 1891. The court found that this deed was destroyed by the fire of April 18, 1906. There were also findings that Thomas Lea never entered into possession of the property under claim of title founded upon a written instrument; that said Lea never protected the land by a substantial inclosure; that he never cultivated nor improved it; that neither the plaintiff nor his predecessor had continuously occupied said property for a period of five years; and that neither the plaintiff nor his grantor had paid all the taxes during a period of five years continuously or during any period of time. The court also found: "That the defendant and his predecessors and grantors were possessed of said property within the times required by the laws of the United States of America, the state of California, and the ordinances of the city and county of San Francisco, from the original location of J. H. Rickett in the year 1849 down to the year 1906"; that defendant had improved the property; had protected it by a substantial inclosure; and had paid all taxes upon said property from the year 1891 to the time of the commencement of the action.

In his motion for a new trial plaintiff introduced an affidavit whereby he asserted that he could prove by certain witnesses that Thomas Lea, his alleged grantor, was in possession of the property here in litigation from 1870 continuously down to the time of his own occupation. His principal excuse for failing to produce said witnesses at the trial was that he had understood the judge who tried the case to express himself as satisfied with the proof which the plaintiff had introduced. An examination of the language used by the court (which also appears by affidavit) convinces us that there was no basis for such belief by plaintiff. At the trial Mr. Pringle, attorney for defendant White, was asked to admit that certain absent persons, if brought into court, would testify substantially to the same facts stated by witnesses who had been examined theretofore in plain-

tiff's behalf. This he declined to do, and the judge said: "By producing those witnesses and putting them on the stand you would be only accumulating those facts; you have established those facts." Obviously the court was merely calling plaintiff's attention to the circumstance that even if the requested stipulation were made it would have no original force, but would be merely in the nature of cumulative evidence.

Plaintiff's claim of title rests upon the following asserted facts: (1) That the 50-vara lot is within that area on Point San Jose or Black Point in the city and county of San Francisco reserved for public purposes by proclamation of the President of the United States dated November 6, 1850; (2) that when by act of Congress of July 1, 1870, c. 197, 16 Stat. 186, this land was relinquished to the city and county of San Francisco in trust to convey to actual bona fide possessors such parcels as were severally held by them, Thomas Lea was in such actual bona fide possession of the property here in dispute; and (3) that said Thomas Lea had held possession of such lot of land until plaintiff took it under a deed from Lea.

Defendant established a record title disclaimed from the pre-emption claim of J. H. Rickett. His proof of title showed possession by Rickett on or about June 5, 1850, five months before the presidential proclamation upon which plaintiff depends. There was no formal finding that the property was not within the area covered by the said proclamation and the act of 1870 to which we have heretofore referred, but as the court accepted defendant White's proof of title, including certain maps, doubtless the conclusion reached was that the property lay outside of the former reservation by the United States government on Point San Jose and not within that area, as plaintiff attempted to prove, according to a map made by Mr. Riley who was not an engineer and who admitted that his drawing was made up from information gleaned from a certain "Spring Valley Water Company's Map." In admitting this diagram for what it was worth the court remarked that it had very little value.

[1] There was considerable testimony on both sides with reference to the alleged occupancy of the property by Lea and his widow. Without reviewing it we may simply say that in view of the conflict of testimony there was sufficient evidence to justify the court's conclusion that neither Lea nor his widow nor Galvin ever occupied this lot for a period of five years. For many of the years covered by the statements of the witnesses the streets in the vicinity of this tract were not definitely marked. Some of defendant White's witnesses testified that Lea occupied the 50-vara lot at the corner of Buchanan and Chestnut streets, and not the lot here in litigation which had frontages on Chestnut

street and Magnolia avenue, its westerly line being 137 feet 6 inches west of Buchanan street. It may well have been that, owing to the lack of graded streets in the earlier years, some of the witnesses may have been misled as to the exact location with reference to Buchanan street of the lot upon which Lea's house stood. But whether such was the fact or not, certain it is that there was abundant testimony to justify the court's conclusion regarding the occupancy of the land in question. Thomas Haley testified that in the latter part of 1870 Lea lived on a 50-vara lot at the corner of Chestnut and Buchanan streets. True, this was after the act of Congress upon which plaintiff relies, but it is nevertheless significant. W. E. Haley testified that from 1868 to 1878, Mr. Lea lived on a 50-vara lot at the corner of Buchanan and Chestnut streets, his house being about 100 feet west of Buchanan street. C. D. Harper and E. S. Ring, whose recollections extended as far back as 1868, gave similar testimony. But the most significant evidence was that offered by defendant by which it was shown that the 50-vara lot on the southwest corner of Buchanan and Chestnut streets was conveyed to Thomas Lea by William Barber on March 13, 1863, and that the same William Barber on March 25, 1863, conveyed the adjoining lot, the one in controversy, to S. H. Dwinelle. This is part of the record title now resting in defendant White. It is hardly probable that two men should have bought from the same grantor adjoining property within a fortnight and that one should be maintaining possession of both lots. It was also shown that in 1868 Thomas Lea conveyed the corner lot to Anne Wilson (afterwards his wife). It may be and doubtless is true that Thomas Lea was for many years the only resident on the block of land upon which the lot in question is situated, but this did not constitute possession of the whole block. It was shown that defendant White by his agent contracted for and paid for the grading of the lot, fenced it, and for more than five years paid all the taxes levied upon it.

[2] Even if it were conceded that the property was in the Point San Jose Military Reservation, the plaintiff having failed, as the court found, to establish possession by Lea of the 50-vara lot west of the one occupied by him at the corner of Buchanan and Chestnut streets, it follows that Lea was not a beneficiary under the act of Congress of July 1, 1870. Plaintiff under assertion of title as his grantee cannot therefore attack defendant's title or possession collaterally. *Palmer v. Galvin*, 72 Cal. 186, 13 Pac. 476.

It follows from the foregoing that the judgment and order must be affirmed, and it is so ordered.

We concur: HENSHAW, J.; LORIGAN, J.

(159 Cal. 778)

SHELDON v. LANDWEHR. (L. A. 2,531.)

(Supreme Court of California. May 20, 1911.)

1. CONTINUANCE (§ 7*)—APPEAL AND ERROR (§ 966*)—DISCRETION OF COURT.

An application for continuance because of the absence of witnesses is addressed to the sound discretion of the trial court, and its refusal is not ground for reversal, unless the trial court clearly abused its discretion.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 17, 18; Dec. Dig. § 7;* Appeal and Error, Cent. Dig. § 3837; Dec. Dig. § 966.*]

2. CONTINUANCE (§ 19*)—ABSENCE OF PARTY.

The unavoidable absence of a party to an action, who is also a witness, does not compel the trial court to grant a continuance, but it should be granted or refused according to the court's sound discretion with consideration to the good or bad faith of the application.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 41-48; Dec. Dig. § 19.*]

3. CONTINUANCE (§ 49*)—RIGHT TO A CONTINUANCE—CONDITIONS.

Where the defendant's physician made an affidavit that defendant would be unable to appear at the trial in less than a month, and the plaintiff had attached mining stock of the defendant in a company controlled by the defendant, and which stock was advertised to be sold within three weeks for failure to pay an assessment, and the plaintiff's attorney as well as the court agreed to a continuance if this sale was postponed, a concession which the defendant's attorney refused to make, a continuance was properly refused, though defendant was an important witness in his own behalf.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 143-145; Dec. Dig. § 49.*]

4. TRIAL (§ 6*)—NOTICE OF TRIAL—STATUTE.

Code Civ. Proc. § 594, providing that either party may bring an issue to trial in the absence of the other party, provided, if the issue be one of fact, proof must be made that the adverse party has had five days' notice of such trial, has reference to ex parte proceedings to secure defaults, and does not apply to those cases where both parties are represented when called for trial; and hence, where a defendant and his attorney had had sufficient notice for them to prepare for trial, it was not error for the court to proceed with the trial, though the defendant was not given formal notice of trial where the only reason for a continuance was that the defendant was absent, and necessarily would be for about a month.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 13-18; Dec. Dig. § 6.*]

5. APPEARANCE (§ 9*)—SPECIAL APPEARANCE—WAIVER.

Where an attorney appeared specially to apply for a continuance, and, on the motion for a continuance being overruled, remained and participated in the trial, he waived his special appearance.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 42-52; Dec. Dig. § 9.*]

Department 1. Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by R. B. Sheldon against H. A. Landwehr. From a judgment for plaintiff and an order denying a motion for new trial, defendant appeals. Affirmed.

Chas. S. McKelvey, for appellant. Purington & Adair, for respondent.

SLOSS, J. Judgment went for the plaintiff in this action to recover the balance claimed to be due on four promissory notes. The defendant appeals from the judgment and from an order denying his motion for a new trial.

The only point made by the appellant is that the court erred in denying his motion for a continuance. It appears that, when the case was called for trial, the attorney for defendant stated to the court that he appeared specially to ask for a continuance on the ground of the inability of the defendant to be present on account of ill health. He supported his application by his own affidavit and by the oral testimony of a physician. The affidavit stated that the defendant, if present, would testify to certain facts material to his defense, and that the case could not be tried without his testimony. The physician's testimony was to the effect that the defendant's condition was such as to make it unsafe for him to appear at the trial, or to go to trial in less than a month.

The plaintiff, through his attorney, objected to a continuance on the ground that he had attached, as security for any judgment to be recovered, certain mining stock of defendant; that an assessment had been levied on said stock, and the same was advertised to be sold at delinquent sale within three weeks; and that such sale, if had before judgment, would destroy plaintiff's security. Declaring that the defendant was in full control of the mining company, and could postpone the sale, the plaintiff, in effect, offered to consent to a continuance of the trial, if defendant would postpone the delinquent sale for 30 days. The defendant's attorney stated that he could not consent to such postponement, and declared that the plaintiff had security for the notes, beyond the stock covered by his attachment. The plaintiff introduced evidence showing that he had no other security. After some discussion, the court continued the matter until the afternoon of the same day, when further testimony on the question of other security was given. Plaintiff's attorney then renewed his offer to consent to a continuance, on condition that the defendant would have the assessment sale postponed. Defendant's attorney, not questioning the statement that it was in defendant's power to have the sale postponed, simply declared that he was not willing to undertake to procure a postponement of the sale. Thereupon the court said: "I will continue this case until to-morrow, and, if that company does not pass proper resolutions and continue that sale, the case will go on to-morrow." Defendant's attorney stated that he could not and would not be present on the following day, whereupon the court directed that the trial proceed, and it did proceed, defendant's attorney participating.

[1] An application for continuance on the ground of the absence of a witness is addressed to the sound discretion of the trial court, and an order denying the application will not be deemed ground for reversal unless it is clear to the appellate court that the court below has abused its discretion. *Musgrove v. Perkins*, 9 Cal. 211; *Kneebone v. Kneebone*, 83 Cal. 647, 23 Pac. 1031.

[2] The circumstance that the witness who is unable to attend is at the same time one of the parties should no doubt be regarded as strengthening the showing in favor of a continuance (*Jaffe v. Lillenthal*, 101 Cal. 175, 35 Pac. 636), but it has never been held in this court that the unavoidable absence of a party necessarily compels the court to grant a continuance. *Lynch v. Superior Court*, 150 Cal. 123, 88 Pac. 708. In such cases, as in others, the court in granting or denying the application should be governed by a desire to take that course which, under all the circumstances disclosed, seems most likely to accomplish substantial justice. One of the questions that may be considered is that of the good or bad faith of the application. *Barnes v. Barnes*, 95 Cal. 171, 177, 30 Pac. 298, 16 L. R. A. 660.

[3] Upon the facts before it in the case at bar, the trial court certainly cannot be said to have abused its discretion in denying the defendant's motion. The plaintiff had shown that he would suffer loss by delay. Notwithstanding this, he expressed his willingness to have the trial continued if he were protected against such loss. The defendant had the power to afford such protection, but his attorney declined to take any step to that end. His position, as he stated it to the court, was that his client was "entitled to a continuance no matter what the result would be to the plaintiff." The court below took the contrary, and we think the correct view that its duty was to consider the interests of both parties. The showing before it fully justified the conclusion that injustice would be as likely to follow from the granting of the continuance as from its refusal. Furthermore, the attitude of defendant's attorney afforded warrant for the belief that the continuance was not asked in good faith to enable the defendant to make a meritorious defense, but that its real object was to hinder and delay the plaintiff in the enforcement of his rights.

[4] It is also claimed that the court erred in proceeding to trial because it was alleged in the affidavit of defendant's attorney that he had not had notice of the time of trial. Said attorney did in fact remain during the trial and participated therein. Section 594 of the Code of Civil Procedure provides that "either party may bring an issue to trial or to a hearing, and, in the absence of the adverse party, unless the court, for good cause, otherwise direct, may proceed with his case, and take a dismissal of the action, or a verdict or judgment, as the case may require;

provided, however, if the issue to be tried is an issue of fact, proof must first be made to the satisfaction of the court that the adverse party has had five days' notice of such trial." It is quite clear from a reading of this section that it has reference only to proceedings taken against a party in his absence. Where one party, the other being absent and unrepresented, calls a case for trial, and seeks, upon an ex parte showing, to secure a dismissal, a verdict, or a judgment, the section requires proof that the absent party has had such notice as would have enabled him to appear to prosecute or defend his case. A proceeding taken against him in his absence is in the nature of a default. The purpose of the Code section is to prevent the possibility of such default being taken against one who has, by reason of insufficient notice or no notice of the time of trial, been unable to appear. The provision has no application to cases in which both parties are represented when the case is called for trial. It is, of course, true that even in such cases the want of notice sufficient to have enabled one of the parties to prepare for trial would be good ground for continuance. But the statute does not fix any arbitrary period of five days for this purpose, nor does it require service of a formal notice. Where the party has actually known that the case was set for a certain time, and appears at that time, he is not entitled to a continuance in the absence of a claim and showing that he has not had such knowledge long enough to enable him to properly prepare. It is in each case a question for the discretion of the trial court.

In the case at bar, no claim was made that the defendant and his attorney had not known of the setting of the case long enough in advance to enable them to be ready. The affidavit of the attorney that he had received no notice must be taken to refer only to a formal service of notice in writing. Other averments in the same affidavit show by clear implication that he had knowledge, at least two days before the day of trial, that the case had been set for that day. That the defendant himself had such knowledge for a considerably longer period is shown by the testimony of his physician. The real ground upon which a continuance was asked was the illness of the defendant, and the period of postponement requested on this ground was 30 days. A continuance of five days was the utmost that could have been claimed for want of notice, even if the period defined in section 594 governed the case. But such continuance would not have put the defendant in any better position, so far as his personal presence and aid to his attorney were concerned. Under these circumstances, we think the court did not err in refusing to postpone the trial upon the mere ground that notice of the setting of the case had not been given.

[5] We attach no importance to the state-

ment of defendant's attorney that he appeared specially to move for a continuance. He had already appeared generally by filing an answer. Assuming that he could thereafter limit his appearance to a special purpose, he certainly waived such limitation by remaining during the trial, cross-examining witnesses, making objections, and otherwise taking part in the proceedings on behalf of his client.

The judgment and the order denying a new trial are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

159 Cal. 765

BROADS et al. v. MEAD et al. (L. A. 2,639.)
(Supreme Court of California. May 18, 1911.)

1. LANDLORD AND TENANT (§ 123*)—RIGHTS OF TENANT—SIGN PRIVILEGE.

Where plaintiff leased the two upper stories of a business building in which to carry on a restaurant and for a residence, she was entitled to make a reasonable use of the front wall above the first story to advertise such business, and therefore was entitled to enjoin the tenant of the first story from placing signs on or against the wall which would obstruct or interfere with her use.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 436; Dec. Dig. § 123.*]

2. EVIDENCE (§ 445*)—PAROL EVIDENCE—SUBSEQUENT AGREEMENT.

An oral agreement, not based on a consideration, between defendants, tenants of the first story of a business building, and B., the original lessee of the upper stories, and plaintiff's assignor, giving defendants the right to place signs on the upper front wall of the building, not executed prior to the transfer of his lease to plaintiff, was void as an attempt to alter a written contract by an executory oral agreement.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2052-2065; Dec. Dig. § 445.*]

3. LICENSES (§§ 58, 62*)—REVOCATION—BY SALE OF PROPERTY.

An oral agreement between plaintiff's assignor and defendants that the latter might use the upper front wall of a building for sign purposes was a mere license, revocable at the pleasure of the licensor, and, not having been exercised prior to the assignment, was revoked thereby.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 116, 125; Dec. Dig. §§ 58, 62.*]

4. LICENSES (§ 49*)—USE OF BUILDING—ADVERTISING PURPOSES—EVIDENCE.

Evidence held insufficient to warrant a finding that the tenant of the upper stories of a building had consented to the use of the front wall above the first story by the tenant thereof for advertising purposes.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 49.*]

5. LICENSES (§ 58*)—EXECUTION—REVOCATION—LOSS.

A license to hang signs on the front wall of a building for advertising purposes, though executed, is revocable, if no substantial loss would be incurred through a removal of the signs.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 120; Dec. Dig. § 58.*]

6. NEW TRIAL (§ 97*)—ABSENT WITNESS—APPLICATION FOR CONTINUANCE—TIME OF DISCOVERY.

Where defendants knew before trial what an absent witness would testify, his evidence was not newly discovered so as to sustain an application for new trial, where the application did not show that an application had been made to postpone the trial to give defendants an opportunity to discover the absent witness.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 195; Dec. Dig. § 97.*]

7. APPEAL AND ERROR (§ 528*)—RECORD—APPLICATION FOR NEW TRIAL—AFFIDAVIT OF WITNESS.

Where an affidavit of a witness alleged to have been newly discovered was not made a part of the statement used on a motion for a new trial, and it did not appear from the record that it was read or used in support of the motion, or otherwise presented to the court, it could not be considered in support of an appeal from an order denying the motion.

[Ed. Note.—For other case, see Appeal and Error, Cent. Dig. § 2388; Dec. Dig. § 528.*]

8. DAMAGES (§ 14*)—NOMINAL DAMAGES—AMOUNT.

Where the court found that plaintiff was entitled to a judgment for nominal damages, it was error to award \$100 damages, and such judgment should be reduced to \$1.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 356; Dec. Dig. § 14.*]

Department 1. Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Suit by Laura Broads and another against Mead and Cook. Judgment for plaintiffs, and defendants appeal. Modified and affirmed.

Ray Howard, for appellants. Sparks, Finkenstein & Moore, H. C. Millsap, and Millsap & Sparks, for respondents.

SHAW, J. Plaintiff Laura Broads was the lessee of the second and third stories of a three-story building on Spring street, in Los Angeles; the lease being in writing for a two-year term. Defendants were lessees of the first story. Plaintiff carried on a restaurant in the second story, and occupied the third story as a place of residence. Defendants in the first story conducted a trunk store. One Boaz Duncan was the owner of the building, and leased the premises to the respective parties. Defendants placed signs, advertising their trunk business, against the outside front wall of the second and third stories. This action was to enjoin them from maintaining said signs thereon, and to recover the damages alleged to have been caused to plaintiff by the placing and maintaining of the same. Bernard Broads is the husband of Laura Broads, and joins as plaintiff solely because of that fact. The court found the facts as above stated, and also found that the signs were maintained on the front walls of the second and third stories for three months, that plaintiff was damaged thereby, but that said damages were only nominal. The judgment enjoined the further maintenance of the signs, and further declared that plaintiffs

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

should recover of defendants \$100 as damages.

[1] Plaintiff Laura Broads had leased the premises for the purpose of carrying on a restaurant therein. She had the right to make a reasonable use of the front wall for the purpose of advertising said business. This clearly implies the right to keep it free for such use and to prevent other persons from placing signs upon or against it which would obstruct or interfere with such use by her. Her right to prevent the defendants from occupying her wall space with signs relating to their own business seems indisputable. The injunction was properly given.

[2, 3] Defendants claim that there was an oral agreement between the defendants, Duncan, and one Bergman, the original lessee of the upper stories and the assignor of Laura Broads, giving defendants the privilege of placing their signs on the upper walls. The agreement was not carried out prior to the transfer by Bergman to Broads, and it was at that time void, being a mere attempt to alter a contract in writing by an executory oral agreement. It is not shown to have been based on any consideration whatever. Therefore, at most, it was nothing more than a license, revocable at the pleasure of the licensor.

[4] It is further claimed that the signs were placed on plaintiff's wall with her consent, and that thereby the license became executed and irrevocable. The evidence merely shows that Mrs. Broads was requested to allow defendants' men to go through her rooms to the front windows to enable them to place some signs in front of the building. She was not told that the signs were to be hung upon the wall of the second or third stories, and there is no evidence that she was aware of their intention in that respect. A few days afterwards she demanded that they be removed. The evidence is not such as to require a finding that she knowingly consented to have them placed above the first story. [5] Besides, there is no evidence that defendants were put to any expense in the matter. If they would suffer no substantial loss from the removal of the signs, the license was revocable, even if executed. *Stoner v. Zucker*, 148 Cal. 518, 83 Pac. 808, 113 Am. St. Rep. 301.

[6] On motion for new trial defendants filed an affidavit showing that Bergman, whose whereabouts defendants had been previously unable to learn, had been discovered since the trial and would testify that the oral agreement had been made as claimed, and that Mrs. Broads had been informed of it before she bought the lease of Bergman. The affidavit shows that defendants prior to the trial knew that Bergman would so testify. Hence it was not strictly newly discovered evidence. It is not shown or claimed that any applica-

tion was made to postpone the trial so as to give an opportunity to discover Bergman and secure his attendance or deposition. A new trial was therefore properly refused. *Scanlan v. San Francisco*, 128 Cal. 589, 61 Pac. 271.

[7] The affidavit was not made part of the statement used on motion for new trial. It does not appear from the record that it was read or used in support of the motion or otherwise presented to the court below for its consideration. Hence it cannot be considered here in support of the appeal, even if it stated good grounds for a new trial.

[8] The judgment for damages is not supported by the facts found. The finding is that the damages caused to the plaintiff by the signs were merely nominal. The conclusion of law on that subject is that the plaintiff have judgment for \$100 as damages, and judgment was given for that sum. A finding of nominal damages only does not warrant a judgment for \$100. The law does not regard trifles, and, if the judgment were for a small sum avowedly as nominal damages, we might not be disposed to reverse or modify it. But \$100 is a substantial recovery and does not come within the definition of nominal damages. *Maier v. Wilson*, 139 Cal. 520, 73 Pac. 418. One dollar is the amount usually adjudged where only nominal damages are allowed. Plaintiff was entitled to costs of suit. There is no merit in the motion for a new trial.

The order denying the motion for new trial is affirmed. The judgment is modified by reducing the money judgment to the sum of \$1, and, as so modified, the judgment is affirmed. The defendants shall recover only one-half of the costs of appeal.

We concur: ANGELLOTTI, J.; SLOSS, J.

(159 Cal. 755)

In re HINCHEON'S ESTATE. (S. F. 5,723.)
(Supreme Court of California. May 16, 1911.
On Rehearing in Bank, June 15, 1911.)

1. EXECUTORS AND ADMINISTRATORS (§ 233*) —CLAIMS.

The court cannot relieve one of the consequences of his neglect to file a claim against an estate within the time limited by statute by directing the executors to pay the claim.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 831; Dec. Dig. § 233.*]

2. EXECUTORS AND ADMINISTRATORS (§ 216*) —PRESERVATION OF ESTATE.

It being the duty of an administrator or executor to make such expenditures as are reasonably necessary to preserve the property pending administration, a devisee doing work on an unfinished house in order to protect the same could not recover from the estate; her payment being voluntary.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 757; Dec. Dig. § 216.*]

3. EXECUTORS AND ADMINISTRATORS (§ 135*) —DUTIES—CONTRACTS.

While it is the duty of executors and administrators to perform valid and uncompleted contracts entered into by testator, they may not expend the estate's funds to do new work which testator was not bound to do; and hence, where testator devised a building "in course of construction," the executors were not bound to pay for the completion thereof.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 551-556; Dec. Dig. § 135.*]

4. EXECUTORS AND ADMINISTRATORS (§ 214*) —FUNERAL EXPENSES.

Money paid for funeral expenses by one not acting officiously, if reasonable, must be repaid by decedent's estate, and one paying such expenses, though in reliance on decedent's promise to leave her certain property, was entitled to a refundment.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 755; Dec. Dig. § 214.*]

5. EXECUTORS AND ADMINISTRATORS (§ 215*) —CLAIMS—BURIAL—REMOVAL OF REMAINS.

A claim for moving the remains of testator's mother and sister to a certain burial plot and erecting a monument over testator's grave, though pursuant to his request, was not binding on his executors; the will containing no directions in this regard.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 756; Dec. Dig. § 215.*]

Department 1. Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

In the matter of the estate of John Hinchon, deceased. From the decree of distribution, Mary Hurley and another appeal. Reversed, with directions.

M. C. Hassett, for appellants. Vance McClymonds, Dudley Kinsell, and T. S. Gray, for respondents.

SLOSS, J. John Hinchon died April 1, 1909, leaving a will which was admitted to probate in the superior court of Alameda county on April 25, 1909. Letters testamentary were issued to Dudley Kinsell and Robert W. Inches, the executors named.

The will contained the following provisions:

"First. To Mary Hurley of San Francisco, California, I give, devise and bequeath that real property owned by me, and which is situate on the north side of East 27th street, East Oakland, Cal., and on which property is situate a cottage in course of construction.

"Second. Out of the balance of my estate I direct that all my just debts, funeral expenses, charges and expenses of last illness and of administration shall be paid; and out of such residue shall be paid the bequests hereinafter set out."

By the third, fourth, fifth, sixth, seventh, eighth, and ninth paragraphs the testator gave various cash legacies aggregating the sum of \$2,250, and also certain furniture and pictures. The tenth paragraph was as follows: "If, after the payment of the legacies and bequests within mentioned, there

shall be any residue, then such residue, if any there be, I give, devise and bequeath to my two nephews, John Sharkey, Jr., and Joseph C. Sharkey, share and share alike." The will bore the date of April 1, 1909, the day of Hinchon's death.

On April 21, 1910, the executors filed their final account with a petition for the distribution of the estate. Their account showed sufficient money on hand to pay all cash legacies, and also something over \$500 to each of the residuary legatees. On the day on which the final account and petition for distribution were to come on for hearing, Mary Hurley, the devisee named in the first paragraph of the will, filed a petition "for construction of the will" and for payment to her of certain sums of money. In this petition she alleged that about a week before the death of Hinchon he had informed the petitioner that he intended to make a deed of gift to her of the lot mentioned in the will and the house thereon, and had stated that the house was practically completed; that upon the same occasion he had requested that, in case of his death, the petitioner would have his remains interred in a certain cemetery and provide for perpetual care thereof, and had also expressed a desire to have the remains of his deceased mother and sister interred in said cemetery, and a suitable monument erected at his grave. She further alleged that on the death of the decedent, and between the 2d and 6th days of April, she made the necessary arrangements for the burial of the decedent as requested by him, and paid out of her own money for that purpose the sum of \$257. After the burial of the decedent she learned for the first time that the house was not completed, and, upon being advised by the executors that it was necessary that she should advance money to protect the house from injury, she paid out for lumber and work done on said building sums amounting to \$148.32. She further alleged that one White had made a contract with the deceased to paint said house, and that a balance of \$155 would be due on said contract when completed; that one William R. Stultz had made a contract with the deceased for doing the plumbing work of said house, and that a balance of \$110 would be due on said contract when completed. The petitioner, as she avers, made herself personally liable to said White and Stultz for the payment of their contracts, the completion of said painting and plumbing work being necessary for the protection of the building, and said work was completed according to the contracts made with the decedent. It is alleged that after the payment of all of the work mentioned a further sum of \$361 will have to be expended to complete the building, and that \$220 will have to be expended to remove the remains of the decedent's mother and sister to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

burial plot in which his body is interred and to erect a suitable monument at his grave.

The prayer of the petition is that the executors of the estate pay to the petitioner the sums expended by her for work done on the building and for the burial of the defendant; that they pay her the sum of \$361 required to complete the building; that the court order the executors to pay to Stultz \$110 for the plumbing work performed by him under his contract with the decedent; and that the executors be ordered to remove the remains of the decedent's mother and sister and bury the same in his burial plot and erect a monument there. At the same time Stultz filed his petition for payment out of the funds of the estate of the \$110 remaining due on his contract.

The account, the petition for distribution, and the said petitions of Mary Hurley and W. R. Stultz came on for hearing, whereupon the court denied the petitions of Stultz and Hurley and settled the account as presented. A decree of distribution was entered distributing to Mary Hurley the real property described in the will, distributing the money legacies and the specific legacies to the respective legatees, and the residue to the residuary legatees named in the tenth paragraph. Mary Hurley and William R. Stultz appealed from the whole of the decree except that part which distributes to Mary Hurley the lot described in the decree.

(a) The prayer for payment to Stultz of the balance (\$110) due on his account.

It appears from the bill of exceptions that, with the exception of the painting and plumbing work contracted for by the decedent with White and Stultz, the house in question was being constructed by Hinccheon by day labor. A claim for the balance due on his contract had been presented by White to the executors, and rejected by them. He had thereupon commenced an action upon his rejected claim, and recovered judgment payable in due course of administration. The final account shows that this judgment had been fully paid. Stultz had failed to present any claim, and the time for such presentation had expired at the time the account was filed. Under these circumstances, it seems clear that he, as an appellant herein, is not entitled to relief. The amount due on any contract made by the decedent, whether accrued or contingent, was, of course, a proper subject of claim against the estate, but the demand, if not presented as a claim within the time limited, was barred. Code Civ. Proc. § 1493. Having failed to present a claim, Stultz has lost his right to maintain any action against the estate. Code Civ. Proc. § 1500. His claim might have been collected if he had followed the procedure adopted by White. Having omitted to do so, he has in effect waived his demand against the estate.

[1] The court cannot relieve him of the

consequences of his own neglect by directing the executors to pay a demand which became barred by his failure to pursue the plain requirements of the statute. Upon like grounds, Mary Hurley has no standing to compel the estate to pay the claim of Stultz. If, by reason of her guaranty to Stultz, she should be compelled to reimburse him, she would at most be subrogated to his rights against the estate. But she cannot, in this way, acquire rights greater than those held by the party under whom she might claim subrogation. 27 Am. & Eng. Ency. of Law (2d Ed.) 206.

[2] (b) The claim for repayment of money expended on the house and for payment of further sums required for completion.

These two items, covered by the petition of Mary Hurley, stand upon a different ground from the matters already discussed. It is no doubt the duty of the executor or administrator to make such expenditures as may be reasonably necessary to preserve the property of the decedent pending administration. In re Clos, 110 Cal. 494, 42 Pac. 971. It is alleged in the petition that the sum of \$148.32 was expended by Miss Hurley in order to protect the house "from great loss and injury owing to its uncompleted condition," and the evidence shows without substantial conflict that this was the real purpose of the expenditure. The petitioner herself testified that, when she saw the house, there was a lot of lumber cut and standing up against the walls, and that both executors had told her that it was "very necessary to protect the house and just as well to go on and put this lumber in place so that it could not be stolen; that the house should be protected; the lumber put in place and the doors fastened." Both executors testified, and neither controverted Miss Hurley's testimony in this regard. Mr. Inches one of the executors, had himself been the foreman in charge of the work for the decedent, and he did the new work under Miss Hurley's instructions. According to Mr. Kinsell's testimony, he had said to Miss Hurley that the executors had no authority to complete the work "notwithstanding the fact that it might be necessary for the preservation of the estate." In this, we think, he took an erroneous view of the extent of the powers of executors. As above stated, they did have the right, and it was their duty, to make such expenditures as were necessary to preserve the property left by the decedent. If, in order to effect such preservation, they, instead of Miss Hurley, had made the expenditures of \$148.32 for putting the lumber in place, they would undoubtedly have been entitled to claim reimbursement from the funds of the estate. In re Clos, supra.

But they declined to make this payment, and Miss Hurley, with full knowledge of the facts, made it herself. We think her payment to this extent must be regarded as vol-

untary, and that she cannot recover the amount from the estate. Upon the refusal of the executors to go ahead, she could have applied to the court for an order requiring them to make such expenditures as were necessary to protect the property. She did not do this, but expended the money herself. There was no such compulsion as would make her payment involuntary, and she must take the consequences of her own action.

The item of \$361, estimated to be necessary to complete the building does not come within the rule authorizing expenditures for the preservation of the estate. In the first place, the administration was virtually over when this matter was brought up. The doing of the work then could hardly have been required to preserve the house during administration. Besides, the petition does not aver that this payment must be made to preserve the estate, but alleges merely that it will be necessary to complete the building. The evidence, too, supports the conclusion that the real purpose of this proposed expenditure was to make a completed house rather than to protect from injury the unfinished structure.

[3] But, apart from the duty of executors to preserve the estate, the appellant Hurley contends that, upon a proper construction of the will, the testator directed that the completion of the building should be a charge upon his estate. We may assume that an executor is protected in carrying out the provisions of the will with reference to improvements of the testator's estate (18 Cyc. 272), but, so conceding, we think the will in question cannot be interpreted as intended to authorize any such improvements. The gift to Mary Hurley was of certain real property "on which property is situate a cottage in course of construction." The will did not purport to give her a completed building. It gave her the lot, together with a building expressly described as unfinished. As we have said, the building was being constructed by day labor, and there were no contracts outstanding with the exception of those of White and Stultz. While it is the duty of executors to perform valid and uncompleted contracts which have been entered into by their testator, they are not called on, nor have they the right, to expend the funds of the estate for the doing of new work which the testator himself was not bound to do. Such expenditure, unless incurred for the preservation of the property of the decedent, is not a charge upon the estate. In *Re Moore*, 72 Cal. 335, 13 Pac. 880, an administrator had expended moneys of the estate in the erection of a new building upon property belonging to the decedent, and claimed reimbursement. It was held that the court erred in allowing this claim, saying: "This money was not expended in the care and management of the estate. It was the duty of the administrator to administer and turn

over the estate as soon as possible, and not to speculate with it, or carry on business on its account, or to improve it for the benefit of the heirs." So in *Byrd v. Governor*, 2 Mo. 102, the decedent had constructed foundations for a house and the administrator completed the house thereon. The court held this to be a misapplication of the funds of the estate. See, also, *Gray v. Hawkins*, 8 Ohio St. 449, 72 Am. Dec. 600.

The fact that, as shown by Miss Hurley's testimony, the decedent believed that the house was substantially completed, cannot alter these conclusions. The language of the will is plain. It gives to the devisee the lot with a house in course of construction. To import into this a direction that the house should be brought to the point at which the testator believed it was would not be to construe the will, but rather to add to it a provision which the testator did not insert. Miss Hurley's testimony was that Hinccheon said to her about a week before his death that he was going to give her a deed of gift of the house, and that in answer to a question by her as to its completion he had said, "Yes; it is all finished. There may be a few locks to put on the closet doors and on the doors; otherwise it is finished." And that thereupon he said: "I want you to do something for me. I want to have my body put in perpetual care and move my mother's and sister's remains and put a monument over it." It can hardly be claimed that this testimony showed a contract by which the decedent agreed, in consideration of the payment of certain burial expenses, to make to Miss Hurley a deed of the house. But if the testimony could be so viewed, the answer is that this proceeding is not one to enforce the supposed contract. In an action upon such contract it might be possible, if the parties were shown to have been laboring under a mutual mistake as to a material fact, to reform the agreement and enforce it according to its true intent. But no such proceeding has been taken. The petitioner is not relying on an agreement to make a deed of gift to her, but is claiming under the will. So claiming she can take no more than the will has given her, and that is a lot with an uncompleted building standing upon it.

[4] (c) The claim for payment of funeral expenses incurred by Miss Hurley.

The funeral expenses paid by her were expended immediately after Hinccheon's death and before she was aware of the terms of his will or of the fact that the cottage was far from completion. In view of paragraph 2 of the will, there can be no doubt that the testator intended that his funeral expenses should be paid out of his estate. Miss Hurley was a relative of Hinccheon. It is not questioned by the respondents that money paid for funeral expenses by one not acting officiously, if reasonable considering the estate of the deceased and the circumstances

surrounding the death and burial, will be repaid by the estate to the party paying them. 2 Woerner, Am. L. of Adm. (2d Ed.) § 357; France's Estate, 75 Pa. 220. This is a proper, and, indeed, a necessary rule in view of the fact that the burial must often be provided for before an executor or administrator can be appointed. The money advanced for this purpose by Mary Hurley should therefore in justice be refunded. The only answer to her demand in this regard is that she paid the money voluntarily. But this claim, we think, cannot, under the circumstances disclosed by the bill of exceptions, be supported. The claim of the respondent is that she agreed with the decedent to make such payment in consideration of his giving her the East Oakland property. It would, as we have already suggested, require an extreme construction of the evidence to hold that it established any such agreement. However, even if Miss Hurley made the payment in compliance with what she thought to be a contract, she should not be held to be a volunteer unless she acted with knowledge of the facts. Her supposed undertaking to pay the funeral expenses was made upon the understanding that she was receiving a deed of gift of a completed house. The house was not completed and a deed of gift was not, in fact, made. The expenditures were incurred by her before she was in possession of these facts. It is more than probable that, if she had known the terms of the will and had been aware of the condition of the house, she would not have paid these expenses. When it appeared that the facts were not as she had supposed them to be, and that she was not receiving the consideration which she had believed she was to get, she was entitled to claim her rights under the will. The testator had evidently not acted on the theory that there was any binding agreement. He had not made a deed of gift, and had expressly declared his intention that the funeral expenses should be borne by the estate. Her payment of the same under these circumstances was not voluntary and she should be reimbursed therefor out of the estate.

[5] (d) The prayer for payment of the expenses of removing the remains of Hinchon's mother and sister and of erecting a monument.

It cannot be held that it was the court's duty to direct the executors to remove to the burial plot of the decedent the remains of his mother and sister and to erect a monument over his grave. The will contained no directions in this regard. The sole foundation for this claim is the request of the decedent to Miss Hurley. This request was not binding upon the executors or the estate.

The decree is reversed, with directions to the court below to enter a decree in con-

formity with the views expressed in this opinion.

We concur: ANGELLOTTI, J.; SHAW, J.

On Rehearing in Bank.

PER CURIAM. Rehearing denied.

BEATTY, C. J. (dissenting). I think the decree herein should have been modified to the extent of allowing Miss Hurley the \$148.32 expended by her for the preservation of the estate. Her omission to seek an order of the court to compel the executors to make the expenditure, conceded to have been necessary, and a part of their duty as executors, ought not to defeat her claim for reimbursement on the ground that she was a volunteer. Neither ought the fact that the property to be preserved was devised to her to have stood in the way of the allowance. The devise was subject to a precatory trust, not expressed in the will it is true, but clearly proved, and involving a considerable expense if executed as presumably it will be. The real intention of the testator will not be fulfilled as between the devisee and the residuary legatees by burdening the devise with an expense that should have been charged to the residue of the estate.

159 Cal. 769

WALTHER v. SOUTHERN PAC. CO.

(L. A. 2,646.)

(Supreme Court of California. May 18, 1911.

On Rehearing in Bank, June 17, 1911.)

1. CARRIERS (§ 307*)—NEGLIGENCE—EXEMPTIONS FROM LIABILITY—SPECIAL RATES.

A contract exempting a common carrier from liability for negligence causing injury to a passenger carried for any compensation is against public policy, though agreed to by the passenger in consideration of special concessions as to rates or otherwise.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1252-1259; Dec. Dig. § 307.*]

2. CARRIERS (§ 307*)—NEGLIGENCE—EXEMPTIONS FROM LIABILITY—GRATUITOUS CARRIAGE.

A contract of exemption from liability to a passenger for injuries resulting from negligence, except willful, wanton, or gross negligence, is valid as to a passenger carried solely as a matter of favor, and without any compensation or advantage to the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1252-1259; Dec. Dig. § 307.*]

3. CARRIERS (§ 307*)—NEGLIGENCE—CONTRACT OF EXEMPTION—PUBLIC POLICY—STATUTORY PROVISIONS.

Civ. Code, § 2175, providing that a common carrier cannot be exonerated by any agreement made in anticipation thereof from liability for gross negligence, fraud, or willful wrong of himself or servants, prevents a carrier from contracting against liability for the character of negligence referred to in the statute, as against one who is carried without any compensation whatever.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1252-1259; Dec. Dig. § 307.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. CARRIERS (§ 238*)—WHO ARE PASSENGERS.

Upon whatever terms a common carrier of persons voluntarily receives and carries a person, the relation of common carrier and passenger exists.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 973; Dec. Dig. § 238.*]

5. CARRIERS (§ 239*) — COMPENSATION — WAIVER.

The voluntary waiver of all claim for compensation for carriage of a person does not take away the status of common carrier with respect to such person.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 974, 975; Dec. Dig. § 239.*]

6. CARRIERS (§ 307*)—LIMITATION OF LIABILITY—"GROSS NEGLIGENCE"—"SLIGHT CARE."

Civ. Code, § 2175, prohibiting a carrier from limiting its liability for injuries resulting from gross negligence, was a part of Civ. Code 1872, which by sections 16 and 17 declared that there are three degrees of care and diligence, "slight," "ordinary," and "great," and three degrees of negligence, "slight," "ordinary," and "gross." "Slight care" was defined as that which is such as persons of ordinary prudence usually exercise about their own affairs of slight importance, and "gross negligence" was defined as that which consists in the want of slight care and diligence. These sections were repealed in 1874. *Held*, that such repeal cannot affect the construction of the words "gross negligence" as used in section 2175, as the intention of the Legislature at the time of the adoption of the latter section must control, and there is no warrant for holding that such words were intended to mean other than as the term is defined in the repealed sections.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1252-1259; Dec. Dig. § 307.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3168-3173; vol. 8, p. 7675; vol. 7, p. 6531.]

7. APPEAL AND ERROR (§ 1010*)—REVIEW—QUESTION OF FACT.

The appellate court cannot disturb the conclusion of the trial court based on evidence legally sufficient to warrant the inference drawn.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

Department 1. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by Carrie E. Walther against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. W. McKinley (W. R. Miller, of counsel), for appellant. L. M. Sprecher and Frank T. Bates, for respondent. Warren Olney, Jr., and Alexander R. Baldwin, Amici Curiae.

ANGELLOTTI, J. The plaintiff is the widow of one Henry F. Walther, who, while being carried on a passenger train of defendant on March 28, 1907, was killed by reason of the derailment of such train and the consequent wrecking and demolition of the car in which he was being carried. The accident occurred in defendant's yard at Colton in San Bernardino county, and was caused by the train on which deceased was riding running from the main track into an open switch at a high rate of speed, estimated by the

trial court to be between 45 and 55 miles an hour, when, being unable to traverse the curve of the sidetrack, it was derailed. The switch had been left open by the switch foreman, who, with his crew, were working on the siding at the time, and who had neglected to keep himself advised of the whereabouts of the train, which was long overdue, and had left the switch open in violation of the rules of the defendant. Deceased was an employé of defendant, but at the time of the accident and for some months next preceding the same was absent on leave. At the time of the accident he was returning from a journey to an Eastern state to his home in California. He was riding on a pass, good until March 31, 1907, which had been issued to him by defendant for the purposes of his journey. It was found by the trial court, in accord with a stipulation of the parties, that the pass was issued to him as an employé, "in accordance with the long established practice of the company, and one well known to its employés, to furnish passes from time to time to its employés." There was no other consideration for such pass. It contained the following statements, subscribed by the deceased: "This is a free pass based upon no consideration whatever. The person accepting and using this pass, in consideration of receiving the same, agrees that the Southern Pacific Company shall not be liable under any circumstances, whether of negligence—criminal or otherwise—of its agents or others, for any injury to the person, or for any loss or damage to the property of the individual using this pass; and that as to such person the company shall not be considered as a common carrier, or liable as such." This action was brought by plaintiff to recover the damage caused her by the death of her husband, being based upon section 377, Code of Civil Procedure, which provides that, when the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or, if such person be employed by another person who is responsible for his conduct, then also against such person. In her complaint she alleged that the accident and the consequent death of deceased were caused by the "gross negligence" of defendant, and these allegations were found by the trial court, which tried the case without a jury, to be true. Damages were assessed at the sum of \$8,000, and judgment was given in favor of plaintiff for that amount. This is an appeal by defendant from such judgment. The record on appeal was filed in this court on March 29, 1910.

The ultimate question presented by this appeal is whether the provision in the pass purporting to exempt defendant from liability for the negligence of its agents pre-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cludes a recovery under the circumstances of this case.

[1] Independent of statutory provisions, it is almost universally held that any contract purporting to exempt a common carrier of persons from liability for negligence of himself or his servants to a passenger carried for compensation is void, as being against public policy, and it is immaterial in such cases that the attempted limitation on such liability is agreed to by the passenger in consideration of special concessions in the matter of rate of fare or other departure from the rules applicable to passengers paying full fare. It is enough that there is any consideration for the carriage.

[2] The person admitted to his vehicle by a common carrier for the purpose of carriage for any compensation is a passenger, with all the rights possessed by any passenger so far as the exercise of care for his safe carriage is concerned. By the great weight of authority, however, in the absence of provision to the contrary, such a contract of exemption from liability for negligence is upheld, at least so far as any except what is called in the opinions wanton or willful or gross negligence is concerned, in the case of a passenger who is carried solely as a matter of favor, and without any compensation or advantage whatever to the carrier. See *Northern Pacific R. R. Co. v. Adams*, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513; *Rogers v. Kennebec Steamboat Co.*, 86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491; *Quimby v. Boston, etc., R. Co.*, 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; *Kinney v. New Jersey, etc., R. R. Co.*, 32 N. J. Law, 407, 90 Am. Dec. 675; *Muldoon v. Seattle City R. Co.*, 7 Wash. 528, 35 Pac. 422, 22 L. R. A. 794, 38 Am. St. Rep. 901; *Payne v. Terre Haute, etc., Ry. Co.*, 157 Ind. 616, 62 N. E. 472, 56 L. R. A. 472.

[3] We think that the question of public policy in regard to such contracts of exemption, even as to passengers carried gratuitously, has been settled in this state by legislative enactment. Section 2175, Civil Code, provides: "A common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for the gross negligence, fraud, or wilful wrong of himself or his servants." Aside from the question of the meaning of the term "gross negligence" as used in this section, it is earnestly contended that the section has no application in the case of one carried without consideration of any kind, and that as to such a passenger the carrier is not a common carrier at all. We are of the opinion that the question of consideration cuts no figure in determining the applicability of the section. Section 2168, Civil Code, contained in the same chapter, which is entitled "Common Carriers in General," declares that "every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of

whatever he thus offers to carry," and, of course, the defendant was under this definition a common carrier of persons. As such, under other provisions of the same chapter and other chapters, it was entitled to refuse to carry any person except upon compliance with certain requirements, including the payment of a prescribed reasonable compensation, but at the time of this accident at least it could legally waive any of these requirements on the part of the passenger, and could receive and carry him for a reduced or different consideration, or altogether without consideration.

[4] But, on whatever terms a common carrier of persons voluntarily receives and carries a person, the relation of common carrier and passenger exists. This is recognized by some of the authorities upholding the exemption from liability for negligence provision in the case of a passenger carried gratuitously. See *Rogers v. Kennebec Steamboat Co.*, *supra*. The sole inquiry in this regard is, as has been said, whether the person was lawfully on the vehicle (see *Ohio & Miss. R. Co. v. Muhling*, 30 Ill. 9, 81 Am. Dec. 336), has been voluntarily received by the common carrier on any terms for the purpose of carriage, and is not, as was the case in *Sessions v. Southern Pacific Co.*, 114 Pac. 982, a mere trespasser on the vehicle.

[5] The voluntary waiver of all claim for compensation for carriage of a person does not take away from the status of the carrier as a common carrier so far as the person carried is concerned, any more than would a special reduction in the amount of compensation charged or a special concession as to some other authorized requirement accomplish such effect. The carrier is still a common carrier as to such person, with all the obligations of a common carrier, except in so far as those obligations are limited by contract provisions which are not inhibited by law. Other sections of our Civil Code permit such limitations as to certain matters not here involved, but section 2175 expressly prohibits limitations of liability for gross negligence on the part of the common carrier or his servants, whatever, as we read the various sections bearing upon this matter, may be the terms upon which it receives and undertakes to carry a passenger.

[6] This brings us to a consideration of the question of the meaning of the term "gross negligence," as used in section 2175, Civil Code, for under the views already stated the exemption provision in the pass of deceased was not effectual to free defendant from liability for damages resulting from "gross negligence" of the defendant or its servants, within the meaning of the term "gross negligence," as used in said section. The contention of learned counsel for defendant is that these words, in the connection in which they are used, imply something in the nature of wilful wrong, and do not include anything in the nature of a mere omission to exercise

care without knowledge that such omission will probably result in injury to others. Section 2175 was, as it now stands, a part of the original Civil Code adopted in the year 1872. This Code contained two sections declaring that there are three degrees of care and diligence, "slight," "ordinary," and "great," and three degrees of negligence, "slight," "ordinary," and "gross." "Slight care" was defined as that "which is such as persons of ordinary prudence usually exercise about their own affairs of slight importance," and "gross negligence" was defined as that "which consists in the want of slight care and diligence." Sections 16 and 17. These sections were repealed outright in 1874, but such repeal cannot affect the question of the construction of the words "gross negligence" in section 2175, Civil Code, as it is the intention of the Legislature at the time of the adoption of the latter section that must control.

We see no warrant for holding that the term "gross negligence" as used therein was intended to mean other than the "gross negligence" defined in section 17 of the same act "to establish a Civil Code," which was simply "the want of slight care and diligence." This must necessarily have been the view of this court in *Donlon Bros. v. Southern Pacific Co.*, 151 Cal. 763, 766, 91 Pac. 603, 11 L. R. A. (N. S.) 811, for an examination of the record shows that there could have been no other ground for the expression of opinion "that there was sufficient evidence in the case warranting the jury in finding that the defendant was guilty of gross negligence occasioning the loss and injury complained of." It was also recognized in *Merrill v. Pacific Transfer Co.*, 131 Cal. 582, 589, 63 Pac. 915, upon evidence that was utterly destitute of anything in the nature of a showing of willful or wanton wrong, that the question whether or not the common carrier was guilty of gross negligence was one for the jury to pass upon under proper instructions. But regardless of these expressions of opinion, both of which were made under such circumstances that they may reasonably be claimed not to constitute binding authority on the question, we are satisfied that the definition of the "gross negligence" of section 2175, Civil Code, must be found in sections 16 and 17 of the Civil Code, as the same were adopted in 1872.

[7] Accepting this definition of gross negligence, it cannot reasonably be contended that the evidence was not legally sufficient to support the finding of the trial court that the deceased was killed by the gross negligence of defendant's servants. The question of the existence of such gross negligence was one for the trial court, and, the facts being legally sufficient to warrant the inference drawn, an appellate court cannot properly disturb the conclusion reached by that tribunal.

The conclusion we have arrived at upon the points already discussed renders it un-

necessary to consider other questions argued in the briefs, and compels an affirmance of the judgment.

The judgment is affirmed.

We concur: SLOSS, J.; SHAW, J.

On Rehearing in Bank.

PER CURIAM. Rehearing denied.

BEATTY, C. J. (dissenting). I think this case deserves further consideration, not because I am convinced that the judgment of the superior court is erroneous, but because the decision here is based upon a ground which will include cases affected by considerations different from those which may properly be deemed controlling in this case. It is held in the opinion of the court that, no matter how entirely gratuitous the transportation of a passenger may be, he can never bind himself, in consideration of such transportation, to waive any claim for damages based upon the gross negligence of a common carrier or his servants. It is in my opinion unnecessary to lay down so broad a rule in order to sustain this judgment. The fact that the pass in question here was issued to an employé of the defendant, in accordance with its long-established and well-understood practice, would warrant the conclusion that his transportation was not purely gratuitous; for it is reasonable to suppose that the privilege of free transportation to employés would in many, if not in all, instances affect the terms upon which men would be willing to enter, or to continue in, the service of a railway corporation, and would in the long run result in a considerable pecuniary advantage to the company—an advantage imposing a corresponding obligation to issue the pass when requested.

In this view the issuance of a free pass to a railway employé rests upon a valuable consideration. But there are many other classes of persons, as for example sick, destitute, or homeless, but deserving, persons, to whom railway companies and other common carriers are permitted to issue free passes, and for whom they do provide transportation for no consideration except the promptings of common humanity. Certainly there is no justice or sound policy in a law which sets a premium on inhumanity by warning a person, otherwise disposed to extend relief to one in dire need of it, that he can only obey the promptings of compassion at the risk of serious pecuniary loss. But that is what our law of common carriers does if it has been correctly construed in the broad declaration that "on whatever terms a common carrier of persons voluntarily receives and carries a person the relation of common carrier and passenger exists." This proposition is only partly true, and the particular in which it falls short of the truth is precisely that element in the ordinary relation of carrier and passenger which takes the case of purely gratuitous transportation out of the opera-

tion of section 2175 of the Civil Code. The definition of common carrier found in section 2168 of the Civil Code comes no nearer defining the relation of carrier and passenger than the definition of lawyer would to defining the relation of attorney and client. What the true relation is in either case is to be gathered from those provisions of the statute which prescribe the mutual rights and duties of the parties. It is the duty of a common carrier to provide transportation for passengers, and the right of the passenger to be transported, but only on condition that the passenger pays the regular fare. Civ. Code §§ 2169-2173. If the person desiring transportation cannot pay, and stands in no relation to the carrier which gives him a right to demand free transportation, the carrier owes him no duty, and in granting him free transportation as a mere bounty he steps out of his character as a common carrier, and deals with him in a relation essentially different from the legal relation of common carrier and passenger. If in such case the carrier requires a waiver of claims for damage, it is absurd to suppose that he is craftily bargaining for exemption from any claims based upon his willful torts or meditated fraud. No agreement would shield him from such claims, and, since he could make no profit out of the free transportation of a passenger, a motive for such an elaborate contrivance is hard to imagine. But that he should desire to be exempt from claims based upon the mere forgetfulness, ignorance, or unskillfulness of himself or his servants is natural and entirely justifiable. To say that a common carrier merely because he is a common carrier cannot in such circumstances stipulate as freely for exemption from claims for damages as any other person is to ignore the fact that for the sole benefit of the passenger he has waived the rights, and in so doing divested himself *pro hac vice* of the character of a common carrier.

The decision of the court in my opinion goes too far in putting upon the same plane with employes of a railway company traveling upon passes issued in accordance with its general custom, those who are carried out of simple compassion.

160 Cal. 98

BREITENBUCHER et al. v. OPPENHEIM
et al. (Sac. 1,756.)

(Supreme Court of California. June 3, 1911.)

1. TRUSTS (§ 63¾*)—RESULTING TRUSTS—PAYMENT OF CONSIDERATION—ORAL AGREEMENT.

Though a resulting trust may be defeated by parol evidence of a contract different from that implied by law from a contribution to the purchase price, that the complaint before amendment alleged an agreement for the purchase of the land in controversy, by which undivided interests were to be assigned in exactly the same proportions afterwards fixed by the court

in its findings in favor of a resulting trust, did not affect the validity of plaintiffs' recovery; the oral agreement, if any, being identical with that which the law would imply.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 92; Dec. Dig. § 63¾.*]

2. TRUSTS (§ 88*)—RESULTING TRUSTS—EVIDENCE.

Where an agreement with a defendant for the advancement of money to purchase interests in land for plaintiffs was abandoned when defendant announced his inability to raise more than \$5,000 cash, such agreement was nevertheless admissible in a suit to establish a resulting trust concerning plaintiffs' alleged interests, under the rule that, while no parol agreement between the parties giving to an implied trust a character different from that which the law would create from their acts can be admitted, all the facts and circumstances out of which the implied trust is raised may be proved to establish the trust itself.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 130-133; Dec. Dig. § 88.*]

3. TRUSTS (§ 76*)—RESULTING TRUSTS—PURCHASE OF LAND—MONEY PAID FOR ANOTHER.

In order that a trust may result from the payment of money for the purchase of land, it is not essential that the money should be paid by the person for whom the trust is to be created, but it may be paid for him by another.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 108; Dec. Dig. § 76.*]

4. TRUSTS (§ 79*)—RESULTING TRUSTS—PAYMENT OF CONSIDERATION—PROPORTION.

Where there is no uncertainty regarding the amount of money contributed by plaintiffs and its proportion to the entire purchase price, a trust results, under Civ. Code, § 853, providing that, where one pays the purchase price of land and the property is conveyed to another, the title is held in trust for the person who paid the money, and such rule may be applied so as to make the payment of a part of the purchase money carry with it a proportionate equitable estate in the land.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 111, 112; Dec. Dig. § 79.*]

5. APPEAL AND ERROR (§ 187*)—PARTIES—NONJOINDER—REVIEW—QUESTIONS NOT RAISED AT TRIAL.

An objection that a necessary party was not joined, not raised by demurrer or otherwise at the trial, cannot be raised for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1184-1189; Dec. Dig. § 187.*]

6. APPEAL AND ERROR (§ 193*)—OBJECTIONS NOT RAISED AT TRIAL—ISSUES.

Where an objection to the declaration of a resulting trust that the property was covered by a deed of trust executed by defendants, to which plaintiffs were not parties, and that it was impossible to declare their interest in the land by reason thereof, was not raised by the pleadings, it could not be raised on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226-1240; Dec. Dig. § 193.* Pleading, Cent. Dig. §§ 1355-1374.]

7. TRUSTS (§ 374*)—RESULTING TRUSTS—ENFORCEMENT—JUDGMENT.

Where, in a suit to enforce a resulting trust arising from contributions to the purchase price of the land in controversy, the fact that defendants had executed a deed of trust on the property was not pleaded, the court properly adjudged the interest of the parties to be in proportion to the amount contributed by each, either in money or notes, leaving unaffected any

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

lien that a stranger to the record might have on account of the balance of the purchase price.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 607–612; Dec. Dig. § 374.*]

Department 2. Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by Al Breitenbucher and another against E. Oppenheim and others. From a judgment for plaintiffs and from an order denying the motion of H. H. Hewlett for a new trial, he appeals. Affirmed.

C. H. Fairall and A. C. White, for appellant. R. C. Minor, Murphy & Percival, and Clary & Louttit, for respondents.

MELVIN, J. H. H. Hewlett, one of the defendants, has appealed from a judgment in favor of plaintiffs, and from an order denying his motion for a new trial. The action was brought for the purpose of having a resulting trust declared in favor of plaintiffs, and for an accounting of the rents and profits of the property involved. The court found that defendants Oppenheim and Hewlett, on the 1st day of May, 1905, purchased from one Covell a certain tract of land in San Joaquin county for \$16,725; that Oppenheim paid on said purchase price \$8,362.50, or one-half thereof, Hewlett \$7,000, or $\frac{415}{1000}$ thereof, and the plaintiffs \$1,362.50, or $\frac{85}{1000}$ of the entire amount expended in the purchase of the said real property; that by agreement between plaintiffs and defendants Oppenheim and Hewlett the deed to the property was taken by the two latter persons; that Hewlett did not purchase an undivided one-half interest in the land for \$7,000, but that he did have relations with plaintiffs as co-purchasers; that Hewlett held an undivided $\frac{85}{1000}$ of the said property in trust for plaintiffs; and that Breitenbucher and Martin were entitled to their proportionate share of the rents, issue, and profits for the years 1905, 1906, and 1907. Defendant Kleinsorge was at the time of the trial the owner of all of Oppenheim's original interest.

There is a conflict in the evidence as to many matters, but Hewlett by his answer does not deny that the entire purchase price of the property was \$16,725, and that he paid \$7,000. Plaintiffs were conducting a real estate business at Lodi, under the name of the Realty Company. They acquired an interest in certain property owned by one Beardslee, and were also trying to sell Covell's property, on which Oppenheim held an option, on which he had paid \$1,000. Breitenbucher went to Hewlett with the proposition that the latter purchase his portion of the Beardslee property and also an interest in that of Covell. He wrote a letter to Hewlett in which it was shown that a half interest in the Beardslee property could be obtained for \$2,500 cash, together

with the assumption of a mortgage interest, and that the Covell land could be had for \$7,725 in cash and three notes for \$3,000 each, payable in 18, 30, and 42 months, respectively, amounting in all to \$16,725 as the purchase price of the property. The letter contained this sentence: "One half of the above cash, \$3,862.50, provided for as follows: \$2,500 in cash; \$1,362.50 advanced on the crop. Necessary to swing the two deals, \$5,000 net." Appellant contends that, as shown by this letter, he and plaintiffs contemplated a transfer to him of a half interest for a payment of \$2,500 cash, and that the rest of the money was to be raised by an advance on the crops. Breitenbucher explains the item in the letter by saying that at first he and Hewlett talked about getting money on the crop to take care of a part of the cash payment, but that they afterwards abandoned that idea and concluded to pay all the cash demanded, and to handle the crop as they saw fit. Hewlett said upon cross-examination that there was no discussion at the time the purchase was consummated about a reduction in the price of the property, or the manner in which the item of \$1,362.50 was to be paid. He simply depended, he said, upon Breitenbucher's promise that for \$2,500 cash and certain notes he should acquire a half interest. He denied any knowledge of the note for \$1,362.50 given by plaintiffs to Oppenheim, or of any payment made by or on behalf of Martin and Breitenbucher for the property. This testimony is squarely contradicted by that of Breitenbucher and Oppenheim. The former said that he and Hewlett had an agreement, whereby Hewlett was to take a quarter interest for himself and to advance the money for a quarter interest for Martin and Breitenbucher, taking their note therefor; but that, when the parties were ready to close the sale, Hewlett did not have sufficient money to carry out this arrangement, and that then the money was borrowed from Oppenheim on the note of Breitenbucher and Martin. This was paid on the purchase price, and Breitenbucher told Hewlett that they "would fix it up later." A few days subsequently he called upon Hewlett and sought an understanding in reference to his interest, but, according to his testimony, Hewlett said: "Never mind, we just bought this on speculation; we will turn it over right away, and we will fix it up at the time we make the sale." Defendant Oppenheim corroborated Breitenbucher in many particulars. He testified that when they met on May 1, 1905, to conclude the purchase of the Covell property, Hewlett said he was going to take an interest, but did not specify what interest. Hewlett, he said, lacked just \$1,362.50 of enough to pay for a half interest, so witness paid that amount for Martin and Breiten-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

bucher, taking their note. This note was not made in Hewlett's presence. Breitenbucher, however, testified positively that Hewlett knew all about the transaction and tacitly agreed to it. He said: "I did not borrow money on the crop. Borrowed it from Mr. Oppenheim. Mr. Hewlett knew this at the time the sale was consummated. He was there at the time. I told him that we were short \$1,362.50, and he said he could not furnish that amount of money, so I told him that I would furnish it, or get it from Mr. Oppenheim. I spoke to Mr. Oppenheim about it, and he said, 'Yes.' He said he would loan us boys that amount of money to put into this deal. I think I was the first to mention the fact that he was short. We figured on the lines of getting some money on the crop. I told him we could not get the money on the crop. I told this to Mr. Hewlett."

[1] Appellant's first contention is that, according to the theory of plaintiffs and their evidence, an express trust was sought to be established by parol, and that, such a trust being within the statute of frauds, the idea of a resulting trust was an afterthought brought before the court by an amendment to the complaint. It is true that the complaint, before its amendment, alleged an agreement for the purchase of the land, by which undivided interests were to be assigned in exactly the proportions afterwards fixed by the court in its findings on the resulting trust, but the averment of exactly the verbal agreement which, in the absence of any contract, the law would imply would not alter the nature of the action. *Bayles v. Baxter*, 22 Cal. 578; *Gerety v. O'Sheehan*, 9 Cal. App. 447, 99 Pac. 546; *Faylor v. Faylor*, 136 Cal. 93, 68 Pac. 482.

[2] While it is true that a resulting trust may be defeated by parol evidence of a contract different from that implied by law, we do not agree with appellant that this is a case for the application of the rule. The agreement which, according to Breitenbucher's testimony, was made by him and Hewlett with reference to the advancement by Hewlett of money to buy a quarter interest for Martin and Breitenbucher was abandoned when Hewlett announced his inability to raise more than \$5,000 in cash for the purchase of interests in the Beardslee and Covell properties. Yet it was proper for the court to hear evidence of such agreement in getting the history of the entire transaction. The Supreme Court of Nevada, in *White v. Sheldon*, 4 Nev. 292 (Ed. 1877, vols. 3, 4, p. 751) said: "That no parol agreement between the parties giving to an implied trust an effect or character different from that which the law would create from the acts of the parties could be admitted in evidence in cases of this kind there is little doubt, for that would be simply creating an express trust by parol, which the law does not tolerate. But that all the facts and circum-

stances out of which the implied trust is raised may be proven is clear; otherwise the trust itself could not be established." The note given by Breitenbucher and Martin to Oppenheim at the time of the purchase of the land from Covell had not been paid when this action was tried. Breitenbucher explained that the makers of the note had expected to pay it from their share of the crops. Appellant contends that the giving of the note under the circumstances shown indicated the intent of plaintiffs to secure their advance, "either out of the proceeds of the land or of the sale thereof." Clearly they could claim none of the profits of the land, unless they owned an interest in it. True the Realty Company afterwards took an agreement for the sale of the land from the owners of the title, and it is the theory of appellant that the \$1,362.50 was contributed to the purchase price to insure a consummation of the sale on May 1, 1905 (the last day of Oppenheim's option); the plaintiffs (who owned nearly all the stock of the Realty Company) expecting to recoup themselves for this amount from their commissions on that transaction and on a subsequent sale which they hoped to make for Oppenheim and Hewlett. But there is nothing to support this theory. Appellant does not assert that they disclosed any such plan to him, and it seems improbable that they should have secretly advanced the amount obtained on their note. The only basis for this deduction on his part is his assertion that he was promised a half interest for a cash payment of \$2,500.

[3] The evidence is sufficient to sustain the finding that upon receiving the note Oppenheim paid the amount represented by it for and on behalf of plaintiffs, thus creating a resulting trust, because, "in order that a trust might result in their favor, it was not necessary that the consideration for the transfer should have been paid by them. It was enough if it was paid for them." *Barroilhet v. Anspacher*, 68 Cal. 121, 8 Pac. 804; section 853, Civ. Code. Appellant calls our attention to the fact that plaintiffs permitted the proceeds of the crops to be equally divided between him and Oppenheim until the time of the commencement of this action. This, according to appellant, shows that the claim by plaintiffs of an interest in the property was an afterthought. But it is not for us to weigh the evidence for the purpose of determining whether or not some acts of plaintiff might, when considered by themselves, seem inconsistent with the facts found. The court below heard and considered all the evidence, and we cannot say that its conclusions were not justified, nor are we unmindful in so holding of the rule that the evidence necessary to establish a trust must be clear, satisfactory, and convincing. *Sheehan v. Sullivan*, 126 Cal. 193, 58 Pac. 543. Appellant cites many authorities to

support the contentions that, "where two or more persons purchase land in equal proportions and pay unequal sums on the purchase price, the one paying the greater portion has no resulting trust for such excess payment," and that "a contribution of money towards the entire purchase of land is not sufficient to create a resulting trust in favor of the contributor, unless the contribution is shown to have been paid for some specific part of the land." Without reviewing these authorities, we may say that many of them are so dissimilar to this case as to be of little value. Undoubtedly there are many cases in which payment of unequal sums by purchasers of property does not indicate the acquirement of unequal interests.

[4] It is equally true that resulting trusts will not be declared where it is impossible definitely to establish the proportion of the purchase price contributed by the person in whose behalf the existence of the trust is asserted. This is the doctrine of such cases as *Woodside v. Hewel*, 109 Cal. 486, 42 Pac. 152; *Los Angeles, etc., Co. v. Occidental Oil Co.*, 144 Cal. 534, 78 Pac. 25; *Plass v. Plass*, 122 Cal. 11, 54 Pac. 372; *Sheehan v. Sullivan*, supra, and other cases cited by appellant. But here there is no uncertainty regarding the amount of money contributed for plaintiffs and its proportion to the entire purchase price, and, as was said in *South San Bernardino Land & Imp. Co. v. San Bernardino Nat. Bank*, 127 Cal. 247, 59 Pac. 700: "It is settled law that, where one pays the purchase price of land and the land is thereupon conveyed to another, the title to the land is held, under such conveyance, in trust for the person who has paid the purchase price. Civ. Code, § 853. This principle is also applied so as to make the payment of a part of the purchase money carry with it a proportionate equitable estate in the land purchased equal to the amount paid. 2 *Pomeroy's Equity Jurisprudence*, § 1038." See, also, *Gerety v. O'Sheehan*, supra; *Somers v. Overhulser et al.*, 67 Cal. 237, 7 Pac. 645.

[5, 6] At the time of the sale certain notes secured by deed of trust were executed by *Hewlett and Oppenheim*. Plaintiffs were not parties to this portion of the transaction, and the contention is made that it is impossible to declare their interest in the land, owing to the existence of these notes and the trust deed, and that, in any event, this action must fail because the trustee was not made a party to it. It is not necessary to consider the question of nonjoinder, as it was not raised by demurrer or otherwise in the superior court, and it cannot be suggested for the first time in this court. A complete answer to the first contention also is the fact that it was not raised by the pleadings.

[7] Appellant by his answer averred the

payment of \$7,000 for a half interest, and did not deny that the total consideration was \$16,725. Under the pleadings and proof the court adjudged the interest of the parties to be in proportion to the amount contributed by each (either in money or in notes), leaving unaffected any lien that a stranger to this record might have on account of the balance of the purchase price. The share of plaintiffs is as much affected pro tanto by the trust deed as are the shares of appellant and of *Oppenheim's* successor in interest, although the part of the purchase price which was advanced for plaintiffs has been paid to *Covell*, the trustee, in cash, while the order shares were partly bought by the notes, to secure which the trust deed was executed. We cannot see how the judgment, therefore, adds anything to the burdens under the trust deed of either the appellant or *Oppenheim's* successor.

There are no other matters in the record which seem to require attention, and, in accordance with the views expressed in the foregoing discussion, the judgment and order from which appeals have been taken are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(160 Cal. 90)

MILLER et al. v. LANE. (L. A. 2,582.)

(Supreme Court of California. June 3, 1911.)

1. LIMITATION OF ACTIONS (§ 183*)—PLEADING.

In an action against defendant to recover an additional statutory liability as a stockholder of a foreign bank, he alleged that for more than 10 years he had been continuously a resident of the state; that the alleged cause of action arose on a subscription to stock of the bank; that the shares were issued to him about June 15, 1900; that he never resided in the state where the bank was located; was never served with process there; and that no judgment was ever obtained on any liability by reason of his subscription to the capital stock, and therefore pleaded limitations, specifying Code Civ. Proc. § 338, subd. 1, and section 359, providing that an action on a liability created by statute other than for a penalty or forfeiture must be brought within three years, and that an action to enforce a statutory liability against stockholders of a corporation should be brought within the same period. *Held*, that such plea was substantially in the form prescribed by section 458, and therefore was not objectionable as applying only to the "subscription to the capital stock," and not to the cause of action pleaded in the complaint.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 683-692; Dec. Dig. § 183.*]

2. BANKS AND BANKING (§ 49*)—LIMITATION OF ACTIONS (§ 34*)—STOCKHOLDERS—STATUTORY OBLIGATIONS—LIMITATIONS—WHAT LAW GOVERNS.

Laws Colo. 1885, p. 264, § 1, provides that shareholders in banks shall be individually responsible for its debts, in double the amount of the par value of stock owned by them respectively. *Held*, that notwithstanding the courts of that state had determined that the obligation

thereby created was secondary, yet when suit was brought thereon in California against a resident stockholder of an insolvent Colorado bank the *lex fori* would prevail with reference to the form of action essential to enforce such liability, which would be considered as an original statutory liability, and therefore barred after three years by Code Civ. Proc. § 338, subd. 1, and section 359.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 71–81½; Dec. Dig. § 49;* Limitation of Actions, Cent. Dig. §§ 151–157; Dec. Dig. § 34.*]

3. LIMITATION OF ACTIONS (§ 58*)—STOCKHOLDERS—INDIVIDUAL LIABILITY—NATURE—CAUSE OF ACTION—ACCRUAL.

Laws Colo. 1885, p. 264, § 1 provides that stockholders of banks shall be individually liable for debts in double the amount of the par value of the stock owned by them respectively. Held that such statutory liability was not a corporate asset on the insolvency of the bank, but was a liability created for the benefit of creditors, and hence a cause of action to enforce the same accrued at the same time as the debt, to pay which the liability sought to be enforced accrued against the corporation.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 324–347; Dec. Dig. § 58;* Banks and Banking, Cent. Dig. § 75.]

4. LIMITATION OF ACTIONS (§ 2*)—WHAT LAW GOVERNS.

Whether an action to enforce a stockholder's statutory liability to pay creditors of a foreign insolvent bank is barred by limitations depends on the statute of limitations of the state where the suit is brought.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 4–8; Dec. Dig. § 2;* Corporations, Cent. Dig. § 1085.]

5. BANKS AND BANKING (§ 47*)—STOCKHOLDER'S LIABILITY—JUDGMENT AGAINST BANK—CONCLUSIVENESS—PARTIES.

A judgment of a Colorado court administering the affairs of an insolvent bank, imposing a double liability on stockholders under a Colorado statute, was not binding on a resident of California never brought within the jurisdiction of the Colorado court.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 62–68; Dec. Dig. § 47.*]

Department 2. Appeal from Superior Court, Los Angeles County; George H. Hut-ton, Judge.

Action by Alfred L. Miller and others against Ezra F. Lane. Judgment for defendant, and plaintiffs appeal. Affirmed.

E. S. Janes and G. L. Whitham (Tolles & Cobbey, of counsel), for appellants. Louis Luckel, for respondent.

MELVIN, J. Plaintiffs appeal from a judgment in favor of defendant, Ezra F. Lane, who was sued upon an alleged stockholder's liability arising from his ownership of certain stock of a bank formerly doing business in the state of Colorado. The bank of which Lane was a stockholder had been found to be insolvent in 1899 and its property had passed into the hands of an assignee, who settled certain preferred claims and paid the depositors a percentage of the amounts due them. By an action commenced June 9, 1905, certain creditors of the bank proceeded in a court of competent jurisdiction in the state of Colorado, under the appropriate statute of that state, and

on May 28, 1907, a decree was made and entered by which the amount of personal liability of each stockholder was declared; Lane's obligation being found to be \$5,353. Kipp v. Miller, 47 Colo. 598, 108 Pac. 164, 135 Am. St. Rep. 236. By the same decree and in accordance with statutory authority, the Colorado court appointed the plaintiffs herein to represent and to sue for the benefit of all creditors, and under this power they brought this action on October 21, 1908.

In his answer the defendant alleged that for more than 10 years immediately theretofore he had resided continuously in the state of California; that the alleged cause of action arose upon subscription to the capital stock of the state bank of Monte Vista, Colo.; that the shares of stock were issued to him on or about June 15, 1900; that he never resided within the state of Colorado; was never served with process within that state; and that no judgment was ever obtained against him upon any liability by reason of said subscription to said capital stock. He pleaded the bar of the statute of limitations, specifying sections 338, 339, 341, and 359, of the Code of Civil Procedure.

The court found in accordance with practically all of the allegations in the complaint and in substantially the language of the answer, including the bar of the statute of limitations.

[1] Appellant contends that the plea of the statute of limitations in the answer and the court's finding upon that subject goes only to the "subscription to the capital stock," and not to the cause of action set up in the complaint. But we are unable to accept this view, as the allegation of the bar of the statute is in substantially the form prescribed by section 458 of the Code of Civil Procedure. This is sufficient for all purposes. Nicholson v. Tarpey, 124 Cal. 449, 57 Pac. 457.

[2] The question, then, and the only important one, is this, When did the statute of limitations begin to run in favor of defendant? At the trial the plaintiffs introduced in evidence a certified copy of the statute of Colorado, which provides that: "Shareholders in banks, savings banks, trust, deposit, and security associations, shall be held individually responsible for debts, contracts and engagements of said associations, in double the amount of the par value of stock owned by them respectively." Laws 1885, p. 264, § 1.

The statutory law of Colorado, as interpreted by the Supreme Court of that state, makes the liability of a stockholder for the corporation's debts a secondary obligation, to be enforced by suit in equity. Zang v. Wyant, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145; Kipp v. Miller, supra. Therefore appellants insist that they have a right to sue under the law of a sister state as interpreted by the Supreme Court of that state, and that their citation of authorities with

regard to secondary obligations are in point. All of the California cases cited in this behalf were actions involving recovery from stockholders on unpaid subscriptions. *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70; *Union Savings Bank v. Leiter*, 145 Cal. 696, 79 Pac. 441; *Glenn v. Saxton*, 68 Cal. 353, 9 Pac. 420; *Harmon v. Page*, 62 Cal. 448; *Baines v. Babcock*, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158. We cannot agree with this interpretation of the law. Even if the liability of a stockholder under the statute of Colorado is secondary, it is nevertheless a statutory obligation which cannot be postponed, even by the corporation itself, against the will of the stockholder. All of the California cases sustaining judgments of foreign tribunals fixing a stockholder's indebtedness for unpaid subscriptions go upon the principle that such subscriptions are part of the assets of the corporation, and that therefore the stockholders are bound to pay only when a proper call has been made for the amounts promised by their subscriptions; such call setting the statute of limitations in motion. While the Supreme Court of Colorado, in the cases cited above, determines that the liability of the stockholders under the statute is a secondary obligation enforceable in equity, it recognizes that the fund created by the indebtedness of stockholders under the provision of the Code of Colorado is not entirely analogous with that existing in the case of an unpaid subscription for stock, because the court holds that the assignee or receiver of an insolvent corporation has no right of action to enforce the liability arising under the statute. As was said in *Re People's Live Stock Ins. Co.*, 56 Minn. 185, 57 N. W. 468: "The statutory liability is not to be regarded, like that of stock subscription, as corporate assets, with regard to which the corporation represents the stockholders. The two liabilities rest upon an entirely different footing." See, also, *Morse on Banks and Banking*, § 696; *Thompson on Liability of Stockholders*, § 342; *Cook on Corp.* § 216; *Morawetz, Priv. Corp.*, § 869.

[3] The right of action against the stockholder on account of his individual liability for debts of the company accrues at the same time as against the corporation. *O'Neill v. Quarnstrom*, 6 Cal. App. 472, 92 Pac. 391; *Davidson v. Rankin*, 34 Cal. 503; *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110; *Hyman v. Coleman*, 82 Cal. 653, 23 Pac. 62, 16 Am. St. Rep. 178. The statute of limitations of the state where the suit is brought must govern. *Platt v. Wilmot*, 193 U. S. 602, 24 Sup. Ct. 542, 48 L. Ed. 809; *Great Western Telegraph Co. v. Purdy*, 162 U. S. 329, 16 Sup. Ct. 810, 40 L. Ed. 986.

[4] It is clear that we must consider the case at bar as one brought to enforce an

original statutory liability, and it is equally clear that the cause of action against the defendant arose at least as far back as June 9, 1905, when suit was brought by the creditors against the corporation. We cannot subject the defendant, who is and for 10 years has been a resident of California, to any special law or judicial ruling of the state of Colorado, prescribing the form of action upon his statutory liability for the debts of the corporation of which he was a stockholder. In such an action as this the *lex fori* must prevail. Mr. Justice Temple, delivering the opinion of the court in *Russell v. Pacific Railway Co.*, 113 Cal. 261, 45 Pac. 324 (34 L. R. A. 747), said: "The general rule upon this subject is very well established. Where a statute creates a right and prescribes a remedy for its enforcement, that remedy is exclusive. Where a liability is created, which is not penal, and no remedy is prescribed, the liability may be enforced wherever the person is found. The procedure will, however, be entirely governed by the law of the forum. If the law creating the liability provides for the particular mode for enforcing it, the mode limits the liability."

[5] The defendant, Lane, never having been brought within the jurisdiction of the courts of Colorado, the judgment pleaded against him was not binding. *Godfrey v. Terry*, 97 U. S. 171, 24 L. Ed. 944. Regarded as a liability created by statute, the cause of action was barred by section 338, subd. 1, of the Code of Civil Procedure, and section 359 of the same Code.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

160 Cal. 21

In re GREGORSON'S ESTATE.

(L. A. 2,795.)

(Supreme Court of California. May 27, 1911.
Rehearing Denied June 26, 1911.)

1. MARRIAGE (§ 7*)—VALIDITY OF CONTRACT—CAPACITY OF PARTIES.

In the absence of statute, want of requisite mental capacity on the part of one of the parties to a marriage renders the same an absolute nullity, under the rule that marriage is a civil contract to which the consent of parties capable of making a contract is essential.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. § 25; Dec. Dig. § 7.*]

2. MARRIAGE (§ 2*)—REGULATION—LEGISLATIVE CONTROL.

The subject of marriage being one over which the Legislature has full control, it may fix the conditions under which the marital status may be created or ended, as well as the effect of the attempted creation of such status.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. § 2; Dec. Dig. § 2.*]

3. MARRIAGE (§ 54*)—VALIDITY—INCAPACITY OF PARTIES—STATUTES—COLLATERAL ATTACK.

Civ. Code, §§ 59, 60, 61, declares marriages between persons related in certain degrees, be-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tween white and colored persons, and by any person during the life of either a husband or wife of such person, except under certain conditions, to be void from the beginning, and section 80 permits either party to proceed by action to have the marriage declared void. Section 82 provides six different causes for which a marriage may be annulled, the third of which is where either party was of unsound mind, unless such party, after coming to reason, freely cohabits with the other as husband or wife. Held that, by such sections, a clear distinction is drawn between void marriages and those which are merely voidable or capable of being annulled, the first class being void from the beginning and the invalidity being capable of being shown in any proceeding in which the fact of marriage may be material, while in the second class the marriage is only void from the time it is so declared, so that, where a marriage between persons incapable for want of mental capacity to contract had not been questioned or annulled during the life of one of them, it could not be collaterally attacked by the public administrator in a proceeding by the guardian of the incompetent husband for letters of administration on the estate of the incompetent wife.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 105, 106; Dec. Dig. § 54.*]

Department 1. Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Petition by Charles W. Northrup, as guardian of the person and estate of David Gregorson, for letters of administration on the estate of Mary J. Gregorson, deceased. From an order granting the petition and denying the application of A. M. Ruiz, public administrator, for letters, he appeals. Affirmed.

W. P. Butcher, for appellant. J. W. Smith and Richards & Carrier, for respondent.

SLOSS, J. Mary J. Gregorson died intestate, a resident of the county of Santa Barbara and leaving estate therein. Charles W. Northrup filed a petition for letters of administration, alleging that the decedent had left a surviving husband, David Gregorson, that said David had been adjudged incompetent, and that petitioner was the guardian of his person and estate. A. M. Ruiz, the public administrator of Santa Barbara county, filed an opposition and a petition that he be appointed administrator, alleging that a marriage had been regularly solemnized between the decedent and David Gregorson in January, 1897, but that at said time, and continuously up to her death, Mary J. Gregorson "was of unsound mind and wholly mentally incapable of entering into, or consenting to, any contract whatever," and particularly any marriage or marriage contract, "and the purported and pretended marriage is and at all times has been null and void." To this opposition and petition Northrup filed a demurrer, which was sustained, and the court entered judgment denying the petition of Ruiz for letters and disallowing his opposition. Ruiz appeals from this judgment.

The position of appellant is that inasmuch as marriage is a relation "arising out of a civil contract, to which the consent of parties capable of making that contract is necessary" (Civ. Code, § 55), no valid marriage can be created except by two persons capable of entering into such contract. Where for want of the requisite mental capacity on the part of one of the parties there has been no consent, the purported marriage is, it is claimed, an absolute nullity, and will be so declared in any court and in any proceeding where the question may arise, whether during the lifetime of both of the parties or after the death of either of them.

[1] It is not to be denied that, in the absence of any statute to the contrary, the great weight of authority is in support of the rule so contended for. 1 Bishop, Marr. & Div. § 614; 2 Nelson on Div. and Separation, § 671; *Inh. of Millborough v. Inh. of Rochester*, 12 Mass. 363; *Jenkins v. Jenkins*, 2 Dana (Ky.) 103, 26 Am. Dec. 437; *Wightman v. Wightman*, 4 Johns. Ch. (N. Y.) 343; *Jaques v. Pub. Adm'r*, 1 Bradf. Sur. (N. Y.) 499; *Rawdon v. Rawdon*, 28 Ala. 565; *Atkinson v. Medford*, 46 Me. 510; *Waymire v. Jetmore*, 22 Ohio St. 271; *Powell v. Powell*, 18 Kan. 371, 26 Am. Rep. 774.

Some courts, while not denying the power to inquire collaterally into the validity of a marriage attacked on this ground, have preferred to leave the question of validity or invalidity to be determined in the first instance in an action commenced for that purpose. *Williamson v. Williams*, 56 N. C. 446; *Wightman v. Wightman*, supra. These rulings are put upon grounds of propriety and convenience, and do not question the soundness of the general rule that a marriage solemnized between parties, one of whom is not mentally capable of consenting, is absolutely and entirely void.

[2] But inasmuch as the Legislature has full control of the subject of marriage, and may fix the conditions under which the marital status may be created or ended, as well as the effect of an attempted creation of that status, the general rule, as above declared, may be altered by statute. Whether a marriage of the kind under consideration should be treated as entirely void, or should be open to attack only in a specific proceeding brought by certain persons, is purely a question of policy for the Legislature. The strict rule of absolute nullity may often serve to prevent designing persons who have led an incompetent into a purported marriage from profiting by the wrong committed. On the other hand, there must be many cases in which a great hardship might be worked on innocent persons if the validity of a marriage which had been treated by the parties as binding could, after the death of one of them or in a collateral proceeding, be questioned by a third party asserting that the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

purported husband or wife had been of unsound mind at the time of undertaking the marriage.

Acting upon some such view as that last indicated, the Legislatures of a number of states have passed statutes designed to render marriages of the kind under discussion free from attack except in proceedings for annulment brought by or on behalf of one of the parties. 2 Nelson, Marr. & Div. § 672. In some of the states the statutes declare that the marriage "shall be void from the time its nullity shall be declared by a court of competent authority." It has been held that the effect of this is to make the marriage valid until the decree of annulment has been entered. *Eliot v. Eliot*, 77 Wis. 634, 46 N. W. 806, 10 L. R. A. 568; *State v. Cone*, 86 Wis. 498, 57 N. W. 50. In Massachusetts the statute declares that "the validity of a marriage shall not be questioned in the trial of a collateral issue on account of the insanity or idiocy of either party, but only in a process duly instituted in the lifetime of both parties for determining such validity." The meaning of this statute is plain, and its validity had been upheld. *Goshen v. Williams*, 4 Allen (Mass.) 458. Statutes very similar to the provisions of our own Civil Code have been passed in Vermont. Under such statutes, it is held that a marriage which might have been annulled at the suit of the wife on the ground of the insanity of the husband cannot, after the latter's death, be questioned in proceedings in probate to administer his estate. *Wiser v. Lockwood's Estate*, 42 Vt. 720.

[3] We think our own statutes should be construed in like manner. Under the provisions of the Civil Code, a clear distinction is drawn between void marriages and those which are merely voidable, or, as it might perhaps be better expressed, those which are capable of being annulled. Thus it is declared that marriages between persons related to each other in certain degrees "are incestuous and void from the beginning" (section 59); that marriages of white persons with negroes, Mongolians or mulattoes "are illegal and void" (section 60); that a marriage contracted by any person during the life of either the husband or wife of such person (except under certain conditions) "is illegal and void from the beginning" (section 61). Section 80 permits either party to an incestuous or void marriage to proceed by action in the superior court to have the same so declared. On the other hand, section 82 declares: "A marriage may be annulled for any of the following causes, existing at the time of the marriage: One. That the party in whose behalf it is sought to have the marriage annulled was under the age of legal consent, and such marriage was contracted without the consent of his or her parents or guardian, or person having charge of him or her; unless, after attaining the age of con-

sent, such party for any time freely cohabited with the other as husband or wife. Two. That the former husband or wife of either party was living, and the marriage with such former husband or wife was then in force. Three. That either party was of unsound mind, unless such party, after coming to reason, freely cohabit with the other as husband or wife. Four. That the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabit with the other as husband or wife. Five. That the consent of either party was obtained by force, unless such party afterwards freely cohabit with the other as husband or wife. Six. That either party was, at the time of marriage, physically incapable of entering into the marriage state, and such incapacity continues, and appears to be incurable." No one of these six classes (except the second) covers any marriages declared by the earlier sections to be void. The second subdivision relates to a marriage contracted by a person during the life of a former husband or wife. It will be observed, by reference to section 61, that even such marriage is not in all cases void. Where the former husband or wife had been absent and not known to be living for five years or was generally reputed or believed to be dead, the subsequent marriage is expressly declared to be valid until its nullity is adjudged by a competent tribunal.

A marriage prohibited as incestuous or illegal and declared to be "void" or "void from the beginning" is a legal nullity, and its invalidity may be asserted or shown in any proceeding in which the fact of marriage may be material. The provision of section 80 that an incestuous, or void marriage may in an action to that end be declared void does not undertake to make such action the exclusive method of questioning the validity of the purported marriage. The judgment merely declares an existing fact—viz., that the marriage is void—and this fact may be shown even though it may not have been so adjudicated.

The action for annulment for the causes specified in section 82 (except in so far as subdivision 2 may cover marriages void in the extreme sense) stands, however, upon a different ground. No general right to have the marriage declared null is given, but the persons who may bring the action, and the times within which they may bring it, are limited by the following section. Thus, where the cause is unsoundness of mind, the action may be brought "by the party injured, or relative or guardian of the party of unsound mind, at any time before the death of either party." These marriages are not declared to be void as are those mentioned in sections 59, 60, and 61. The fact that they are not so declared and that the right to have them annulled is closely limited as to

both persons and time indicates clearly the intent of the Legislature that these marriages are to be regarded as merely voidable, and that the only manner of avoiding them is that provided by the Code. If the parties who are alone recognized by the statutes as entitled to have the marriage annulled do not, during its existence, see fit to avoid it, a stranger to the marriage should not be permitted to question its validity in a collateral proceeding. This would clearly be the proper interpretation of subdivisions 4, 5, and 6 of section 82. If the consent of either party had been obtained by fraud or force, or if one of the parties had been physically incapable of entering into the marriage state, no one would contend that in the absence of complaint by the injured party the validity of the marriage could be disputed collaterally. We think the same results were intended to apply to all of the grounds covered by section 82, unless in so far as subdivision 2 of that section may cover bigamous marriages that are void, as well as those which are merely voidable under the terms of section 61. Any intimation of a contrary view that may be found in the opinion in *Stierlen v. Stierlen*, 6 Cal. App. 420, 92 Pac. 329, was unnecessary to the decision.

With reference to the particular case under discussion, some force is added to the views we have expressed by the analogy of the sections of the Code dealing with the power of insane or incompetent persons to make contracts generally. Under section 38, "a person entirely without understanding has no power to make a contract of any kind," whereas, under section 39, "a conveyance or contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission as provided in the chapter on rescission in this Code." We need not here inquire whether the marriage of "a person entirely without understanding" should be held to be absolutely void and open to collateral attack. The appellant's pleading does not allege directly or inferentially that the decedent was entirely without understanding. So far as the pleading shows, the decedent at the time the marriage was contracted was in the condition described in section 39. A contract for any other purpose than marriage, if made by her, would have been voidable merely, and would, in the absence of a rescission, have been binding upon her. In view of the various Code provisions dealing with the subject, we see no reason why a stricter rule should be applied to a marriage entered into by a person not entirely without understanding.

For these reasons, we think the court below rightly held that the public administrator had no standing to question the validity of the marriage which furnished the basis

of the respondent's claim to letters of administration.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

160 Cal. 1

WINCHESTER v. NORTH BRITISH & MERCANTILE INS. CO. OF LONDON AND EDINBURGH. (L. A. 2,753.)

(Supreme Court of California. May 25, 1911.)

1. APPEAL AND ERROR (§ 1011*)—FINDINGS OF TRIAL COURT—CONCLUSIVENESS.

A finding on conflicting testimony will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

2. INSURANCE (§ 505*)—FIRE INSURANCE—CONTRACTS—CONSTRUCTION.

A fire policy requiring the separation of damaged and undamaged property in the event of a fire so as to protect the undamaged part from further deterioration does not require segregation where the loss exceeds the amount of the insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1291, 1292; Dec. Dig. § 505.*]

3. INSURANCE (§ 568*)—FIRE INSURANCE—APPRAISERS—DEMAND—WAIVER.

A fire policy requiring written notice for the appointment of appraisers by either party, and stipulating that the loss shall be payable 60 days after proof of damage and award by appraisers when required, and that insurer shall not waive any provision of the policy by any act relating to appraisal, requires insurer desiring the appointment of appraisers to serve on insured written notice within 60 days after proof of loss or the right to arbitration is waived, and insured need not thereafter submit to arbitration but may sue on the policy, and such notice must actually be received by insured within the specified time.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1424; Dec. Dig. § 568.*]

In Bank. Appeal from Superior Court, Los Angeles County; George E. Church, Judge.

Action by J. M. Winchester against the North British & Mercantile Insurance Company of London and Edinburgh. From a judgment for plaintiff, defendant appeals. Affirmed.

R. T. Archer and John W. Kemp, for appellant. Bernard Potter, for respondent.

MELVIN, J. Defendant appeals from a judgment rendered in favor of plaintiff in a suit upon a contract of insurance for loss by fire. The property alleged to have been destroyed consisted of certain walnuts which, at the time of the fire, were stored in a room of a dwelling house in the city of Los Angeles. The suit was for \$700, the full amount of the policy. Judgment was rendered as prayed.

The court found that before the fire the nuts were of the value of \$958.50; that the total value of the nuts not entirely destroyed

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

by fire was not in excess of \$155; and that the loss to plaintiff was in excess of \$700.

[1] This finding is attacked, but we think it is upheld by certain evidence, and, of course, we cannot undertake to pass upon questions which have been decided by the lower court upon a conflict of testimony where there is substantial evidence to support the finding. Mr. Mabb testified that there were 6,400 pounds of walnuts, about one-half being of the soft shell variety, and that nuts of one kind were worth 14 cents a pound, and of the other kind, 15 cents a pound. This estimate alone would place the value of the nuts at \$928, not the figure fixed by the court, but an amount sufficiently large to justify the conclusion reached. But there was other evidence tending to show that the personal property insured was of approximately the value found by the court. The evidence showed that only about 15 sacks of nuts were in such condition that they could be removed from the room in which the fire occurred. These were placed in another apartment and were afterwards sold for \$15. The nuts averaged in weight a little less than 70 pounds to the sack, and estimating their value at 15 cents per pound (the highest price which, according to the testimony, any of the nuts would bring) they would be forth approximately \$150, or about the value found by the court to be the greatest possible limit of their worth.

[2] Appellant's next contention is that the insured failed to comply with the provision of the policy requiring that damaged and undamaged property should be separated and cared for in such manner as to protect the undamaged portion from further deterioration. Respondent's agent did cover the nuts with canvas to protect them from rain and later removed the 15 sacks mentioned above to another room. Besides this, there was no need of segregation, and an inventory of the property in view of the fact that the loss, exclusive of the highest appraisal of the slightly damaged portion of the property was greater than the full amount of the policy. It has been correctly held that whenever the loss exceeds the amount of the insurance there is no question of apportionment. *Lesure Lumber Co. v. Mutual Ins. Co.*, 101 Iowa, 524, 70 N. W. 761. Under the terms of the policy, the segregation is to be made when there is damaged and undamaged property. Here there was testimony which, if true, would support a finding that all of the property was damaged either by fire, water, or smoke. In such a case no segregation or inventory would be necessary.

[3] The most serious question arises upon appellant's contention that the action was prematurely brought. After the fire there were conferences between plaintiff's attorney in fact and defendant's agent. They were unable to agree, and an adjuster was employed by plaintiff's attorney in fact to

assist in the settlement of the matter. He prepared the proofs of loss in due form, and they were filed with the company. Subsequently defendant made a demand in writing that appraisers should be appointed under the terms of the policy, but this did not reach plaintiff's attorney in fact until after the expiration of 60 days. Thereupon plaintiff refused to submit the matter of her difference with the insurance company to arbitrators and an umpire. It was doubtless the theory of the trial court (and we think the correct theory) that the failure to serve such notice upon the insured within 60 days after service of proof of loss amounted to a waiver. The policy of insurance contained the following provisions: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. * * *

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss. * * *

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."

It is earnestly contended on behalf of appellant that, the parties having failed to agree, an appraisal by persons selected according to the terms of the policy was a condition precedent to the right of the insured to bring suit; that no duty to demand

an appraisement rested upon the insurer; and that, therefore, the passing of 60 days after the filing of plaintiff's proofs of loss without a demand for appraisal by the company did not amount to a waiver of the right to such an adjustment. We are aware that these views find support in some cases. *Phoenix Ins. Co. v. Lorton & Co.*, 109 Ill. App. 63; *Murphy v. Northern British & Mercantile Co.*, 61 Mo. App. 323; *Graham et al. v. German-American Ins. Co.*, 75 Ohio St. 374, 79 N. E. 930, 15 L. R. A. (N. S.) 1055. We believe, however, that the weight, both of reason and of authority, is the other way.

In *Case v. Manufacturers' Fire & Marine Ins. Co.*, 82 Cal. 266, 21 Pac. 843, 22 Pac. 1083, the policy under consideration contained the following clauses: "The loss to be paid sixty days after due notice and proofs of the same shall have been made by the assured and received at the office of the company in accordance with the terms and provisions of this policy. In case of differences touching any loss or damage after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial appraisers, whose award in writing shall be binding on the parties as to the amount of such loss or damage."

The defendant made a demand for arbitration more than 60 days after proof of loss by the plaintiff, the latter refused to arbitrate, and the same contention was made as that urged by appellant's attorneys here. Mr. Chief Justice Beatty, delivering the opinion of Department 1, which, as to the subject here involved was subsequently adopted unanimously by the court in bank, said: "We think it clear that if the formal proofs had stated a total loss of \$4,000 or over, and defendant had failed to demand arbitration within the sixty days, at the expiration of which the loss was, by the terms of the policy, to become payable, this would have amounted to a waiver by the defendant of its right to make such demand, and the plaintiff would have been entitled, notwithstanding his refusal to arbitrate, to prove the whole amount of loss so stated. The necessity of an appraisement was not absolute upon any construction of the policy. It was not a condition precedent to the right of action, unless demanded. The most that can be said is that either party could demand arbitration within a reasonable time; but, if not so demanded, it was waived. It is not necessary to decide what would, under the circumstances of this case, have been a reasonable time within which to make the demand, if the amount of the loss had been correctly stated in the proofs. It is sufficient to say that a demand made for the first time after the expiration of the full period of sixty days, or, in other words, after the loss had become payable and a right of action had accrued, would have been too late. And we think it equally clear that, if the

plaintiff in this action had confined his demand to an amount justly proportioned to the statement of his total loss, his refusal to arbitrate would have been no ground for denying his right to recover, even admitting defendant's right to an arbitration if seasonably demanded."

Our attention has been called to *Old Saucelito, etc., Co. v. Commercial, etc., Co.*, 66 Cal. 253, 5 Pac. 232, *Carroll v. Girard Ins. Co.*, 72 Cal. 297, 13 Pac. 863, and *Adams v. Insurance Co.*, 70 Cal. 198, 11 Pac. 627, as expressing the view that arbitration is a condition precedent to the right to sue where the insurer and the insured have failed to agree. In the case first named the question here presented was not squarely raised. In that case there seems to have been a request for arbitration by defendant. Indeed, such request was averred in the complaint, and the court found that defendant was always ready to arbitrate the matter, but that plaintiff had at no time offered to submit the difference of opinion between himself and defendant as required by the policy to disinterested persons; but the case was decided upon the language of the policy itself which provided that the loss or damage was payable after the accounts had been adjusted. There could be no adjustment of the account where the parties to the contract disagreed except by the method of submitting the difference of opinion to a committee as provided in the policy. In the case at bar the loss became payable, not after adjustment, but the policy provided that "the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required." In other words, according to the policy before us, there might be an automatic "adjustment" arising from the passage of 60 days without demand for the selection of appraisers. In *Carroll v. Girard Ins. Co.*, supra, the arbitrators had been selected and the court held that respondent was bound by their award in fixing the amount of his claim in the suit. That case is in favor of respondent's position here because it holds, in effect, that, notwithstanding general language in a policy whereby an insurance company seeks to protect itself against waiver of any of the provisions thereof, it may by its conduct waive a requirement so important as that by which the insured is bound under the contract to file written proofs of loss. In *Adams v. Insurance Co.*, supra, the contract was not like the policy here considered as it did not provide (so far as the opinion discloses) that the loss should be paid after the expiration of a certain time following the filing of proofs, etc., including appraisal if it should be required. But, even if it be conceded that the opinions in the cases just discussed tend to sustain appellant's position, then we must hold that those cases are to that extent overruled by

the later opinion of this court in bank in Case v. Manufacturers' Fire & Marine Ins. Co., supra.

The two portions of the policy, one requiring written notice of request for the appointment of arbitrators by either party to the contract, and the other making the loss payable after proof of damage and award by appraisers when required, lead to the conclusion that in the absence of a demand from either party within the 60 days mentioned, there could be no requirement of that kind and a waiver of such settlement of the amount of the loss must be presumed. In *Randall v. American Fire Ins. Co.*, 10 Mont. 359, 25 Pac. 959, 24 Am. St. Rep. 64, after analyzing the authorities, including the Californian cases on the subject, the Supreme Court of Montana says, speaking through Mr. Justice Harwood: "Without further reviewing authorities, we conclude from the number examined bearing upon this important subject that the tendency now is to construe the provision found in contracts like the one before us, providing for arbitration as to differences respecting the amount of loss or damage, to mean, in contemplation of the parties, that the party desiring arbitration shall request the same. In view of the numerous terms and conditions of the contract, and the position occupied by the parties, we believe this is the manifest intention. Under the terms of the policy, when a loss occurs, the time for payment is fixed. Notice and verified proofs of loss are required to be presented by the assured, with other conditions as to proofs and examinations, if the insurer request them. The proofs of loss certify under oath the amount of loss as claimed by the assured. The insurer may accept this estimate, or proceed to negotiate for an adjustment or a 'mutual agreement' with the assured as to the amount he will take in satisfaction of the contract, or the insurer may give notice within the required time of intention to restore the property. All these alternatives for the insurer are provided in the policy, and it is contemplated that the assured must await the movements of the insurer upon some of these lines of action. The assured cannot know which will be adopted until notified by the insurer. The insurer may also, if a difference of opinion as to the fair amount of the loss is entertained, notify the assured thereof, and request arbitration. The insurer has the amount of loss claimed by assured stated under oath, and the suggestion of 'differences' in that respect must come from the insurer, and such differences ought to be certain, and would probably involve the admission of liability to pay a stated amount (*Lasher v. Northwestern Nat. Ins. Co.*, 55 How. Prac. [N. Y.] 318), so that an issue would be stated to submit to arbitration. The insurer, under such a contract, is the

only party who can effectually demand and bring about arbitration, or gain a defense by reason of the other party's default in failing to comply therewith. But, if the assured fails to request arbitration, this deprives the insurer of no right whatever. If the insurer is deprived of the right of arbitration, it happens by his own laches. Nor by demanding arbitration can the assured bring that remedy into action, for the insurer may simply ignore such demand, and lose no defense thereby when the cause of action is taken into court. Therefore, under the peculiar conditions of the contract, it depends on the will of the insurer alone as to whether he will have arbitration or not. If he demands it in season, according to the conditions of the policy, and the conditions are shown to exist which the policy provides shall be submitted to arbitration, then the assured must accede to the request, for the courts will afford him no remedy until he submits to arbitration: *Hamilton v. Liverpool, etc., Ins. Co.*, 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419. But, on the other hand, if the insurer is unwilling to arbitrate, he may ignore the request made by assured therefor; and under such conditions, to require the assured to make the request and plead and prove the fact is to require a vain and useless act, and the ceremony of proving it, which is always against the policy of the law."

It has been held that appraisal must be demanded by the insurance company, otherwise the insured need not submit to that form of settlement. *Nurney v. Fireman's Fund Ins. Co.*, 63 Mich. 633, 30 N. W. 350, 6 Am. St. Rep. 338; *Mutual Fire Ins. Co. of N. Y. v. Alvord*, 61 Fed. 752, 9 C. C. A. 623. See, also, *Manchester Fire Ins. Co. v. Simmons*, 12 Tex. Civ. App. 607, 35 S. W. 722.

It follows that the judgment should be affirmed, and it is so ordered.

We concur: HENSHAW, J.; LORIGAN, J.; SLOSS, J.; SHAW, J.; ANGELLOTTI, J.

160 Cal. 28

BRUCE v. BRUCE. (Sac. 1,886.)

(Supreme Court of California. May 27, 1911.)

DIVORCE (§ 182*)—TEMPORARY ALIMONY PENDING APPEAL—POWER OF COURT—"PENDING THE ACTION."

Under Code Civ. Proc. § 1049, providing that an action is pending from the time of its commencement until its determination on appeal, and Civ. Code, § 137, empowering the court, where an action for divorce is pending, to require the husband to pay alimony for the support of his wife and children, or suit money, the court, granting to a wife an interlocutory decree of divorce and permanent alimony, may, on the motion of the wife, desiring to appeal from the judgment fixing the alimony, allow her temporary alimony pending the appeal, together with suit money, notwithstanding section 139, empowering the court, on granting a divorce for an offense of the husband, to compel him to pro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

vide for the maintenance of the wife and children, which is inapplicable to orders for payments "pending the action."

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 641; Dec. Dig. § 182.*

For other definitions, see Words and Phrases, vol. 6, pp. 5276-5279; vol. 8, p. 7750.]

Department 1. Appeal from Superior Court, Kings County; John G. Covert, Judge.

Action by Alice Bruce against H. S. Bruce. From an order awarding temporary alimony to plaintiff pending the determination of her appeal, granting insufficient relief, defendant appeals. Affirmed.

See, also, 116 Pac. 994.

H. P. Brown and Lamberson & Lamberson, for appellant. Dixon L. Phillips and M. L. Short, for respondent.

SLOSS, J. The plaintiff commenced this action to obtain a divorce on the ground of extreme cruelty. The defendant having answered, the cause was tried, and the court made its interlocutory decree, which, after reciting that findings had been waived, adjudged that plaintiff was entitled to a divorce. The decree further adjudged that the plaintiff be awarded permanent alimony in the sum of \$4,500, and that to secure this sum she have a lien on the homestead of the parties; said homestead being assigned to the defendant.

This interlocutory decree was rendered on April 20, 1910. The plaintiff was dissatisfied with the amount of alimony awarded, and with the disposition of the homestead. Asserting her intention to appeal from the portions of the decree dealing with these matters, she applied to the court, upon notice duly given, for an order directing the defendant to pay her a reasonable sum for attorney's fees and expenses of her appeal, and for her support pending said appeal. The motion came on for hearing on May 23, 1910. It was supported by affidavits and by oral testimony. The defendant opposed the making of an order requiring him to pay the plaintiff any money, except upon condition that it be allowed as a credit upon the \$4,500 awarded as alimony. The court made its order directing the defendant to pay to plaintiff, as alimony, pending determination of the appeal, or until the further order of the court, the sum of \$25 monthly. It further ordered the payment of the expense, not exceeding sums named, of printing a transcript and a brief on appeal, and the payment of \$125 for fees of plaintiff's attorney on appeal. The present appeal is taken by the defendant from this order.

The defendant's sole contention is that the court was without jurisdiction to make the order complained of. It is argued that, after the entry of judgment in an action for divorce, the court's power with respect to alimony is limited to modifying or changing the order already made, and that the order under

review did not purport to modify or change the original judgment. The claim is absolutely without merit. It is based upon Civil Code, § 139, which has no application to orders for payments during the pendency of the action. Section 137 provides in express terms that, "when an action for divorce is pending, the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action." An action is pending "from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." Code Civ. Proc. § 1049. Following these provisions, this court has repeatedly held that the power to make an allowance to the wife for her support, or to enable her to defend or prosecute the action, is not exhausted upon the rendition of the judgment in the trial court, but continues during the pendency of an appeal. *Reilly v. Reilly*, 60 Cal. 624; *Ex parte Winter*, 70 Cal. 291, 11 Pac. 630; *Larkin v. Larkin*, 71 Cal. 330, 12 Pac. 227; *Bohnert v. Bohnert*, 91 Cal. 428, 27 Pac. 732; *Grannis v. Superior Court*, 143 Cal. 630, 77 Pac. 647; *Gay v. Gay*, 146 Cal. 237, 79 Pac. 885.

Howell v. Howell, 104 Cal. 45, 37 Pac. 770, 43 Am. St. Rep. 70, and similar cases cited by the appellant, are not in point. They deal with the power of the trial court, after a final judgment which makes no provision for the support of the wife or children, to require such support by subsequent orders. The orders involved did not purport to cover the period of an appeal, and had no reference to the pendency of the action. The question in each of these cases was whether the order was authorized by the terms of section 138 or section 139 of the Civil Code. The extent of the court's power under section 137 was not presented or considered.

The order appealed from is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

160 Cal. 9

McQUIDDY et al. v. WORSWICK STREET PAVING CO. et al. (Sac. 1,697.)

(Supreme Court of California. May 26, 1911.)

1. MUNICIPAL CORPORATIONS (§ 305*)—ASSESSMENTS FOR STREET IMPROVEMENTS—ORDINANCES—VALIDITY—"WORK."

A provision in an ordinance for a street improvement that the contractor shall use precautions to prevent accidents to persons and property by providing barriers and shall be responsible for damage to persons, property, or the work, due to the nature of the work, when considered in connection with the provision that all work or materials shall be performed or furnished in accordance with the specifications, refers exclusively to damages arising during the progress of the work, and not to damages arising subsequently thereto, caused by the nature of the work when completed, and it does not

invalidate an assessment for the work; the word "work" meaning the state of actively working or operating.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 817; Dec. Dig. § 305.*

For other definitions, see *Words and Phrases*, vol. 8, pp. 7517-7519; vol. 8, p. 7837.]

2. MUNICIPAL CORPORATIONS (§§ 293, 304*)—STREET IMPROVEMENTS—ASSESSMENTS—VALIDITY.

Where the resolution of intention and the resolution ordering a street improvement referred to the specifications on file in the clerk's office and to the ordinance prescribing the specifications, there was a sufficient description of the work to support the assessment therefor.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 811-816; Dec. Dig. §§ 293, 304.*]

3. MUNICIPAL CORPORATIONS (§ 444*)—STREET IMPROVEMENTS—ORDINANCES—VALIDITY.

A provision in a general ordinance providing specifications for street improvements, including specifications for work under the Vrooman act or under street improvement acts, that no work or materials shall be changed or omitted except on the order of the trustees, certified by the clerk, and that additional work will be allowed only on the order of the board certified by the clerk, etc., does not give the trustees power to change the contract for the work, but only provides that, if a change is intended, it cannot be made except by order of the trustees, and it does not apply to contracts for work under the street improvement acts, and it does not invalidate an assessment for the improvement.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 444.*]

4. MUNICIPAL CORPORATIONS (§ 444*)—STREET IMPROVEMENT—ORDINANCES—VALIDITY.

A provision in an ordinance for a street improvement that any materials, apparatus, or plant owned by the city may be furnished the contractor on such terms as may be stipulated in the contract therefor does not secure to one contractor more than to another the privilege of making contracts with the city for the use of any property which may be available in the construction of the improvement, so as to invalidate for that reason an assessment for the improvement.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 444.*]

5. MUNICIPAL CORPORATIONS (§ 444*)—STREET IMPROVEMENT—ORDINANCES—VALIDITY.

A provision in an ordinance for a street improvement that the contractor shall employ only competent and faithful laborers, and dismiss any employé failing to perform the work satisfactorily to the city authorities, merely allows the city authorities when an employé is incompetent or unfaithful to see that he is dismissed, and it does not invalidate an assessment for the improvement.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 444.*]

6. MUNICIPAL CORPORATIONS (§ 444*)—STREET IMPROVEMENTS—ORDINANCES—VALIDITY.

A provision in an ordinance for a street improvement that the wearing surface shall be composed of asphaltic cement 16 to 20 parts, sand 80 to 65 parts, and stone dust as required, when read as it must be in connection with the provision that the materials must be mixed in proportion by weight depending on their character within the limits specified, and that the stone dust must be used in such proportions that the mixture of sand, cement, and dust will pass at least 10 per cent. through a

100-mesh screen, is not objectionable for indefiniteness, or uncertainty as to the amount of stone dust, and does not empower the city engineer or trustees to fix the amount to be used, and does not invalidate an assessment for the improvement.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 444.*]

7. MUNICIPAL CORPORATIONS (§ 307*)—STREET IMPROVEMENTS—ORDINANCES—VALIDITY.

Minor details in a street improvement may, by the ordinance for the work, be left to the supervision of the officer in charge of the work, who will presumptively perform his official duty.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 819; Dec. Dig. § 307.*]

8. MUNICIPAL CORPORATIONS (§ 307*)—STREET IMPROVEMENTS—ORDINANCES—VALIDITY.

A provision in an ordinance for a street improvement which gives to the contractor his option to use broken rock or clean river gravel of the quality prescribed is not objectionable as giving the city or its superintendent power to determine which material shall be used.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 819; Dec. Dig. § 307.*]

In Bank. Appeal from Superior Court, Kings County; John G. Covert, Judge.

Action by William R. McQuiddy and another against the Worswick Street Paving Company and others. From an order denying defendants' motion for a new trial, they appeal. Reversed.

Charles G. Lamberson, Frank Lamberson, H. P. Brown, Everts & Ewing, and Gray & Cooper, for appellants. Dixon L. Phillips and W. R. McQuiddy, for respondents. William Denman, amicus curiæ.

SHAW, J. This is an appeal by the defendants from an order denying their motion for a new trial. The action was one to quiet title to two lots in the city of Hanford. The defendants claim a lien on the property by virtue of their ownership of certain bonds for street improvements issued under the provisions of the act of 1893 and amendments of 1899 thereto, entitled "An act to provide a system of street improvement bonds. * * *" St. 1893, p. 33; St. 1899, p. 40. The court below held that the proceedings leading up to the issuance of the bonds were void, and gave a judgment for the plaintiffs, declaring that the defendants had no interest in the land.

The resolution of intention, and the resolution ordering the work done, described the proposed improvement as follows: "That Eighth street * * * be paved with asphaltic pavement on an asphalt concrete foundation, and curbed with granite curbing, all in accordance with the plans and specifications on file in the office of the city clerk of the city of Hanford. * * *" The specifications referred to were those contained in a general ordinance (No. 131) prescribing

ing specifications for the construction of the several varieties of improvements of streets and sidewalks in the city of Hanford, whether paved by means of special assessments upon private property, or out of the general funds of the city. The principal objection to the validity of the proceedings upon which the bonds were issued is based upon the provisions of section 6 of the ordinance. Section 1, which is introductory in character and is given under the subhead "Declaration," provides that "all work or materials required in grading, paving or improving any street * * * shall be performed, or furnished in accordance with these specifications and plans." Section 6 is as follows: "Safeguards. The contractor shall use all necessary precautions to prevent accidents to persons and property by providing sufficient fences, guards, barriers, temporary bridges, lights, etc., and shall be responsible for all loss, damage or injury to persons, property or the work, due to the nature of the work or the action of the elements."

It is contended that this specification is identical in effect with those declared to be fatal to the validity of such assessments by the decisions in *Blochman v. Spreckels*, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213; *Goldtree v. Spreckels*, 135 Cal. 666, 67 Pac. 1091; *Woollacott v. Meekin*, 151 Cal. 701, 91 Pac. 612; *Hatch v. Nevills*, 152 Cal. 16, 95 Pac. 43; *Van Loenen v. Gillespie*, 152 Cal. 222, 96 Pac. 87; *Stansbury v. Poindexter*, 154 Cal. 709, 99 Pac. 182, 129 Am. St. Rep. 190; *True v. Stansbury*, 155 Cal. 534, 102 Pac. 263. We cannot agree with this contention. The portion of the specification which was held fatal to the assessment in *Blochman v. Spreckels*, *supra*, was as follows: "All loss or damage arising from the nature of the work to be done under these specifications shall be sustained by the contractor." It was said that the other specifications might reasonably be held to refer exclusively to damage occurring from acts done in the progress of the work and to make the contractor responsible merely for damages caused by his negligence in prosecuting the work. But as to the clause above quoted the court said that it had a "broader meaning and looked to damage which might arise out of and subsequent to the completed work—practically any damage for which the city would be liable which might originate in 'the nature of the work to be done.'" It is perfectly clear from a reading of the opinion that, if this meaning had not been attributed to the clause quoted, the assessment there considered would not have been held to have been invalidated by the specification in question. The specifications involved in the other cases above cited were each and all held to be the same, in effect, as that considered in the *Blochman* Case.

[1] We think the specification here under

consideration contains language which, when taken in connection with the introductory clause and considered in the light of the purpose for which such specifications are made, must be construed to refer exclusively to damages arising during the progress of the work, and not to damages arising subsequently thereto caused by the nature of the work when completed. The introduction to the ordinance prescribing the specifications and plans declares in effect that they are adopted as a guide for the performance of the work. There is nothing in the ordinance anywhere which indicates any intention to provide anything with respect to liabilities accruing after the work is performed in the way of damages to property or persons arising from the nature or character of the pavement when completed. The subhead of specification No. 6 consists of the word "Safeguards." This of itself indicates an intention to provide for the safety of persons who may be upon the streets while the work of paving them is in progress. It is a well-settled proposition, frequently applied in the case of sections of the Code which are preceded by subhead or title, that such subhead or title may have the effect of making the language of the section more certain and limited in its application. The construction given to the clause considered in the *Blochman* Case was necessarily based upon the theory that the word "work" in the phrase, "nature of the work to be done under this specification," referred to the completed work, the pavement itself, and not to the process of doing the work. The word "work" has numerous variations of meaning. Webster defines it as "state of actively working or operating"; also as "that which one is doing"; and as "that which is produced; structures." In the *Blochman* Case the word was given the meaning last stated. In the specification in the case at bar the word appears in different company and in a connection which necessarily gives it the meaning first stated. It makes the contractor "responsible for all loss, damage or injury to persons, property, or the work, due to the nature of the work or the action of the elements." Here are three things to which damages may be caused: (1) Persons; (2) property; (3) the work. The thing which is to cause the damage, as contemplated by the specification, is "the nature of the work." In the *Blochman* Case this was held to mean the completed work. In the present case it could not mean this, because one of the things which may be damaged is "the work," and, if it were given this meaning, we would have the work itself—that is, the completed work—injuring itself. The phrase "nature of the work," in the last clause in the specification, necessarily must refer to the character of the operations carried on by the contractor in the construction of the pavement, otherwise the clause would be absurd upon its face. The only reasonable con-

struction of this part of the clause, therefore, is that it was intended to make the contractor liable for all injuries to persons, property, or the pavement to be constructed, by reason of his negligence in constructing the pavement, or, to more closely follow its language, by reason of the nature of his operations in carrying on the work of construction. So construed, there is nothing in it which violates the law or which would have the effect of invalidating the contract.

In *Gay v. Engebretsen*, 158 Cal. 21, 109 Pac. 876, we had under consideration a similar specification, whereby the contractor was made responsible for "all loss or damage arising from the nature of the work to be done under these specifications, during the progress of the work, and before the acceptance thereof, from any act or omission on the part of the contractor," and whereby he agreed to hold the city harmless from any suits for damages arising from or out of and during the performance of the work. It was there held that a provision which made the contractor responsible for the consequences of his own negligence or carelessness in the construction of the improvement contracted for was not improper or fatal to the validity of the street assessment.

[2] Certain other objections are made to the validity of the proceedings which it is necessary to consider. The specifications are not set out at length in the resolution of intention or in the resolution ordering the work to be done, but are referred to therein by reference to the specifications on file in the clerk's office and to ordinance No. 131 prescribing the said specifications. The objection that this is not a sufficient description of the work is disposed of by the decision of this court in *Chase v. Trout*, 146 Cal. 367, 80 Pac. 81.

[3] Section 4 of the specifications provides that "no work or materials for which a contract has been made under the provisions of these specifications shall be changed or omitted, excepting upon order of the board of trustees, certified by the clerk thereof. Additional work in connection with that under contract will be allowed only upon the order of the board of city trustees, certified by the clerk. The price to be added to, or deducted from, the contract price for any added, changed or omitted work or materials shall be stated in the order of the board of city trustees, authorizing such addition, change or omission." It is claimed that this provision gives the city trustees power to make changes in the contract and in the work to be done thereunder, and that this invalidates the proceedings. As before stated, the ordinance in which these specifications are contained is a general ordinance and the specifications include those for work done under the Vrooman act or under street improvement acts, providing for assessments upon private property, and also for work to be done by the city under direct contract and to be paid

for out of the general funds. The provision above quoted does not give the city trustees any power to change the contract. It only provides that, if a change is intended, it cannot be made except by order of the trustees. We do not think that this applies to contracts for street work made under assessment acts. Such contracts cannot be materially changed after they have been let in accordance with the statute. If in connection with this contract the city desired to have other work done and the contractor and the city could agree upon the terms upon which such work should be done, this section of the ordinance might be applicable thereto, but it would not in any respect affect or change the contract for the particular improvement to be done under the proceedings in question.

[4] Section 5 of the ordinance in question provided that "any materials, apparatus or plant owned by the city may be furnished, loaned or hired to the contractor, upon such terms as may be stipulated in the contract therefor." It is suggested that this invalidates the proceedings because it is possible that prospective bidders might have had a private understanding with the officers of the city by which they could have procured such materials, apparatus, or plant at lower rates than would have been allowed to other bidders, and that this would allow unfair competition.

There is nothing in the provision which would secure to one contractor more than to another the privilege of making such contracts with the city for the use of any property which the city might have which would be available in the construction of the improvement, or which could be made the basis for any discrimination between bidders.

[5] This section also requires the contractor to employ no one but competent and faithful laborers, and requires him to dismiss any employé who fails to perform the work satisfactorily to the city authorities. We can see nothing improper in this provision. It does not give the city authorities absolute power to arbitrarily dismiss an employé whether he was competent or faithful or not. It only allows such action by the city authorities when the employé is in fact incompetent or unfaithful. There is nothing improper in the clause giving the city the right to demand the dismissal of such employés.

[6] Section 13 provides that the wearing surface shall be composed of asphaltic cement 16 to 20 parts, sand 80 to 65 parts, and stone dust "as required." It is claimed that this leaves the amount of stone dust entirely indefinite and makes the contract void. This, however, must be read in connection with sections 16 and 18, which provide that the materials must be mixed in proportion by weight, depending upon their character, within the limits specified, and that the stone dust must be used in such proportions that the mixture of sand, cement, and dust will pass at least 10 per cent. through a 100-mesh,

screen. Asphaltic cement will vary in its consistency, and sand will necessarily vary in the size of its particles. The statement that stone dust is to be used as required does not mean that it shall be used as required by the city engineer or the city trustees, but that so much of it shall be used as may be required to make the mixture pass 10 per cent. through the screen aforesaid. Thus understood, there is nothing objectionable in the specification. We do not think there is any such indefiniteness or uncertainty in the provisions of section 14 prescribing the character of the asphaltic cement, or in section 17 describing the broken rock or gravel to be used where specified, as to make the proceeding invalid. Many of such minor details must necessarily be left to the decision of the officer in charge of the work. This subject was discussed at length in the recent case of *McCaleb v. Dreyfus*, 156 Cal. 206, 103 Pac. 924. We cannot add anything to the argument there made.

[7] It shows clearly that such minor details may be provided for by leaving them to the supervision of the officer in charge of the work, who, it is to be presumed, will faithfully and honestly perform his official duty.

[8] There is nothing in the objection that section 17 gives the city or the street superintendent power to determine whether the contractor shall use broken rock or clean river gravel. The effect of the specification is that either may be used by the contractor at his option, but that whichever material is used must be of the quality there prescribed.

We do not find any other defects in the specifications or proceedings in which the bonds were issued which require notice. The proceeding was apparently conducted in accordance with law and the bonds constitute valid liens upon the property. The court below erred in declaring that they were void.

The order appealed from is reversed.

We concur: ANGELLOTTI, J.; LORIGAN, J.

BEATTY, C. J. (concurring). I concur in the judgment, and in all material particulars in the opinion of Justice SHAW. The following observations are added only for the purpose of emphasizing the importance of limiting more carefully, than has been done in some of the cases followed by the superior court, the application of the principle established by the decision in *Brown v. Jenks*, 98 Cal. 10, 32 Pac. 701. It was there held, and I think correctly held, that a contract for street paving to be binding upon abutting owners must not impose upon the contractor the duty of keeping the pavement in repair after completion of his contract and accept-

ance of the work; and this upon the ground that the necessary effect of such a contract would be to impose upon abutting owners the cost of insuring against defects inherent in the plan and specifications of the work—a liability not contemplated by the statute. It was a mistake in my opinion to apply this principle in deciding the case of *Blochman v. Spreckels*, because the contract there in question would easily have borne a construction limiting the liability imposed upon the contractor to the risks assumed by him in undertaking the work, and to the consequences of his own negligence in carrying it out—a construction to be preferred to one which rendered the contract invalid. I dissented from the decision in that and a companion case, and ever since have hoped to see them overruled, being entirely convinced that they and the whole line of decisions in which they have been followed, so far from subserving the policy they were designed to promote, have simply tended to subvert it. Instead of encouraging competition among contractors bidding upon such improvements, the effect has been to diminish competition and to lay upon abutting owners a heavier, and in many cases, an intolerable burden. This serious and growing evil, I think, requires the courts to limit as strictly as possible the doctrine of *Blochman v. Spreckels* in its application to the construction of contracts differing in language from that which was there construed. I thought, and still think, this might have been done in *Woollacott v. Meekin*, and despite that precedent I think it may be done in this case.

In the argument some stress has been laid upon the fact that the Hanford ordinance was passed two years after the decision in *Blochman v. Spreckels*, and the work here in question ordered nearly two years later; from which it is inferred that contractors generally, being aware of the infirmity in the resolution of intention, order for the work, and contract, failed to compete in the bidding, with the result that the price at which the contract was awarded was excessive in proportion to the risks they supposed to be involved. This may, in fact, have been so, but it is a sounder legal inference that the city council of Hanford, being aware at the time its ordinance was adopted of the unfortunate consequences resulting from the wording of the San Diego ordinance, deliberately chose a different phraseology for the express purpose of invoking a different and more beneficial construction. I think myself that there is a difference sufficient to exempt this case (in which the contract was made and performed before the decision in *Woollacott v. Meekin*) from the rule of stare decisis.

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SUNRISE LAND CO. v. ROOT. (Sac. 1,876.)
(Supreme Court of California. June 3, 1911.)

1. APPEAL AND ERROR (§ 654*)—CORRECTION OF RECORD.

The Supreme Court has no power to correct a record by inserting in the complaint allegations which were never there.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2819-2822; Dec. Dig. § 654.*]

2. APPEAL AND ERROR (§ 717*)—CORRECTION OF RECORD.

The Supreme Court may not consider the opinion of the trial judge in lieu of a finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2967; Dec. Dig. § 717.*]

3. APPEAL AND ERROR (§ 548*)—MATTERS REVIEWABLE.

Where there is no bill of exceptions, excerpts from the evidence will not be regarded, and the case will be considered in the light of the original record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2433-2440; Dec. Dig. § 548.*]

4. SPECIFIC PERFORMANCE (§§ 114, 123*) — PLEADING—FINDINGS.

While, under Civ. Code, § 3391, providing that specific performance of a contract cannot be enforced against a party not receiving an adequate consideration, it is not necessary that it be alleged in the complaint and found by the court in *hæc verba* that "the contract was supported by an adequate consideration," a complaint, alleging a written contract for the sale of land, and a finding that the sale was "legally and fairly" made, were insufficient; there being no allegation that defendant received an adequate consideration for the contract or that it was to her just and reasonable.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356-372, 397-399; Dec. Dig. §§ 114, 123.*]

5. SPECIFIC PERFORMANCE (§ 65*) — REASONABLENESS OF CONTRACT.

The court must be satisfied, in an action for specific performance, that a claim for a deed under a contract is fair, just, and reasonable, the contract equal in all its parts, and founded on an adequate consideration.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 196; Dec. Dig. § 65.*]

Department 2. Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by the Sunrise Land Company, a corporation, against Abbie J. Root. From the judgment, defendant appeals. Reversed, with instructions.

Maddux & Maddux and D. M. Young, for appellant. L. L. Dennett and J. M. Walthall, for respondent.

MELVIN, J. Plaintiff brought an equitable action to enforce the specific performance of a contract for the sale of 840 acres of land in Stanislaus county, at \$100 per acre. This contract was made by plaintiff and Messrs. Root & Saunders (copartners), alleged in the complaint to be defendant's duly authorized agents for the sale of the

land, the written agreement between defendant and the said copartnership granting the latter full power to contract for the sale of any or all of the land described in the complaint, being made a part of the pleading. Defendant demurred to the complaint; her demurrer was overruled; and, after she had answered, the case was tried on its merits, with the result that judgment was rendered in favor of plaintiff, decreeing specific performance of the contract. From this judgment defendant appealed on the judgment roll alone; the record being authenticated by stipulation of counsel that it correctly set forth the complaint, demurrer, proceedings of argument on demurrer, minute order overruling defendant's demurrer to the complaint, etc. Appellant filed her points and authorities, resting her appeal upon the single contention that her demurrer should have been sustained because of want of sufficient facts in the allegations of the complaint, and it is pointed out in the brief of her attorneys that said complaint fails to allege that defendant received an adequate consideration for the contract, or that it was as to her just and reasonable. Thereafter plaintiff filed a document entitled "Suggestion of Diminution of Record," asking permission to insert at the proper places in the complaint an allegation respecting the reasonableness of the contract and adequacy of consideration, which would meet the point made in appellant's brief. This amendment was sought for the reason, as stated by one of plaintiff's counsel in an affidavit accompanying the "Suggestion of Diminution of Record," "that the said allegation in the complaint was inadvertently omitted and the findings inadvertently made to follow the complaint, and the point was never raised that such allegations were omitted; but, on the other hand, the case was tried by the court, and the evidence was introduced without objection showing the reasonableness of the consideration, and that the complaint was amended by implication, and the first time that the point was ever raised specifically by the defendant was on her brief on appeal herein." This document also presents the written opinion of the judge of the superior court who tried the case, and certain extracts from the testimony at the trial. Respondent seeks to utilize part of this opinion as a finding upon the adequacy of consideration, and to show by the selected portions of the testimony that this matter was thoroughly tried in the action.

[1] We have no power to correct a record by inserting allegations in the complaint which were never there, and cannot, of course, receive respondent's suggestion that such averments be supplied after an appeal in which its attorneys stipulate to the correctness of a record containing no such allegations. By such action we would deprive

defendant not only of her right to answer, but of the privilege of meeting, perhaps, by sufficient proof, statements which, under the condition of the record at the trial, she was not called upon to controvert.

[2] Neither can we consider the opinion of the learned judge of the trial court in lieu of a finding, even if we should ignore the appellant's suggestion that such opinion cannot be part of the record of an appeal on the judgment roll alone, because such finding, in the absence of the proper allegation in the complaint, would be without the issues. *Kaiser v. Barron*, 153 Cal. 790, 96 Pac. 806.

[3] The excerpts from the evidence have no place here because there is no bill of exceptions. We must therefore, of course, consider the case in the light of the original record. Respondent contends that there was sufficient allegation and finding of adequacy of consideration because a written contract was alleged and the court found that the sale was "legally and fairly" made.

[4] While it is not necessary that, to conform to the requirements of section 3391 of the Civil Code, it must be alleged in the complaint and found by the court in *hæc verba* that "the contract was supported by an adequate consideration" (*Wait v. Kern River Mining, etc., Co.*, 157 Cal. 25, 106 Pac. 102), nevertheless the complaint and findings in this case fall far short of the measure long established by courts of equity. A sale might be "legally" made, in that an agent had power to bind his principal, and, while it might be "fairly" conducted in respect to full disclosure to the purchaser of all of the matters pertaining to the property, yet the consideration might be so inadequate as to shock the conscience of the chancellor.

[5] As was said by the chancellor in *Seymour v. Delancey*, 6 Johns. Ch. (N. Y.) 225 (language quoted more than once by this court): "A court of equity must be satisfied that the claim for a deed is fair and just, and reasonable, and the contract equal in all its parts, and founded on an adequate consideration, before it will interpose with this extraordinary assistance." As the complaint failed to set up the adequacy of the consideration, the demurrer should have been sustained. *Section 391, Civ. Code; Kaiser v. Barron, supra; White v. Sage*, 149 Cal. 614, 87 Pac. 193; *Stiles v. Cain*, 134 Cal. 171, 66 Pac. 231; *Bruck v. Tucker*, 42 Cal. 354; *Agard v. Valencia*, 39 Cal. 302.

There is nothing in respondent's point that, inasmuch as the copartners had done much work in negotiating for the sale of land, the contract was partly executed, and therefore its adequacy not a matter subject to inquiry. The agents are not parties to this action, and their contract with appellant is not in issue here.

The judgment is reversed, with instructions to the court below to sustain defendant's demurrer.

We concur: HENSHAW, J.; LORIGAN, J.

160 Cal. 82

GASSNER v. McCARTHY, Mayor, et al. (S. F. 5,711.)

(Supreme Court of California. June 2, 1911.)

1. MUNICIPAL CORPORATIONS (§ 57*)—POWERS.

A municipal corporation may exercise only such powers as are conferred on it in its charter, or by some general law.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 144, 148; Dec. Dig. § 57.*]

2. MUNICIPAL CORPORATIONS (§ 412*)—POWERS—CONSTRUCTION OF TUNNELS.

The provision in the charter of the city and county of San Francisco that the board of supervisors may construct or permit the construction of tunnels grants authority to construct tunnels, but does not authorize a special assessment to pay the cost of the work.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1013; Dec. Dig. § 412.*]

3. MUNICIPAL CORPORATIONS (§ 406*)—SPECIAL ASSESSMENTS—STATUTORY POWERS.

In the absence of a grant of power to levy a special assessment to pay the cost of authorized work, the cost of the work must be borne by the city as a whole, either out of current revenues or a bond issue.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1001, 1002; Dec. Dig. § 406.*]

4. MUNICIPAL CORPORATIONS (§ 415*)—SPECIAL ASSESSMENTS—STATUTORY POWERS.

The charter of the city and county of San Francisco, empowering the board of supervisors to change the grade of any public street and to regrade or repave, or otherwise improve, the same so as to conform to such change, etc., does not authorize the board of supervisors to change the grade of two blocks of a street and to construct a tunnel under two intervening blocks of the street, without changing the grade of that part of the street, and to levy a special assessment to bear the cost of constructing the tunnel.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1018; Dec. Dig. § 415.*]

5. MUNICIPAL CORPORATIONS (§ 414*)—SPECIAL ASSESSMENTS—STATUTORY POWERS.

The power to levy a special assessment to repave streets granted to the city and county of San Francisco by the charter, empowering the board of supervisors to change the grade of streets and to regrade and repave the same so as to conform to such change, is an incident to the change of grade, and must be limited to the length of the changed grade.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1008, 1017; Dec. Dig. § 414.*]

6. MUNICIPAL CORPORATIONS (§ 414*)—STREET IMPROVEMENTS—VALIDITY.

A proposed improvement changing the grade of two blocks of a city street and constructing a tunnel under two intervening blocks of the street, without changing the grade of the street in the blocks through which the tunnel is to run, is an entire scheme, and, where the municipality had no power to construct the tunnel

at the cost of property benefited, the regrading and repaving of the two blocks at either end of the tunnel cannot be sustained.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1008, 1017; Dec. Dig. § 141.*]

7. MUNICIPAL CORPORATIONS (§ 413*)—STREET IMPROVEMENTS—ASSESSMENTS—POWERS.

Under the charter of the city and county of San Francisco, providing that the expense of any street work may be made chargeable on the district specially benefited, but that all work on accepted streets must be done at the expense of the city and county, the cost of improving an accepted street cannot be charged to private property owners according to frontage or by the special assessment district plan.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1014; Dec. Dig. § 413.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Louis Gassner against P. H. McCarthy, Mayor of the City and County of San Francisco, and others. From a judgment for defendants, plaintiff appeals. Reversed.

Olin L. Berry, for appellant. Dorn & Dorn & Savage, amici curiæ. Percy V. Long, City Atty., and Jesse H. Steinhart, Asst. City Atty., for respondents.

SLOSS, J. The purpose of this action is to test the validity of proceedings instituted by the board of supervisors of the city and county of San Francisco, looking to a change of grade on two blocks of Stockton street in said city, and the construction of a tunnel under two other blocks of said street. The steps taken provide for the assessment of the cost of the proposed work and the damage to be caused thereby upon a district declared to be specially benefited. The plaintiff, an owner of property fronting on Stockton street, within the proposed district, brought this action to enjoin the mayor, the supervisors, and other officers of the city and county from ordering the said proposed work to be done and from taking any further proceedings with reference thereto. A demurrer to the complaint was sustained. The plaintiff declined to amend, and judgment was rendered in favor of the defendants. The plaintiff appeals.

The appellant makes no attack upon the form of the proceedings taken by the board of supervisors or the board of public works. His main contention is that under the charter of the city and county the municipal authorities have no power to assess the cost of the proposed work upon a special assessment district. On the other hand, the respondents do not question the appropriateness of the remedy of injunction, if the city be without power to carry out the contemplated scheme.

Stockton street is a street running north and south. Proceeding southerly, it crosses

successively Sacramento, California, Pine, Bush, and Sutter streets. Between these crossings there are great variations of grade; the street rising sharply until it reaches its highest point between Pine and California streets, and then descending to Sutter street. The board of supervisors, upon the recommendation of the board of public works, passed a resolution declaring its intention to change the grade of Stockton street between Sacramento and California streets and between Bush and Sutter streets. This was to be done by lowering the grade of Stockton street at the northerly line of California street 44 feet and establishing it at 117 feet above the city base. The grade at the crossing of Sacramento street was to remain at 128 feet above city base. The grade at the southerly line of Bush street was to be lowered 24 feet and established at 86 feet above city base, and at the crossing of Sutter street was to be left at its existing status of 78 feet above city base. It was further declared to be the intention of the board that Stockton street, between Sacramento and California and between Bush and Sutter streets, be graded and changed to the official grade, and that the two said blocks be regraded, repaved, resewered, and residewalked. The doing of this work would have produced two open cuts running into the northerly and southerly sides, respectively, of the Stockton street hill and separated by a distance of two blocks, i. e., the space between Bush and California streets, and it was proposed to connect these two cuts by a tunnel running through the hill under Stockton street. The resolution in question, accordingly, declared it to be the intention of the board to order Stockton street to be improved by constructing a tunnel thereunder, to a width equal to that of Stockton street, between the southerly line of Bush street and the northerly line of California street, the grade of such tunnel to conform to the foregoing changed grade of Stockton street. It was further declared to be the intention of the board to construct two appropriate stairways in Stockton street between Sutter street and Bush street, leading from the level of Stockton street as changed to Bush street, and to construct similar stairways in Stockton street between California and Sacramento streets. The resolution went on to describe a tract of land constituting a district which was declared to be specially benefited by the proposed work, and provided that the actual cost of performing the work and the damages caused thereby should be assessed upon the said district.

The plaintiff is the owner of a lot on the easterly line of Stockton street between Sutter and Bush streets, a lot which would therefore, if the proposed work be done, face upon the open cut leading to the southerly mouth of the tunnel. It is alleged in the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

complaint that Stockton street between Sutter and Sacramento streets is an improved and accepted street.

The question in dispute, i. e., the power of the municipal authorities to impose the cost of the proposed work upon an assessment district, involves an examination of the provisions of the San Francisco charter, upon which the respondents rely for authority to carry out the improvement in the manner declared in the resolution of intention.

[1] It is elementary that "a municipal corporation can exercise only such powers as have been conferred upon it in its charter, or by some general law." *Von Schmidt v. Widner*, 105 Cal. 151, 157, 38 Pac. 682, 684; *Hyatt v. Williams*, 148 Cal. 585, 84 Pac. 41; 1 Dill. Mun. Corp. (4th Ed.) §§ 89, 91.

[2] The respondents point, in the first place, to section 1 of chapter 2 of article 2 of the charter, which declares that the board of supervisors shall have power, among other things: "26. To construct or permit the construction of tunnels, under such rules and regulations as the board may prescribe." This is the only reference to tunnels to be found in the charter. It clearly constitutes a grant of authority to construct tunnels, but as clearly does not authorize the board to select any limited area of property within the city and county; and impose the burden of the construction upon the owners of such property.

[3] In the absence of a grant of power to assess the cost of an authorized work upon a special assessment district, the expense of the work must be borne by the municipality as a whole, either out of current revenues or by means of a bond issue. This is, indeed, conceded by the respondents.

[4] They claim, however, that the power to create an assessment district in a case like this is conferred upon the board of supervisors by chapter 6 of article 6 of the charter. Article 6 relates to the department of public works. Chapter 2 of this article is entitled "Improvement of Streets." Its provisions follow, in the main, those of the general street law, commonly known as the "Vrooman Act." Stats. 1835, p. 147. Chapter 6 of article 6 was not a part of the charter as originally framed. It was added by an amendment approved by the Legislature on November 23, 1907. Stats. (Sp. Sess.) 1907, p. 41. Compare sections 38 et seq. of Vrooman Act, incorporated by Stats. 1891, p. 116; 1893, p. 89. By section 1 of this chapter the board of supervisors is "empowered, on the written recommendation of the board of public works, to change or modify the grade of any public street, avenue * * * and to regrade, repave, sewer, sidewalk, curb or otherwise improve the same so as to conform to such change or modified grade in the manner as hereinafter provided. Before any change of grade is attempted, the board of supervisors shall pass a resolution of intention to make such change or modification of

grade, and it shall in the same resolution, when regrading, repaving, sidewalk, sewer, curbing or other improvement on such street or streets is contemplated in connection therewith, define and establish the district benefited and to be assessed for the payment of damages and for the expense of regrading, repaving, sewer, sidewalk, curbing, or otherwise improving such street or streets so as to conform with such change or modified grade; and it shall have power at the same time and in the same resolution to provide for the actual cost of performing the work of regrading, repaving, sewer, sidewalk, curbing or otherwise improving such street or streets or portion or portions thereof with the same or other material with which it was formerly graded, paved, sewer, sidewalk, curbed or otherwise improved, briefly describing the work to be done and providing that the cost of the same shall also be assessed upon the same district which is declared to be benefited by such change or modified grade; and it shall have power at the same time and in the same resolution to provide for the actual cost of performing the work of regrading, repaving, sewer, sidewalk, curbing or otherwise improving such street or streets or portion or portions thereof with the same or other material with which it was formerly graded, paved, sewer, sidewalk, curbed or otherwise improved, briefly describing the work to be done and providing that the cost of the same shall also be assessed upon the same district which is declared to be benefited by such change or modified grade. When a change or modification of grade or grades is proposed to be made upon a street, avenue, alley, lane, court or place, which has already been sewer, paved, curbed or graded, no such change or modification of such grade or grades shall be made unless provision shall also be made for the re-sewer, repaving, re-curb or re-grading of such street, avenue, alley, lane, court or place. One or more streets or blocks of streets may be embraced in the same resolution. * * *

The respondents claim that, inasmuch as the resolution of intention provides for a change of grade upon two blocks of Stockton street (i. e., from Sutter to Bush and from California to Sacramento streets), the construction of a tunnel under the two intervening blocks (from Bush to California streets) is an exercise of the power to "regrade, repave, sewer, sidewalk, curb or otherwise improve the same so as to conform to such change or modified grade." We think this contention cannot, under any fair interpretation of the language, be maintained. It must be remembered that the resolution of intention does not assume to change the grade of Stockton street in the two blocks through which the tunnel is to run. The change of grade is limited to one block south and one block north of the tunnel. From Bush to California streets the grade of the

street is to remain as it has been; that is to say, running over the crest of the hill. The claim of the city is, then, that the section is intended to authorize, as an incident to a change of grade in one block, not only the regrading, etc., of that block, but the improvement of any number of other blocks which have theretofore been brought to an established grade which remains unchanged.

The charter authorizes the board to change the grade of any street, and to regrade, repave, etc., the same so as to conform to such change. The idea underlying this provision evidently is that the raising or lowering of the grade of an improved street may and probably will necessitate the destruction and replacement in whole or in part of the pavement, sewer, sidewalk, or other improvements which had been laid and constructed in accordance with the old grade. The regrading, repaving, etc., is therefore authorized as a part of the proceeding for change of grade. But it can hardly have been contemplated that the necessity for such repaving or regrading would arise with respect to those portions of the street which are not to be brought to a new grade. Certainly it would be a straining of the ordinary meaning of words to say that the regrading, repaving, or other work upon parts of an improved street, the grade of which remained unchanged, was necessary in order to "conform" to a change of grade at some other place. The section, like other provisions of the street law, looks to the ordering or doing of work upon a part less than the entire length of a street. It declares in terms that "one or more streets or blocks of streets may be embraced in the same resolution."

[5] The power to repave, etc., is an incident to the change of grade, and must be limited to the length of the changed grade. When it is proposed to change the grade of two blocks of a street, such two blocks constitute the street, so far as the change of grade and any improvement incidental thereto are concerned. A reading of the section as a whole leaves no doubt in our minds of the correctness of the construction here given. Take, for example, the clause declaring that the board shall provide for the cost of regrading, repaving, etc., "such street or streets or portion or portions thereof with the same or other material with which it was formerly graded, paved * * * or otherwise improved," and the succeeding one to the effect that, when a change of grade is proposed to be made upon a street which has already been improved, no such change of grade shall be made "unless provision shall also be made for resewering, repaving, recurbng or regrading of such street. * * *" This language clearly indicates that the work authorized is the replacement or reconstruction of necessary improvements upon those portions of the street which are to be brought to a new grade, not the original improvement of other portions of the same street.

[6] Under these views, the creation of an assessment district to bear the cost of constructing a tunnel in or under a portion of Stockton street which remains at its old grade is unauthorized. The proposed improvement is an entire scheme and the grading and paving of the two blocks at either end of the tunnel cannot be separated and upheld. In fact, there can be no doubt that the tunnel is the principal object sought, and the change of grade at the adjoining blocks is an incidental thing, undertaken for the purpose of affording approaches to the tunnel. In the effort to bring the project within the terms of the charter, the resolution of intention seeks to make the change of grade on the blocks leading to the tunnel the principal purpose, and the tunnel itself an incident. This is a forced construction of the real nature of the undertaking, and only serves to emphasize the argument that the framers of chapter 6 never contemplated that the burden of what is here sought to be done could be imposed on a special assessment district.

[7] To avoid any misunderstanding, it may be remarked that the provision in chapter 6 is not the only one authorizing the creation of special assessment districts in connection with street improvements. Under section 5 of chapter 2 the expense of any street work or improvement may be made chargeable upon a district found to be specially benefited. But the respondents have not relied upon this section, for the sufficient reason that, under sections 8 and 23 of the same chapter, all work on accepted streets must be done at the expense of the city and county. Stockton street being an accepted street, the cost of improving it in any way authorized by chapter 2 certainly could not be charged to private property owners, whether according to frontage, or by the special assessment district plan. The proceedings are therefore sought to be supported under chapter 6 alone; the contention of the defendants in this regard being that work done under this chapter, in connection with a change of grade, is not subject to the rule declared in chapter 2 exempting private property from the cost of work on accepted streets. Under the construction we have given to chapter 6, it becomes unnecessary to decide whether this contention is sound. For the same reason, we need not consider appellant's point that, under a proper interpretation of section 1 of chapter 6, the words "otherwise improve" are, under the rule of ejusdem generis, to be limited to work of a kind similar to that enumerated in the preceding words, and should therefore be held to exclude the construction of a tunnel. For the purposes of this decision, we have assumed that the wider interpretation urged by respondents is the correct one.

The judgment is reversed.

We concur: SHAW, J.; ANGELLOTTI, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.

15 Cal. App. 770

TOWN OF RED BLUFF v. WALBRIDGE.
(Civ. 793.)

(District Court of Appeal, Third District, California. April 3, 1911. Rehearing Denied by Supreme Court June 2, 1911.)

1. PUBLIC LANDS (§ 114*)—PATENTS—HIGHWAYS.

Land belonging to the United States, on parts of which were persons, who had taken no steps to acquire title from the government, was by some one platted as a town site into blocks, lots, and streets; and while part of one of such streets was fenced in with lots, the Legislature passed an act declaring the streets shown on the plat to be highways. Thereafter Act Cong. July 26, 1866, c. 262, 14 Stat. 251, was enacted, granting rights of way for highways over the public lands, and reserving to the public the use of all highways that were then across or over the land granted. Subsequently, a patent for the platted lands issued to one "in trust for the several use and benefit of the occupants of the town site * * * according to their respective interests." Held that, all the right an occupant had being under the patent, his right was subject to the rights of the public in the highways established by the Legislature, and intended to be recognized by the patent; so that the one who had inclosed with his lots part of the streets took no private right in such part of the streets.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 114.*]

2. PUBLIC LANDS (§ 116*)—PATENTS—TITLE.

The title to land which one derails from the government by patent cannot be questioned, except by one bringing himself within the saving provisions of the patent.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 323, 325-328; Dec. Dig. § 116.*]

3. MUNICIPAL CORPORATIONS (§ 657*) — STREETS—LOSS BY NONUSER.

The additional width of a street is not lost merely by the street being opened up and used for part only of its width.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1429; Dec. Dig. § 657.*]

4. HIGHWAYS (§ 71*)—CHANGING WIDTH.

A county surveyor not being authorized to cut down the width of a highway, his direction to one, who had his fence in the highway, to move it back to a certain line, did not have the effect of cutting the highway down to such line, it being, as a matter of fact, still wider.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 71.*]

5. ADVERSE POSSESSION (§ 8*)—HIGHWAYS.

Title to a public street cannot be acquired by adverse possession except where the public use has been abandoned by competent authority.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 45; Dec. Dig. § 8.*]

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by the Town of Red Bluff against E. B. Walbridge. Judgment for plaintiff. Defendant appeals. Affirmed.

W. P. Johnson, for appellant. McCoy & Gans, for respondent.

CHIPMAN, P. J. This is an action to have an encroachment upon a certain street in the town of Red Bluff, Tehama county, declared to be a public nuisance and an un-

lawful obstruction, and to have the same removed. Plaintiff had judgment, from which and from the order denying his motion for a new trial defendant appeals.

It is averred in the complaint that Washington street, running north and south in said town has a uniform width of 80 feet through its entire length, is now and for many years last past has continuously been one of the regularly and legally established and existing public streets and highways of said town; that defendant is the owner of certain six lots, situated in block 27, as laid down on the official map of said town, on file in the office of the county recorder of said Tehama county, the westerly ends of said lots lying along and being identical with the easterly boundary of said street a distance of 150 feet; that defendant has encroached upon said street and the sidewalk thereof, along the westerly ends of said lots, "by a fence and sheds, to the extent of 9 feet 6½ inches, and he has inclosed and does now inclose such and said portions of said street and sidewalk"; that on February 1, 1909, the board of trustees of said town duly adopted a resolution declaring said encroachment to be a public nuisance, and directed suit to be commenced for its abatement.

Defendant does not deny his inclosure of the said strip of land, but he claims that his lots are not bounded on the west by the westerly line thereof as laid down on said official map, but by "a line parallel to the said west line as shown on said official map and 9 feet and 6½ inches to the west thereof"; denies that said strip of land forms part of said street, and hence he has not encroached thereon; avers that the land described in the complaint is part of a tract granted by the United States by patent dated September 20, 1866, to Warner Earl, judge of the county court of said county, "in trust for the several use and benefit of the occupants of the town site of Red Bluff according to their respective interests, and to his successors and assigns in trust as aforesaid"; that the town of Red Bluff was incorporated in the year 1876, but that said town had existed as an unincorporated town and had comprised the said land for many years prior to its incorporation and for many years prior to the date of said patent; that said strip of land has been inclosed by defendant and his predecessors in interest for more than 50 years last past, and has never at any time been opened, traveled or used as a street or highway; that on March 6, 1868, and for many years prior thereto, there was a substantial frame building in said street as laid down on the official map of said town and bordering upon said strip of land, about 120 feet long and 50 feet wide; that about the year 1873, and prior to the incorporation of said town, the board of supervisors of said county ordered the streets of said town to be opened and the

obstructions removed, whereupon defendant's predecessor in interest, the then owner of said strip of land and of said lots and the said building, at great cost to him, moved said building under the direction of the surveyor of said county to a point by him indicated as the east line of said street where said building remained until in 1903 when defendant took down the said building and erected a fence along the west line thereof for its entire length inclosing said strip of land; that ever since said east line of said street had been fixed by said county surveyor, as aforesaid, the said line has been acquiesced in as the east line of said street until the commencement of this action; that plaintiff is estopped from claiming that said strip of land as a part of said street and that the action is barred by section 318 of the Code of Civil Procedure.

The cause was tried by the court, without a jury, and it made findings as follows: (1) That all the allegations of the complaint are true; (2) that the strip of land in question is of dimensions as averred by both parties; (3) that the cause of action is not barred by section 318, Code of Civil Procedure; (4) that the land described in the complaint was granted to Warner Earll as alleged in the answer; (5) that the said town was incorporated in 1876 as alleged and, prior thereto, for many years, existed as an unincorporated town; (6) that said strip of land has not been inclosed by defendant and his predecessors in interest for more than 50 years last past, nor longer than since the year 1865; "said described land has been inclosed since the year 1856, but not by said defendant or his predecessors in interest"; (7) that said strip of land has never at any time been opened or traveled or used as a street; (8) that neither on March 6, 1868, nor for any time prior thereto was there a substantial frame building in said street as said street is laid down on the official map of said town; that some time after July 6, 1868, one H. C. Curry erected a barn and shed in said street as so laid down on said map and bordering on said strip of land and of the dimensions alleged; (9) that about 1873 and before said town was incorporated, and while the streets thereof were under the control of the board of supervisors of said county, the said board ordered the streets opened and the obstructions removed; (10) that the predecessor in interest of defendant and the then owner of the said lots and the said building, after said order was given and made and about 1873 and in consequence thereof, moved said building upon the said lots and upon the strip of land; "that at said time the said predecessor in interest of the defendant was not the owner of said strip of land;" (11) that after said removal of said building and until about 1903, when defendant took down said building, the west line of said building formed the west line of said strip of land for a distance of 120 feet, being the entire length

of said building, and when so taken down defendant built a fence along the west side of said strip; (12) that said building was not removed at great expense or at any expense greater than one hundred dollars; (13) that the line to which said building was removed "has not been acquiesced in as the east line of said Washington street"; (14) that plaintiff is not estopped from claiming that said strip of land is a part of said street. With the pleadings before us and the findings thus given, which latter seem to have support in the evidence, the opinion rendered by the learned trial judge, brought to our attention by respondent, clearly and as succinctly as the questions raised may readily be disposed of, covers the principal points involved in the case. It is as follows:

"The plaintiff has brought this action to have removed a fence which it claims is an encroachment upon a part of Washington street, in the plaintiff town and an obstruction to said street. The case as made up and presented may be stated in narrative form in such manner as to present the controlling features of the situation and make apparent the grounds of the conclusions I have reached.

"In 1853 the land embraced in the present town site of Red Bluff was public land of the United States. Some parts of it were occupied by settlers, but it was simply a small village. In that year one Gillette made a map of the town of Red Bluff, showing streets, alleys, blocks and lots. The blocks were represented as being 300 feet long by 250 feet wide, with an alley extending through them from about north to south 20 feet wide. The lots were all marked as having a frontage of 25 feet and a depth of 115 feet. Upon this map appeared, among others, a street marked Washington street, of a uniform width of 80 feet, extending through the whole length of the town from about north to south. This map showed, among others, a block numbered 27, bounded on the east by Main street, on the north by Hickory street, on the west by Washington street, and on the south by Walnut street. The map showed this block to be divided into 24 lots, each 25 feet wide by 115 feet deep. Lots 1 to 12 (inclusive) face on Main street and lots 13 to 24 (inclusive) face on Washington street. The evidence does not show for whom nor by what authority Gillette made this map. It was filed in Book A of Patents some time in the year 1859.

"The property in controversy in this action is a strip 9 feet 6½ inches wide by 150 feet long, lying along and west of the west end of lots 19 to 24, inclusive, in said block 27, the whole thereof being in Washington street as said street appears on the Gillette map. At the time the Gillette map was made in 1853, the west half of block 27 was vacant, unfenced, and unimproved land, with a growth of chapparal upon it. In 1856 the west half of the block was inclosed by a fence, which fence extended out into Wash-

ington street, as said street was shown on the Gillette map, a distance of about 34 feet. It does not appear who put this fence along that part of the block west of lots 19 to 24.

"On April 30, 1860, the Legislature of the state of California passed an act as follows: 'That all streets and alleys in the town of Red Bluff, as described on the plat of the said town, are hereby declared to be highways.' [St. 1860, c. 355.] The evidence shows that at that time no plat of the town had been made other than the Gillette map, and I conclude that this act referred to that plat.

"On the 20th day of February, 1861, Lucien B. Healey, county surveyor of Tehama county, made and filed a map of the town of Red Bluff, in the county recorder's office of Tehama county. This map refers to the Gillette map and states that blocks numbered 1 to 48, inclusive, except blocks 16, 19, 15, 6 and 7, are shown on this map as they appear on the Gillette map. Upon the Healey map, Washington street is shown as 80 feet wide its whole length, and the lots in block 27 are shown as 25 feet front by 115 feet deep, the same as on the Gillette map.

"On the 23d day of March, 1861, an act of the Legislature was passed which provided: 'The plat of the town of Red Bluff, as made by L. B. Healey, Feby. 20th, 1861, is hereby declared to be the official map of said town, and in all questions arising as to the size or locality of the streets, alleys, blocks and lots, said plat shall be evidence of such size and locality.' [St. 1861, c. 92.]

"On the 20th day of September, 1866, a patent was issued by the United States to Warner Earll, county judge of Tehama county, California, conveying to him the town site of Red Bluff (which patent embraced all the lands shown upon both of the maps above referred to), 'in trust for the several use and benefit of the occupants of the said town site.'

"In 1868 the Legislature of the state of California passed an act providing a method for the giving of titles to the lots in the town to the occupants thereof. Section 15 of said act provided: 'In all proceedings under this act, the blocks and lots when mentioned shall be designated with reference to the official plat of the said town.' Section 16 provided: 'The town plat or map filed in the county recorder's office on the 20th day of Feby. 1861, shall be the official map or plat of said town and all the streets, alleys and public squares as designated upon the said plat or map are hereby dedicated to public use.' Section 17 provided: 'When there have been brick or other substantial buildings erected, not in exact accordance with the said official map, the owner or owners of such buildings shall be entitled to the land upon which said building shall stand.' [St. 1867-68, c. 129.]

"The first deed to the lots 19 to 24, inclusive, that appears is one dated March 23, 1861, by which one William Peyton deeds

them to William Cook. There is no evidence to show that Cook ever deeded them to any one. The next deed appearing is a deed from Joseph Smith, sheriff, to one Hollister, dated February 3, 1865, conveying to him all the interest of W. T. Brooks, J. N. Williams, and Alpheus Bull in and to the lots. It does not appear how or when or from whom these three acquired an interest in the property. Hollister conveyed to Curry and Nicholson, March 11, 1868. July 1, 1868, Curry obtained from the county judge a certificate of title to the lots, and his title by mesne conveyances came regularly down until it vested in the defendant. No one has ever acquired any record title to the strip in dispute, either from the general government or from the county judge. The evidence shows that the strip in dispute was inclosed along with the adjoining lots in 1856, and has been inclosed ever since and during all that time has been used as a corral. Some time after March 11, 1868, H. C. Curry, the then occupant of the lots 19 to 24, inclusive, built a feed shed about 25 feet wide along the whole length of the west end of the lots, except about 30 feet at the south end thereof. This shed was out in Washington street about 25 feet west of the present fence of the defendant. Some time between 1870 and 1875 this shed was moved in, so that its west line was on a line with where the defendant's fence now stands and remained there until after 1899, when it being old and rotten, was torn down and a fence—the present fence built along where the west line of the shed had stood.

"From the foregoing I think the situation may be fairly stated as follows: In 1860, when the Legislature passed the act declaring all streets shown on the plat of the town of Red Bluff then on file to be public highways, all the lands in Red Bluff were public lands of the United States and subject to disposal by it to any person, in any manner and on any terms it saw fit to impose. It is true there were parts of the town site in the possession of individuals, but they had no title or interest in the land other than such as their mere possession gave them. But none of them, so far as the evidence shows, had taken any steps to acquire title from the United States government under any of its laws providing for the disposal of government lands. At that time there were two maps on file showing Washington street to be a street 80 feet wide, one the Gillette map, made in 1853, and one the Healey map, made in 1861. The act of 1860 declared all streets on the Gillette map to be public highways and the act of 1861 declared all streets shown on the Healey map to be public highways.

"In 1866 the land embraced in the town site of Red Bluff was deeded to the county judge 'in trust for the several use and benefit of the occupants thereof.' It must be apparent to any one, I think, that the federal

government, in deeding the town site to the county judge, did not intend to give to any private individual an equitable or any kind of a title to those parts of the town site that were then legally constituted public highways. It intended that all public highways thereon at the time of the patent should remain public highways until abandoned by some competent authority and that the other parts of the town site should, under appropriate regulations to be prescribed by the Legislature, be deeded to those who were bona fide occupants at the date of the patent. So this necessarily brings us to a consideration of the question: Was Washington street, at the date of the patent, a public highway, 80 feet wide where it passes along west of block 27?

"I think it beyond question that the Legislature had power, by the acts of 1860 and 1861, to create Washington street a public highway, if in so doing it did not take any private property. As against the federal government it could not perhaps make a public highway over its lands without its consent or acquiescence, but the federal government is not complaining and its policy has always been to encourage the building of highways over the public domain, thereby facilitating its settlement and use, and this policy was crystallized into a statute passed on the 26th day of July, 1866, which was as follows: 'The right of way for the construction of highways over the public lands, not reserved for public use is hereby granted.' [Act July 26, 1866, c. 262, § 8, 14 Stat. 253.] Was the strip of land in question public land of the United States when the acts of 1860 and 1861 were passed? Did any individual have such an interest therein that the state could not put a public highway over it without the consent of the occupant or by bringing condemnation proceedings? The evidence shows that at the date of those acts the strip was inclosed by a fence, by whom built does not appear. There is no evidence to show that the occupant, whoever he was, had taken any steps to acquire title from the general government.

"In *Wells v. Pennington* [2 S. D. 1, 48 N. W. 305] 39 Am. St. Rep. 764, it is said: 'Settlement on the public lands of the United States confers no rights against the government or its grantees. The settler acquires no vested interest in the land until he has entered the same at the proper land office and obtained a certificate of entry. Until then the land continues subject to the absolute disposing power of the Congress.' In the case of *Campbell v. Wade*, 132 U. S. 35 [10 Sup. Ct. 9, 33 L. Ed. 240], Justice Field says: 'It has always been held that occupation and improvements of the tracts desired, with a view to pre-emption, though absolutely essential for that purpose, do not confer upon the settler any right in the land occupied as against the United States which could impair in any respect the power of

Congress to withdraw the land from sale for the uses of the government or to dispose of the same to other parties.' In *Smith v. Mitchell* [21 Wash. 536, 58 Pac. 667] 75 Am. St. Rep. 858, it is said: 'The act of Congress already referred to does not make any distinction as to the methods recognized by law for the establishment of highways.' And in that case it was held that where travel had begun over a piece of land while it was held as a pre-emption claim, such travel created a highway, and when the patent issued to the patentee he took the land subject to the highway on it.

"In *Labish v. Hardy*, 77 Cal. 329 [19 Pac. 531], it appeared that a man and his wife went into possession of a piece of land that was or became a part of the town site of the city of Santa Cruz. The wife died before the act was passed providing for the disposition of the lots and the husband continued to live thereon and procured title. The question arose as to what rights the heirs of his wife had in the lots by reason of her occupancy, the law as to the general rights of the wife in the property of herself and husband being then somewhat different from what it is now. In deciding that the wife by her occupancy acquired no rights in the property that descended to her heirs, the court said: 'We are unaware of any law under which a bare occupancy of any public lands of the United States vests in the occupant any rights or equities in the land occupied. We think no property was acquired in the premises in controversy by either parent of the appellants prior to the passage of the act of Congress of July 23, 1866' [chapter 211, 14 Stat. 209] (being the act providing for the disposition of the lots in the town). See *McLaughlin v. Monetti*, 89 Cal. 363 [26 Pac. 880], for an instructive discussion of the term 'lawful claim to government land' and of the words 'bona fide settler.' 'We think that they (the words "bona fide settler") must refer to one who has done something more than merely occupy land and put a few improvements on it. It cannot be said that every one who enters upon land and builds a fence and cabin or a house is a bona fide settler.'

[1] "From the foregoing decisions, and in view of the general policy of the federal government to encourage the establishment of highways upon the public lands, I conclude that the party in possession of this strip of land in 1860 and 1861 did not have such an estate or interest in the land as precluded the Legislature, by an act passed, from establishing a highway over it and that a highway 80 feet wide was legally established in 1860 and 1861 by the acts of the Legislature, and that Washington street being a legally established highway at the date of the patent, the patent conveyed the land subject to the right of way for a highway thereon. The grant from the United States to Warner Earll of the town site in

trust was a grant to him of the lots in trust for the occupants thereof and of the lands covered by the legally established highways to the use of the public. The patent was dated the 20th day of September, 1866. The act of Congress granting rights of way for highways over the public lands of the United States was passed July 26, 1866. The above act reserved to the public the use of all highways that were then across or over the land granted. 'We are of the opinion, therefore, that all persons acquiring any portions of the public lands, after the passage of the act in question, took the same subject to the right of way conferred by it for the proposed road.' *St. Joe v. Baldwin*, 103 U. S. 426 [26 L. Ed. 578], cited in *Okanogan County v. Cheetham* [37 Wash. 682, 80 Pac. 262] 70 L. R. A. 1030. See *Doran v. C. B. Co.*, 24 Cal. 256. The lands embraced in the patent had been platted into streets, blocks, and alleys as early as 1853, and the plat filed in 1859. Another plat had been filed in 1861, which so far as the property in question is concerned, was a copy of the plat of 1853. Both of these plats were declared official by acts of the Legislature, and the streets shown thereon declared to be public highways. The patent to the county judge vested an equitable interest in the lots in those who were in possession thereof on the 20th day of September, 1866 (*Eversden v. Mayhew*, 65 Cal. 163 [3 Pac. 641]), and those who were in possession before that time and for any reason had ceased to be occupants on that day had no interest in the lots, legal or equitable. *Labish v. Hardy*, 77 Cal. 329 [19 Pac. 531]. Prior to the date of the patent, the government of the United States had full authority to ignore all claims of those who were or had been in possession, and to convey the land to any one it chose and upon any terms it wanted to. So I think it must be held that whatever rights or equities the occupants ever obtained in and to any part of the town site they obtained by virtue of the patent and not by reason of anything that had transpired before that time. But for the patent recognizing their possession and granting them certain rights by reason thereof, their occupancy would have been of no avail and would not have conferred any interest in the property occupied. The patent was in trust for the several use and benefit of the occupants of the town site. The use and benefit of the occupants of the town site necessarily required streets and alleys to be maintained so that travel could be had from one part to another. 'The grant of the lots by Congress to the occupants according to their respective rights necessarily recognized the existence of streets and alleys as then laid out and used, and such grant was a dedication of them to the public.' 'Disposing of the land covered by the town site to the occupants according to their several rights and interests could

not be done except that the streets and alleys thereon for public use were reserved to the public.' *Parchen v. Ashby* [5 Mont. 68] 1 Pac. 204. From this I conclude that, the land being the property of the government at the time of the patent and no person having any such rights in any part of it as would preclude the government from disposing of it as it saw fit, it had a clear right to sell it in view of the situation as to the streets and alleys and of the highways established by the acts of the Legislature of the state, and that the patent was intended to vest in the public the use of the highways then existing.

"It must be borne in mind that the Legislature in passing an act to dispose of the lots to the occupants, redeclared the streets and alleys, as they appeared on existing maps, to be public highways. It did not attempt to make a new map or to change any of the streets as to location or size, but adopted a condition that had existed ever since 1853. This observation is in answer to many of the cases cited where the Legislature, after the execution of the patent in trust, undertook, by making a new map and survey, to change and affect the rights of occupants as they were at the date of the patent.

"There is another view of the case that may be taken. The plats of the town, showing streets and blocks, were filed in 1859 and 1861. In 1860 and 1861 the Legislature passed acts declaring those streets of the width shown on the maps to be public highways. The evidence does not show that the defendant or any one of his predecessors in title were in possession of the strip in dispute at that time. The defendant's chain of title only runs back to a deed from the sheriff of the county to one Hollister in 1865. One William Cook obtained a deed from William Peyton, March 23, 1861, but there is nothing to connect Cook with the defendant. So it must be held that the defendant's grantors went into possession of the strip of land after the plats of the town had been filed and after the Legislature had declared the street to be a public highway 80 feet wide. In *Aleman v. City of Petaluma*, 38 Cal. 559, it is said: 'If the land in contest was a part of one of the streets of Petaluma as laid down on the plan of the town when the occupation of the plaintiff's grantors began, his occupation was not bona fide within the meaning of the act of Congress of March 1, 1867 [chapter 143, 14 Stat. 418], and the plaintiff cannot recover.' In *Jones v. City of Petaluma*, 36 Cal. 237, it is said: 'The effect of the act of July 1, 1864 (so-called "Town Site Act," 13 Stat. of Congress, 1864, c. 205, p. 343), was to withdraw land upon which cities and towns had been established before the passage of the act, or might be established thereafter, from the operation of the general statutes relating to

the disposal of the public lands, and to provide a different system in some respects for their disposal. The former system was inapplicable to such cases, and would have worked much mischief. Accordingly some plan was needed by which towns and cities already established could be secured in the privileges which the former had usurped and the latter needed. The act of July 1st was the result. Its result was to confirm the usurpations of the past and to provide a lawful mode for the acquisition of such privileges in the future. Its effect was to ratify and confirm the use to which the land had been put by cities and towns for the purpose of streets and squares and alleys and to permit such use in the future by providing for the sale of *lots* only. It was a dedication to the public of so much of the public land as had theretofore been appropriated to streets and squares and alleys, and a license for a like appropriation in the future. Such being the object and effect of the statute, if the land in question was public land (and by public land we mean land to which no private rights had attached at the time the steps in question were taken) we are unable to see why the city of Petaluma did not acquire a right to it as a public square. If so the plaintiff could not thereafter, while it so remained, acquire a bona fide occupation, within the meaning of the act of 1867 which obviously refers only to lands in lots and not to lands in streets and alleys. While the act above considered was not the act under which the town site of Red Bluff was secured, its general subject and purpose were the same and the decision seems to me to be very much in point.

"From all this I conclude that Washington street is a legally constituted public highway, 80 feet wide, and that the defendant has shown no legal justification for putting or maintaining any obstruction in any part of it, and that the city has the legal right to have the obstructions removed so that the public may have the free use of all of it for travel and other municipal purposes. Findings and decree will be drawn in accordance herewith."

[2] Appellant contends that, as title to the town site starts with the government, the burden was on plaintiff to connect itself with that title, which it has not done except by dedication, and this could not be accomplished as against the government by the Legislature. We think the learned trial judge showed, by the legislative history relating to the land, by the filing of plats of the town, as early as in 1859 and 1861, designating the streets, alleys and lots, as they have ever since existed, and by the Earll patent, which issued subsequently to the act of Congress expressly granting right of way over public lands not reserved for public use (Act July 26, 1866, c. 262, 14 Stat. 251), suf-

ficient, at least, to make a prima facie case, and to cast the burden upon defendant to bring himself, through some predecessor in interest, within the trust clause of the patent, and to show that such predecessor was an "occupant" of the disputed land, such as was contemplated by the patent. This defendant failed to do. He does not, as the court found, connect himself with any title prior to the issuing of the patent. A sheriff's deed was introduced to show a conveyance to one Hollister in 1865 and by Hollister to H. C. Curry, from whom defendant derails title. But the sheriff's deed to Hollister and his to Curry refer to the lots and block as designated on the official plat and lend no support to the claim of occupancy of the strip in controversy. Plaintiff was not called upon to show occupancy of the street for highway purposes in order to show title. Its title is derailed from the government, and it could not be questioned except by some one bringing himself within the saving provisions of the Earll patent. There is no evidence connecting Hollister's title with the government or to show that he conveyed this strip of land or intended to convey it, and it does not appear very clearly who first erected the obstruction in Washington street. Hollister conveyed to Curry May 11, 1868, and Curry's title is connected with the Earll patent by certificate of the successor to Earll and is dated July 6, 1868. It recites the provisions of the patent, also that it is issued in conformity with the acts of Congress and of the Legislature, and grants "the following property described according to the official plat of said town as lots," etc., naming the said lots. It appears that at this time the obstruction now complained of existed and Curry was using the shed and building on the said strip, but if he claimed it as an occupant by virtue of the provisions of the patent, it was his duty to have made known his claim to the county judge when he applied for the lots and to have had his certificate issue in conformity with his claim and proofs. In our opinion, he took nothing by his certificate of title beyond the boundaries of the lots as laid down on the official plat of the town.

[3] The evidence was that the street was used in its entire length but was never opened and used for its full width, and defendant claims that by nonuser plaintiff lost its right to any greater use than had been given the street. The plaintiff having acquired a right to an 80-foot street, such right was not lost because only part of this width was in fact used. Even where the right is by dedication, "the sale of lots," says Mr. Elliott, "with reference to the plat fixes the private rights of purchasers." Elliott on Roads, § 118, 2d Ed. It often happens that in towns and cities there may be streets only partially improved and used, or

used not at all, for a long period, but the public does not necessarily thereby lose its right to such streets. *Meier v. Portland, etc., Co.*, 16 Or. 500, 19 Pac. 610, 1 L. R. A. 856; *Beall, Road Commissioner, v. Weir*, 11 Cal. App. 364, 105 Pac. 133. The evidence does not support defendant's contention that the public and plaintiff acquiesced in the occupation of the street by defendant and are estopped now to claim the full width for the street. Even defendant was ignorant of the fact that his inclosure extended into the street. He testified: "I had no idea when I bought the property that there was inclosed there between the alley and the east line of Washington street more than the regular 115 feet." The court refused to allow defendant to prove that similar conditions existed at some other points on this street. We cannot see that the inquiry was material.

[4] Defendant offered witnesses to show that the county surveyor, pursuant to the order of the supervisors to remove all obstructions from the streets, indicated the line to which the obstructions were to be removed and that this line was the same as the west line of the strip now in controversy. In ruling, the court said: "I still adhere to my original proposition, *Mr. Johnson*, that if you can prove that that property, at the date of the patent, was in the occupancy of somebody you will have a right to do it. If it is a matter of fact that there was a street there 80 feet wide, *Mr. Shackelford* (the county surveyor) had no authority to cut it down to 60 by anything he might do." In this view of the matter we concur. In point of fact, the order of the board of supervisors was that the roadmaster open the streets and alleys. No authority is shown to have been given to *Shackelford*.

Other assignments of error do not seem to present any point not disposed of.

[5] The claim that the action is barred by section 318, Code of Civil Procedure, is based on the assumption that "the land inclosed by the defendant never was a street, and that defendant has been in possession of said strip of land for about 10 years immediately preceding the commencement of the action, claiming to be the owner adversely to the whole world." The first premise is not supported by the evidence. The land inclosed was part of a street. Upon the other ground, suffice it to say that title to a public street cannot be acquired by adverse use. See subject fully considered in *People v. Kerber*, 152 Cal. 731, 93 Pac. 878. This is the rule, in general, and ceases to operate only where the public use is abandoned by competent authority and the land is held as proprietary property. *Id.*

The judgment and order are affirmed.

We concur: **HART, J.; BURNETT, J.**

HAWLEY v. LOS ANGELES CREAMERY CO. et al. (Civ. 907.)

(District Court of Appeal, Second District, California. April 17, 1911.)

JUDGMENT (§ 256*)—CONFORMITY TO FINDINGS—PARTIES AGAINST WHOM JUDGMENT MAY BE RENDERED.

In an action by a driver of a milk wagon for personal injuries, there were findings that the defendant companies held out to the public, and to plaintiff as an employé of one of the companies, that the appellant company was operating as a branch of the other defendant, and that the employés of the other defendant were also the employés of the appellant company, and that at the time of plaintiff's injury the appellant company did not operate a milk delivery system, but was the owner of the lot on which the other defendant maintained a dairy plant under lease and later under purchase from the appellant company; that plaintiff was employed by the other defendant; that his horses and harness were furnished by that defendant, and that plaintiff's complaint as to the unsafe condition of the harness was made to that defendant; and that there was no secret understanding between appellant and the other defendant by which plaintiff was deceived as to which company was his employer. *Held*, that the judgment against appellant was not sustained by the findings.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 446-454; Dec. Dig. § 256.*]

Appeal from Superior Court, Los Angeles County; *George E. Church*, Judge.

Action by *Ray Hawley* against the *Los Angeles Creamery Company* and the *Belle Vernon Farms Company*. Judgment for plaintiff, and defendant the *Belle Vernon Farms Company* appeals. *Reversed*.

M. E. C. Munday, for appellant. *J. Vincent Hannon*, *Hannon & McCormick*, for respondent.

JAMES, J. Plaintiff was awarded a judgment for the sum of \$3,750 against defendants. His cause of action as set out in the complaint was for damages alleged to have been sustained through the negligent act of said defendants. This appeal is taken by the *Belle Vernon Farms Company* from the judgment, and also from an order denying its motion for a new trial.

Plaintiff was employed to drive a milk delivery wagon. On the 13th day of February, 1908, the team driven by him became unmanageable and ran away, throwing plaintiff from the wagon, and causing his foot to be caught and crushed under the hind wheel thereof. In plaintiff's complaint it is alleged that the horses furnished to him to drive on the milk delivery wagon were wild and unbroken, and that the harness which he was required to use was worn, weak, and unsafe; that he had called the attention of his employers to the unsafe condition of the harness and requested that they furnish him with a good and safe set to be used upon the horses, but that his request had not been heeded; that portions of the harness

broke, whereupon the team was caused to run away, and plaintiff was injured as before stated.

It is the contention of appellant that there was no evidence tending to show any liability on its part for any of the alleged damage caused to plaintiff. It is also urged that upon the facts as found by the court no judgment should have been rendered against appellant.

[1] The trial court found that at all of the times mentioned in the complaint of plaintiff defendants had represented and held out to the public and to the employés of the Los Angeles Creamery Company, including the plaintiff, that the Belle Vernon Farms Company was operating with and as a branch of the Los Angeles Creamery Company in carrying on and conducting a general dairy business, and "that the said employés working at and from the said Belle Vernon Farms Company plant were under the employ of the said Belle Vernon Farms Company operating as aforesaid as a branch of the said Los Angeles Creamery Company." This further finding follows: "That during said time the said Belle Vernon Farms Company did not carry on or conduct such dairy business in the said city of Los Angeles, nor did it maintain, operate, or conduct as incidental to such business, or at all, any delivery system for the purpose of selling or delivering milk, or other dairy products, in the said city of Los Angeles, but at all times mentioned in said complaint owned the land and buildings in the said city of Los Angeles upon which was situated a dairy plant known as the Belle Vernon Farms Company plant, and which said land and buildings were during all of said time held under lease by the said defendant, Los Angeles Creamery Company, a corporation, and on or about the 1st day of January, 1907, the said Los Angeles Creamery Company purchased and took over from the said Belle Vernon Farms Company all wagons, teams, harness, and other appliances of a milk delivery system and the Los Angeles Creamery Company at all times mentioned in said complaint operated such Belle Vernon Farms Company plant as a part of its dairy system in the said city of Los Angeles." The court then found specifically that plaintiff was employed by the Los Angeles Creamery Company as a driver and deliveryman on one of its wagons, and that he was continuously employed by said Los Angeles Creamery Company from the 15th day of October, 1907, up to and including the 13th day of February, 1908, during which period he suffered the injuries complained of. The court also found that the horses and harness furnished to plaintiff to drive were furnished by the Los Angeles Creamery Company, and that the complaint made by plaintiff of the unsafe condition of the harness being used by him was made to the manager

of the Los Angeles Creamery Company. No liability for damages against the Belle Vernon Farms Company can be predicated upon these findings of fact. It is nowhere found that through any secret understanding between the Los Angeles Creamery Company and the Belle Vernon Farms Company, or any concealment of any sort, plaintiff was deceived as to which of the defendants he was being employed by, nor as to which had furnished him with the horses and harness for use on the delivery wagon. On the other hand, it is expressly found, not only that his employment was with the Los Angeles Creamery Company, but that, if there was any negligence on the part of either company in furnishing unsafe horses or harness, it was the negligence of the Los Angeles Creamery Company, and not the negligence of the Belle Vernon Farms Company. The finding that the Belle Vernon Farms Company held out to the public and to plaintiff that it was operating with the Los Angeles Creamery Company, or as a branch thereof, becomes immaterial in the face of the other findings referred to. The judgment against the Belle Vernon Farms Company is therefore clearly not sustained by the findings.

As the judgment must be reversed, it will be unnecessary to consider the question of the insufficiency of the evidence as presented by appellant on its motion for a new trial.

The judgment is reversed.

We concur: ALLEN, P. J.; SHAW, J.

16 Cal. App. 50

HAWLEY v. LOS ANGELES CREAMERY CO. et al. (Civ. 911.)

(District Court of Appeal, Second District, California. April 18, 1911. Rehearing Denied by Supreme Court June 16, 1911.)

1. MASTER AND SERVANT (§§ 101, 102*)—APPLIANCES FOR WORK—DUTY OF MASTER.

An employer is bound to furnish his employé with reasonably safe appliances to perform the work for which they are designed, and to keep them in repair.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 180-184; Dec. Dig. §§ 101, 102.*]

2. MASTER AND SERVANT (§ 221*)—ASSUMPTION OF RISK—PROMISE TO REPAIR DEFECT—DURATION OF CONTINUANCE IN EMPLOYMENT.

Civ. Code, § 1970, provides, in effect, that a servant having knowledge of the unsafe character of appliances used by him shall be barred of recovery, if thereafter, with knowledge and appreciation of the danger incident thereto, he continues in the use thereof, but when the master, through a vice principal, has expressly promised to repair a defect, the servant can recover for an injury caused thereby within such period of time after the promise as it would be reasonable to allow for its performance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 638-647; Dec. Dig. § 221.*]

3. MASTER AND SERVANT (§ 288*)—ACTION FOR INJURIES—QUESTION FOR JURY—CONTINUANCE IN WORK WITH KNOWLEDGE OF DEFECT.

The question whether a servant continues his employment with knowledge of a defect in an appliance used by him after the lapse of a reasonable time within which the master might perform his promise to repair the defect is one of fact for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

4. MASTER AND SERVANT (§§ 278, 280*)—ACTION FOR INJURIES—SUFFICIENCY OF EVIDENCE—NEGLIGENCE OF MASTER—ASSUMPTION OF RISK.

Evidence in an action by a servant for personal injuries caused by a defect in a harness which he was using after the employer had promised to repair a defect therein held to support a finding of the employer's negligence, and that plaintiff did not assume the risk incident to the use of the defective harness for 10 or 12 days after the promise to repair.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954-972, 981-986; Dec. Dig. §§ 278, 280.*]

5. APPEAL AND ERROR (§ 1058*)—ACTION FOR INJURIES—EVIDENCE—RULES AND ORDERS.

In an action by a servant for personal injuries alleged to have been caused by a defective harness furnished for his use by defendant, the exclusion of the existence of a rule of defendant requiring reports as to defective appliances to be made to a certain employé is not prejudicially erroneous, where there was evidence tending to show that such a report was in fact made, and that plaintiff was referred by him to the company's manager, to whom also report of the defect was made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4200-4206; Dec. Dig. § 1058.*]

6. CONTINUANCE (§ 22*)—ABSENCE OF WITNESS.

Where defendant knew before trial that a witness subpoenaed by him was absent, probably from the state, and that counsel had suspicions that he would not be present at the trial, and where the matter sought to be proved by the witness was cumulative, the trial court was justified in denying a continuance on the ground of the witness' absence.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 58-67; Dec. Dig. § 22.*]

7. NEW TRIAL (§ 108*)—DISCRETION OF LOWER COURT—NEWLY DISCOVERED EVIDENCE.

Where the evidence presented in affidavits for a new trial on the ground of newly discovered evidence was that of the president of defendant company, who was present during most of the trial and who remained silent until after the trial and then disclosed his information to the manager of the company, and where the trial court, in denying the motion for new trial, necessarily determined whether such evidence, had it been introduced, would have changed the decision, its denial of a new trial was not an abuse of its discretion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 226, 227; Dec. Dig. § 108.*]

Appeal from Superior Court, Los Angeles County; George E. Church, Judge.

Action by Ray Hawley against the Los Angeles Creamery Company and the Belle Vernon Farms Company. From the judgment for plaintiff defendant the Los Angeles Creamery Company appeals. Affirmed.

Hatch & Lloyd, for appellant. J. Vincent Hannon and Hannon & McCormick, for respondent.

ALLEN, P. J. This appeal is by the Los Angeles Creamery Company alone, from a judgment and from an order denying a new trial.

The action was for damages on account of personal injuries. The bill of exceptions presents evidence tending to show the following facts: Plaintiff was employed by appellant as a driver of a milk wagon. During the existence of such employment and a few days prior to and upon February 1, 1908, plaintiff notified appellant's manager, with whom he had made his contract of employment, that the lines furnished by appellant for use in guiding and checking the team of horses used in drawing such milk wagon were defective, and that unless they were made safe, or a new set furnished, plaintiff would quit work. The manager promised plaintiff that he would "take care of such lines" for plaintiff; that "we will fix you up all right." Relying upon such promises, plaintiff continued his work for the 10 or 12 days succeeding. On February 13th plaintiff made an effort to check the team through the use of the lines, when the same parted at the place where their weakness was evident and with reference to which complaint had been made. The team thereupon become unmanageable, and plaintiff was thrown with his left foot under a wheel in such manner as to cause serious and permanent injuries. Appellant did not fulfill its promise of seeing to the safety of the appliances in any way. By reason of said injuries plaintiff was confined to his bed for several days under a physician's care, and until about March 1st, when he was able to undertake and perform the work of collecting for appellant, which he did with the assistance of his wife, and continued in such work of collection until August 1st, although much of the time he was unable to work. On the last-named date, his injuries becoming more aggravated, he ceased work, and has ever since suffered from such injuries. This action was commenced in November, 1908. The trial court found the facts as above stated, found that the creamery company was negligent in not providing suitable and proper appliances for the work incident to plaintiff's employment, and that plaintiff was without fault.

[1] Appellant's principal contention is that plaintiff could have fixed, and it was his duty to fix, the lines so as to render them safe, and that continuing in their use for the period of 12 days, or thereabouts, with knowledge of their unsafe condition, he assumed the risk of working with such defective appliances. Section 1970, Civil Code, provides, in effect, that a servant having knowledge of the unsafe character of ap-

pliances by him used shall be barred of recovery, if thereafter, with such knowledge, and, understanding, comprehending, and appreciating the danger incident thereto, he consents to or continues in the use thereof. This must be accepted as the law of this state, notwithstanding the rule that an employer is bound to furnish his employé with reasonably safe appliances to perform the work for which they are designed and to keep them in repair.

[2] When, however, as in this case, the master, through a vice principal, has expressly promised to repair a defect, the servant can recover for the injury caused thereby within such period of time after the promise as it would be reasonable to allow for its performance and, as said by the Supreme Court of the United States in *Hough v. Railroad Co.*, 100 U. S. 224, 25 L. Ed. 612, "as we think for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept." In *Martin v. California Cent. Ry. Co.*, 94 Cal. 331, 29 Pac. 646, it is said that: "The plaintiff had a right to go to the jury on the question whether he was, under the circumstances, justified in going on with his work." And again in *Rothenberger v. Northwestern Milling Co.*, 57 Minn. 461, 59 N. W. 531: "It is sufficient if it appears that the servant was induced to remain in the master's service by reason of the promise to repair and that he had no intention of waiving his objection to the defect of which he complained."

[3] The question, then, as to whether plaintiff in the case under consideration continued his employment after the lapse of a reasonable time within which the master might fulfill his promise is one of fact.

[4] That matter the court determined adversely to appellant, and we are not prepared to say that the evidence did not support the finding of defendant's negligence, and that plaintiff did not assume all of the risk of his employment, which, of course, must be taken as including the risk incident to the use of the defective appliances for a limited period and after the promise to repair.

[5] We see no prejudicial error in excluding evidence of the existence of a rule of the creamery company requiring reports as to the defective condition of appliances to be made to the barn man. There was evidence tending to show that such report was in fact made to such barn man, who referred plaintiff to the manager, to whom complaint was in fact made. The knowledge imparted to the manager was knowledge to appellant, whether it came through a rule or otherwise.

[6] We see no error in the action of the court in refusing during the progress of the trial to continue the same because a wit-

ness regularly subpoenaed by appellant did not respond when called. It sufficiently appears that appellant's counsel knew before entering upon the trial that the witness was absent, probably from the state, and that counsel "had suspicions" that he would not be present at the trial. In addition, the matter sought to be proven by the witness was cumulative, and, under all the circumstances furnished by the record, we think the court justified in denying the continuance.

[7] Neither do we see any error in the order of the court refusing a new trial on account of newly discovered evidence. This evidence, as presented to the court through affidavits, was that of the president of the creamery company, who was present during most of the trial, and it is fair to assume that, if the plaintiff upon the witness stand made statements contrary to those theretofore narrated to the president, he had full knowledge of their importance, and his relations to appellant were such as required him to act promptly if he desired to contradict such statements of the plaintiff. The president, however, remained silent until after the trial, and then disclosed his information to the manager of the company. Aside from any other question connected with this motion for a new trial, it became the duty of the trial court to determine the effect which such newly discovered evidence would have had, if any, upon its decision had it been introduced upon the trial, and whether the same would have changed the decision had it been offered in due time. By the denial of the motion, it may be assumed that the court determined such matter in favor of plaintiff. Certainly, under this record, it cannot be said that the court abused its discretion in this regard, and we can conceive of no prejudice resulting to appellant, even were it to be assumed that certain counter affidavits filed after the time limited by stipulation for the filing thereof were improperly considered.

A careful examination of the record indicates that the judgment of the court was proper and that no prejudicial error intervened during the progress of the trial.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

16 Cal. App. 67

HENNE v. SUMMERS. (Civ. 894.)

(District Court of Appeal, Second District, California. April 24, 1911.)

1. CONTRACTS (§ 162*)—CONSTRUCTION—CONFLICTING CLAUSES.

Where two clauses of a contract are so repugnant that they cannot stand together, the first is to be given effect and the latter rejected.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 744; Dec. Dig. § 162.*]

2. LANDLORD AND TENANT (§ 184*)—SECURITY FOR RENT—BOND—CONSTRUCTION—CONFLICTING CLAUSES—"ALSO."

Civ. Code, § 1641, provides that the whole of a contract is to be taken together so as to give effect to every part if reasonably practicable, and section 1652 declares that repugnancy in a contract must be reconciled, if possible, by such interpretation as will give some effect to the repugnant clause, subordinate to the intent of the whole contract. Tenants entered upon a five-year term January 1, 1907, and executed a bond with defendant as surety in the sum of \$1,800; that sum being the amount of two months rent, conditioned for the full performance of all the obligations of the lease, and also the last two months rent due and payable as provided by the lease being the rent for the months of November and December, 1911. *Held* that, as the word "also" preceding the last clause indicated an intention to include something not theretofore included, there was no repugnancy in the two clauses of the obligation, and that the contract would be interpreted so as to give effect to the last clause relating to rent.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 743-750; Dec. Dig. § 184.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 357-360.]

3. LANDLORD AND TENANT (§ 184*)—SECURITY FOR RENT—BOND—CONSTRUCTION—CONFLICTING CLAUSES.

The bond of a surety for tenants was conditioned to secure the full performance of all the obligations contained in the lease and also the last two months rent. *Held*, that the last clause with reference to rent was effective as a limitation of the general words.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 743-750; Dec. Dig. § 184.*]

4. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action on the bond of a surety for tenants, where an interpretation unaided by extrinsic evidence was possible on the face of the contract, the admission of evidence that the promisor believed at the time of making the contract that the promisee understood it in such sense was harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4153-4166; Dec. Dig. § 1050.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Jane Louise Henne, executrix of C. Henne, deceased, against Emma A. Summers. Judgment for defendant, and plaintiff appeals. Affirmed.

Campbell & Moore, for appellant. Jones & Weller, for respondent.

ALLEN, P. J. The action was one to enforce the provisions of a certain bond in the sum of \$1,800 executed by defendant in favor of C. Henne, plaintiff's testator. It is made to appear by the record that on or about the 20th day of November, 1906, Edward Booth and John W. Neighbours leased from Henne, for the term of five years from the 1st day of January, 1907, a certain storeroom in the city of Los Angeles, by which lease the lessees covenanted and agreed to pay to said lessor

as rent for said premises the sum of \$54,000, payable in monthly installments of \$900 each in advance on the 1st day of each and every month of said term of the lease. Certain other covenants are found therein of the usual and ordinary character, with reference to keeping the premises in good order and condition, not to make alterations or repairs without the consent of the lessor, not to underlet the premises without the written consent of the lessor, and with a covenant that if the lessees should move out or abandon said premises, or any part thereof, the lessor might relet the same and apply the proceeds collected, less the expenses, upon the rent to be paid by the lessees, and the lessees should be liable for the payment of any balance due under the lease, and it is expressly provided that such reletting shall not operate as a termination of the lease or as a waiver or postponement of other rights or remedies; and there are certain other obligations with reference to not engaging in any hazardous or extra-hazardous business, which might result in damage to the building. Contemporaneous with the execution of the lease, Booth and Neighbours as principals, with Emma A. Summers as surety, executed to Henne a bond in the sum of \$1,800, conditioned that the same was given to secure the full performance of all of the obligations contained in said lease above referred to, and also the last two months rent to become due and payable as therein specified and provided, being the rent for the months of November and December, A. D. 1911. It further appears that, with the consent of Henne, Booth and Neighbours, shortly after the execution of the lease, assigned and transferred the same to a corporation, called the Booth & Neighbours Clothing Company, and the said corporation took possession of the premises, paying the rent therefor and performing all other conditions, until the first day of January, 1908, at which date the corporation became bankrupt. Thereafter, one Harris, trustee in bankruptcy, entered into an agreement with plaintiff for the use and occupation of said premises from the 27th day of March, 1908, until the 1st day of July, 1908, at a rental of \$20 per day, and thereafter at the rate of \$500 per month until the 1st day of September, 1908, paying to the lessor as rental the aggregate sum of \$4,454.97 from January to August, 1908, inclusive; the balance of the rental for said premises, amounting to more than \$2,700, remaining unpaid. The defendant by her answer denied that the original lessees ever actually took possession, but that the premises were occupied solely by the corporation; and, further alleged that at the time of the execution of the undertaking sued on it was agreed and understood that said undertaking, so far as the same referred to rent falling due under the terms of the lease, should apply only to the last two months of said term, and that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the condition of said bond with reference to the performance of all obligations contained in said lease referred to and was intended only to apply to obligations of said lease other than the payment of rent. Upon the trial of the action the court permitted the defendant to introduce evidence, under objection, tending to show that at the time of the execution of the lease it was orally agreed that, notwithstanding its term, the only liability incurred by signing the said bond was for the payment of the two months rent mentioned in the concluding part of said bond. The court found that it was agreed and understood between the defendant and the agent of plaintiff's testator that such undertaking, so far as the same referred to rent falling due under the terms of the lease, should apply only to the last two months of said term as specifically mentioned in the undertaking, and that the term therein used with reference to said bond being given to secure the performance of all the obligations contained in said lease referred to and was intended to apply to the obligations of said lease other than the payment of rent. Judgment was accordingly rendered in favor of the defendant, from which judgment and an order denying a new trial plaintiff appeals.

The questions, therefore, for determination upon this appeal are as to the construction which should be given the undertaking set out in the complaint, and the competency of evidence to establish a contemporaneous oral agreement as signifying the intention of the parties. Certain rules to govern in the interpretation of contracts are declared in the Civil Code of this state. Section 1636 provides: "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Section 1641: "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Section 1648: "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." Section 1649: "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." Section 1652: "Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract." And by section 1654 it is provided that if the uncertainty cannot be removed by the rules laid down by the Code, the language of the contract must be interpreted most strongly against the promisor as being the one presumed to have caused the uncertainty.

[1] It is elementary law that, if two clauses of a contract are so wholly repugnant to each other that they cannot stand together, the first shall be received and the latter rejected. *Straus v. Wanamaker*, 175 Pa. 213, 34 Atl. 648; *Blackstone's Commentaries*, book 2, p. 381.

[2] Considering the language employed in the whole instrument, we are led to the conclusion that the learned judge who tried this cause did not err in his construction of the contract. The fact that the amount of the bond exactly equaled two months rent, and that this amount was specifically mentioned as being that guaranteed by the surety, is significant. Nor can it be said that the two clauses of the contract are so repugnant that they cannot stand together. The word "also," which precedes the last clause, would indicate an intention to include something not theretofore included. We are of opinion that it was not error to so interpret the contract under the provisions of sections 1641 and 1652 of the Civil Code as to give effect to the last clause.

[3] It is settled law that to give effect to the intention of the parties general words may be restrained by a particular recital which follows them, when such recital is used by way of limitation or restriction. It is obvious that the insertion of the last clause with reference to rent was intended as a limitation; otherwise, it is meaningless. In the interpretation of the entire contract, it is the duty of the court to so interpret the same as to give effect to every part, if reasonably practicable.

[4] Given this interpretation, no prejudice could have resulted from the admission of oral evidence of the sense in which the promisor believed at the time of making the contract that the promisee understood it, even though an interpretation unaided by extrinsic evidence was possible upon the face of the contract. If, therefore, the bond was so restricted in its conditions, the rent for which it was given had not yet matured, and the action was premature.

We see no error in the judgment and order, and the same are affirmed.

We concur: JAMES. J.; SHAW, J.

16 Cal. App. 44

PEOPLE v. MULLALLY. (Cr. 149.)

(District Court of Appeal, Third District, California. April 18, 1911.)

1. CRIMINAL LAW (§ 211*)—COMPLAINT—VERIFICATION—WHO MAY TAKE.

Under Code Civ. Proc. § 2093, authorizing a notary public to administer oaths, a criminal complaint is not bad because verified by such officer.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 420-430; Dec. Dig. § 211.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. INDICTMENT AND INFORMATION (§ 139*)—INSUFFICIENT VERIFICATION—OBJECTIONS—TIME FOR MAKING.

Motion to set aside an information on the ground that the verification of the preliminary complaint was insufficient will not be entertained after the regular preliminary examination and commitment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 473; Dec. Dig. § 139.*]

3. CRIMINAL LAW (§ 1144*)—APPEAL—PRESUMPTIONS.

A stenographer appointed by a justice of the peace to take the testimony on a preliminary examination is presumed to have been sworn where the record is silent as to whether he was.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3016; Dec. Dig. § 1144.*]

4. CRIMINAL LAW (§ 236*)—PRELIMINARY EXAMINATION—STENOGRAPHERS' OATH—NECESSITY.

An official reporter of a superior court appointed to take the testimony at a preliminary examination before a justice of the peace need not be sworn.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 489-491; Dec. Dig. § 236.*]

5. CRIMINAL LAW (§ 1144*)—APPEAL—PRESUMPTIONS.

A transcript of a preliminary examination is presumed to have been filed within 10 days, as required by Pen. Code, § 869, subd. 5, when the date of filing does not appear.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3016; Dec. Dig. § 1144.*]

6. CRIMINAL LAW (§ 244*)—PRELIMINARY EXAMINATIONS—TRANSCRIPTS—FILING.

The provision of Pen. Code, § 869, subd. 5, that the transcript of a preliminary hearing be filed within 10 days, is only directory; filing within a reasonable time being sufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 511-514; Dec. Dig. § 244.*]

7. DEPOSITIONS (§ 111*)—OBJECTIONS—WAIVER.

Objection to the admissibility of a deposition on specified grounds waives other grounds.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 329-339; Dec. Dig. § 111.*]

8. CRIMINAL LAW (§ 390*)—EVIDENCE—ASSUMPTION OR BELIEF BY ACCUSED.

In a larceny trial, accused is not entitled to testify to his "assumption" as to ownership of the property, especially where it relates to a time subsequent to the offense, but he may testify to his belief at the time of the alleged offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 858; Dec. Dig. § 390.*]

9. CRIMINAL LAW (§ 1170*)—HARMLESS ERROR—EXCLUSION OF TESTIMONY.

In a larceny trial, any error in excluding a showing by accused as to his assumption as to who owned property was harmless, where he testified that he never saw it, and never gave any directions respecting it, and that he considered it the property of a certain person.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.*]

10. WITNESSES (§ 347*)—IMPEACHMENT—CONDUCT.

In a larceny trial, evidence as to whether a witness who had disposed of the property took the most direct route in going to town to

sell the same was inadmissible on an issue as to such witness' guilty knowledge.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1134; Dec. Dig. § 347.*]

11. CRIMINAL LAW (§ 368*)—EVIDENCE—ADMISSIBILITY.

In a larceny trial, evidence of statements made by another when he sold the property after commission of the alleged offense was inadmissible, being no part of the *res gestæ*.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806, 812, 815, 821; Dec. Dig. § 368.*]

12. WITNESSES (§ 388*)—IMPEACHMENT—PRE-REQUISITES.

A witness cannot be impeached by showing statements made by him out of court without first calling his attention thereto.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1233-1242; Dec. Dig. § 388.*]

Appeal from Superior Court, Colusa County; H. M. Alberg, Judge.

P. Mullally was convicted of larceny, and he appeals. Affirmed.

Ernest Weyand and W. H. Carlin, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

BURNETT, J. Defendant was convicted of the larceny of a yearling bull and sentenced to the penitentiary for the term of three years.

[1] 1. There is no merit in the contention that the court should have set aside the information for the reason that the complaint filed in the justice court was verified before a notary public. Every notary public has power to administer oaths or affirmations. Section 2093, Code Civ. Proc. And, since the statute does not designate any particular officer before whom the complaint must be verified, it necessarily follows that the verification may be attested by any one authorized to administer an oath. *Dunn v. Ketchum*, 38 Cal. 99. Every clerk of any court is placed upon the same footing in this respect as a notary, and it has been held that, under the authority given by said section 2093 of the Code of Civil Procedure, the clerk of a police court has authority to administer an oath to a person verifying a complaint and a motion to set aside an information based thereon for want of a legal commitment under such complaint, owing to the absence of a legal verification thereof, cannot be sustained. *People v. Vasalo*, 120 Cal. 168, 52 Pac. 305; *People v. Burns*, 121 Cal. 529, 53 Pac. 1096.

[2] Besides, if the verification had been illegal, the objection could not avail after a regular preliminary examination and commitment of the defendant. *People v. Gregory*, 8 Cal. App. 738, 97 Pac. 912.

2. Edward de St. Maurice, the official reporter of the superior court of Colusa county, took in shorthand the testimony and proceedings at the preliminary examination, and thereafter transcribed and filed the same with the clerk of said superior court.

During the trial the prosecution made proper showing that one Charles Schnitter, who had testified at the preliminary examination, could not be found in the state, and, upon attempting to offer the deposition of said witness, it appeared that the original transcript of the proceedings at the preliminary examination had disappeared and could not be found. The district attorney then stated: "At this time, I have had certified this transcript by the official reporter as a true copy of the testimony taken in the case." The reporter was then examined by counsel for defendant, and testified that there were three copies of the testimony at the preliminary examination made, that the original was filed with the clerk, one copy delivered to the district attorney and the other delivered to defendant's attorney and that they were all alike. An objection was then made to the offer of the deposition on the grounds that due diligence had not been shown in attempting to serve the witness; that it did not appear that Mr. de St. Maurice was appointed as reporter of the justice court in the case against the defendant; that it was not shown that the reporter was sworn to take the testimony; or that the transcript was filed in the superior court within ten days after the defendant was held to answer. There was no contention that a copy of the deposition could not be received, or no question raised as to it being an exact copy of the original, counsel stating: "I desire that my objection should run to the question of the certificate of the reporter, showing exactly what was done. In other words, I am willing that this be considered in the same place as the original was, whenever that was filed. I don't care when that was. My objection does not run to any question of that kind. In other words, I understand they have a right to substitute a paper when one is lost."

It is clear that all the objections urged to the admissibility of the deposition are entirely without merit. With commendable candor it is, indeed, admitted by appellant that "the prosecution did make a sufficient showing of the absence of the witness and of efforts made in good faith to procure his attendance."

[3, 4] The other objections may be disposed of as follows: It appears that the said de St. Maurice was appointed by the justice as reporter to take the testimony. The record is silent as to whether he was sworn. Therefore, if the matter was material, the presumption would be that the oath was administered, but, since it appears that he was the official reporter of the court, it was not necessary that he be sworn. *People v. Riley*, 75 Cal. 98, 16 Pac. 544. The record also shows that the original transcript was properly certified, as the reporter testified that the one substituted therefor was an exact copy of the original and the certificate attached to said substitute is unobjectionable in form.

[5] It does not appear just when the orig-

inal was filed and therefore the presumption would be that it was filed within the statutory time. *People v. Witty*, 138 Cal. 578, 72 Pac. 177.

[6] Besides, it is settled that the specification as to time (Pen. Code, § 869, subd. 5) is directory merely, and that, if the filing be within a reasonable time, it is sufficient. *People v. Buckley*, 143 Cal. 381, 77 Pac. 169. As before indicated, there is nothing to show that an unreasonable time elapsed.

[7] Appellant is deemed to have waived any other ground of objection to the admissibility of said deposition. *People v. Garnett*, 9 Cal. App. 200, 98 Pac. 247; *People v. Buckley*, supra.

[8] 3. The defendant was asked this question by his counsel: "I will ask you again what you assumed on the 24th and 25th when you knew that there was a calf killed on the place? What did you assume about that calf and the ownership of that calf?" And again: "I will ask you if, on the 24th and 25th of March, when you knew that a calf was killed there, whether or not it is a fact that you assumed that that calf was Jack Mullally's?" An objection to each of these questions was sustained. It is admitted by appellant that the form of the questions asked is not free from criticism. This is undoubtedly true, as the defendant's assumption would be no defense, since it might be contrary to his knowledge or belief. But it is claimed that, "if the circumstances under which these cattle came upon defendant's premises and were driven from his grain were such that he had reason to believe that they belonged to himself and his cousin Jack, he had a right to lay that before the jury and refusal to permit him to do so was the denial to him of a legal right." In a case like this, a party, really believing that property asported by himself or under his direction was his own, would not be guilty of larceny, since the felonious intent would be absent. His belief is an important element in the case, and, under proper circumstances, he should be permitted to state what he believed at the time of the alleged commission of the offense as to the ownership of the property. The jury, of course, would not be bound by his statement, but it should be considered with the other evidence in the case. But here, in addition to the objectionable form of the question, it appears that it related to a time subsequent to the commission of the offense. What he may have assumed after the offense was complete would be no defense to the charge and if intended to explain his subsequent conduct the questions should have been directed specifically to the conduct which it was sought to explain.

[9] But, again, the defendant testified that he never saw the calf and never gave Schnitter any directions in reference to it, and knew nothing of the killing until he was told of it afterwards. He could have had no belief, therefore, as to the calf at the time it

was taken. Another complete answer to the whole proposition is that the witness had already testified that he considered the calf the property of his cousin Jack. He said: "Well, I didn't know anything about the killing of the calf much. Jack and me talked it over once, and I didn't pay any attention to it as long as he didn't and we didn't think it worth while to talk about it. He considered it his calf and I did too until George Lenning told me I was going to be arrested."

[10] 4. The court committed no error in sustaining the objection of the district attorney to the following question asked by appellant to the witness Harry Brooks: "Is the route around by the way where your dwelling house is, and where you were when you met Schnitter, as direct a route to the town of Arbuckle as another route to that town?" The purpose was to show, so it is claimed, that Schnitter was in a clandestine manner seeking to dispose of the meat, and thereby to discredit his statement that he had no reason to believe that the calf was stolen. But there is no contention that one route was more secluded than the other or that there was any secrecy whatever in his disposition of the meat. In fact, the carcass was openly sold, as the evidence all shows, and whether Schnitter took the most direct route to town would have no bearing upon the question of his guilty knowledge.

[11, 12] 5. Likewise, the court's ruling was correct in sustaining an objection to questions asked of witnesses as to statements made by Schnitter when he sold the meat. This was no part of the *res gestæ*, as the offense had been fully completed (*People v. Petruzo*, 13 Cal. App. 577, 110 Pac. 324), and Schnitter could not in that manner be impeached as his attention was not called to the alleged statements (*People v. Garnett*, supra, and cases therein cited).

Appellant does not claim that the evidence is insufficient to support the verdict, and none of the points made would justify us in interfering with the judgment and order of the court, and they are therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

16 Cal. App. 55

SEABOARD NAT. BANK v. ACKERMAN.
(Civ. 865.)

(District Court of Appeal, First District, California. April 22, 1911.)

1. RECORDS (§ 17*)—LOST RECORD—SECONDARY EVIDENCE—JUDGMENT.

Under Code Civ. Proc. § 1855, subd. 1, relating to proof of the loss or destruction of writings before the admission of oral evidence of their contents, and Act June 16, 1906 (St. [Sp. Sess.] 1906, p. 73), providing for the restoration and proof of court records destroyed by fire, secondary evidence is admissible and competent in an action on a judgment to es-

tablish the existence of the original action, and of the proceedings therein, including the judgment; the records having been destroyed by fire.

[Ed. Note.—For other cases, see Records, Cent. Dig. § 25; Dec. Dig. § 17.*]

2. RECORDS (§ 17*)—LOST RECORDS—EVIDENCE—CHARACTER AND DEGREE OF SECONDARY EVIDENCE.

Where secondary evidence is admissible to prove the contents of a lost or destroyed instrument, proof of the substance of the instrument is all that is required.

[Ed. Note.—For other cases, see Records, Cent. Dig. § 33; Dec. Dig. § 17.*]

3. RECORDS (§ 17*)—LOST RECORDS—EVIDENCE—SUFFICIENCY—INFERENCES.

In an action on a judgment, where the original complaint, summons and return of service, and judgment roll have been lost or destroyed, the fact that in the original action they were prepared by an attorney at law in the ordinary and usual form employed in actions of that kind warrants in some degree the inference that the destroyed record contained in detail all that was essential to support the jurisdiction and judgment in the original action.

[Ed. Note.—For other cases, see Records, Cent. Dig. § 33; Dec. Dig. § 17.*]

4. RECORDS (§ 17*)—LOST RECORD—JUDGMENTS—EVIDENCE—WEIGHT AND SUFFICIENCY.

Evidence in an action on a judgment of which the record has been destroyed *held* sufficient to establish the rendition of the original judgment, and that it was made and entered by a court of superior jurisdiction in favor of the present plaintiff and against the present defendant.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 17.*]

5. JUDGMENT (§ 470*)—COLLATERAL ATTACK—JUDGMENT PRESUMED TO BE VALID IN GENERAL.

A judgment of a court of general jurisdiction not void on its face is immune from collateral attack, and on such attack it is presumed to be in all respects regular, and its rendition implies that the court rendering it had determined upon sufficient evidence that it had jurisdiction of the subject-matter of the action and of the defendant therein.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 907; Dec. Dig. § 470.*]

6. RECORDS (§ 17*)—LOST RECORD—ACTION ON JUDGMENT—EVIDENCE—PRESUMPTION.

In an action on a judgment of which the record has been destroyed, the fact that it is not shown upon whom or how the service of summons in the original action was made is not inconsistent with the conclusion that defendant therein was properly served with summons, and, in support of the action of the court, it must be presumed that such service was shown, although no record thereof was preserved.

[Ed. Note.—For other cases, see Records, Cent. Dig. § 33; Dec. Dig. § 17.*]

7. RECORDS (§ 17*)—LOST RECORD—ACTION ON JUDGMENT—SUFFICIENCY OF EVIDENCE.

Evidence in an action on a judgment, the record of which was lost, *held* sufficient to sustain the finding on which judgment in the present action was based.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 17.*]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by the Seaboard National Bank against A. H. Ackerman. Judgment for plaintiff, and defendant appeals. Affirmed.

Lloyd S. Ackerman, for appellant. Cushing & Cushing and William S. McKnight, for respondent.

LENNON, P. J. This is an appeal from a judgment.

Respondent, as plaintiff in this action, recovered judgment in the superior court of the city and county of San Francisco against appellant, as the defendant below, in the sum of \$7,882. This judgment was made and entered upon a judgment alleged to have been previously duly made and entered in the same court against the defendant and in favor of the plaintiff in the sum of \$5,583.

Appellant's answer in the action at bar denied specifically the allegations of plaintiff's complaint, and, as a separate and distinct defense, alleged that the records and papers in the original action had been destroyed by fire, and set out the act of June 16, 1906 (St. [Sp. Sess.] 1906, p. 73), providing for the restoration of court records lost, injured, or destroyed by conflagration or other calamity. Upon the trial of the present case respondent relied entirely upon oral evidence to establish the making and entry of the original judgment, and no testimony in reply thereto or contradictory thereof was offered upon behalf of appellant. The trial court found as a fact that "on the 10th day of November, 1903, in an action brought by the above-named plaintiff against the above-named defendant, in the above-entitled court, a judgment was duly given, made, and entered in favor of said plaintiff, and against said defendant, for the sum of \$5,583, * * * which said action and judgment are the same referred to in the complaint herein." Appellant challenges the sufficiency of the evidence to support this finding.

The uncontroverted evidence on the part of the plaintiff which was offered and received without objection showed, in substance, that about the year 1902, upon a complaint in the usual form for money loaned, an action was instituted in the superior court of the city and county of San Francisco, wherein respondent was plaintiff and appellant the defendant, for the recovery of the sum of \$5,000, alleged to have been loaned to appellant by the Seaboard National Bank, the plaintiff here; that the complaint and summons in the action were personally prepared by Mr. Charles S. Cushing, attorney for plaintiff, and service of the same made; that subsequently a return thereon, showing service in due form, was made and filed in the action; that on November 10, 1903, judgment was rendered and entered against the defendant upon his default, and in favor of the plaintiff, for the sum of \$5,583.33, and costs amounting to the sum of

\$8.50; that this judgment was entered in the regular form, and thereafter a judgment roll made up, consisting of the complaint, return of summons and the judgment; that this judgment was never paid either in whole or in part.

[1] The record evidence of the original action having been entirely destroyed by fire before the commencement of the present action, secondary evidence was admissible and competent to establish the existence of the original action and all of the proceedings, including the judgment had therein (Code Civ. Proc. § 1855, subd. 1; *Ames v. Hoy*, 12 Cal. 11; *In re Will of Warfield*, 22 Cal. 64, 83 Am. Dec. 49); and this is so notwithstanding the provisions of the act of June 16, 1906 (*Hibernia Sav. & Loan Society v. Boyd*, 155 Cal. 193, 100 Pac. 239).

It is appellant's contention that in the case at bar there was no direct proof of personal service of summons on the defendant, or of the contents of the complaint and judgment roll in the original action. The evidence of the institution of the original action, service of summons, and entry of judgment therein was positive and direct, and in substance established the contents of the papers and pleadings constituting the judgment roll.

[2] "In the case of a lost instrument where no copy has been preserved, it is not to be expected that witnesses can state the contents, word for word." *Posten v. Rasette*, 5 Cal. 467. The substance of a lost or destroyed document is all that is required. *Kenniff v. Caulfield*, 140 Cal. 43, 73 Pac. 803.

[3] The fact that the complaint, the return of summons, showing service, and the judgment roll in the original action were prepared by an attorney at law in the ordinary and usual form employed in actions for money loaned tended in some degree to warrant the inference that the destroyed record contained in detail all that was essential to support the jurisdiction and judgment of the court in the first instance. *Mandeville v. Reynolds*, 68 N. Y. 536; *Jackson v. Crawfords*, 12 Wend. (N. Y.) 536. In brief, the evidence in its entirety was in our opinion a sufficient premise for the deduction and inference that the destroyed record contained all that was necessary to effectuate its purpose and establish the ultimate fact disputed in the case at bar.

[4] Aside from this conclusion as to the scope and effect of the evidence generally, it is certain that the uncontroverted evidence offered upon behalf of the plaintiff established the rendition and existence of the judgment upon which the present action is based, and that said judgment was made and entered by a court of superior jurisdiction in favor of the present plaintiff and against the present defendant.

[5] It is the settled rule in this state that a judgment of a court of general jurisdiction not void on its face is immune from collateral attack. In the face of such an at-

tack it is presumed to be in all respects regular, and its very rendition carries with it the implication that the court rendering the judgment had previously determined, upon sufficient evidence, that it had jurisdiction of the subject-matter of the action and of the defendant therein. *Carpentier v. City of Oakland*, 30 Cal. 439; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742; *Estate of Eichhoff*, 101 Cal. 600, 36 Pac. 11.

[6] The fact that the evidence in the case at bar does not show upon whom or how the service of summons in the original action was made is not inconsistent with the conclusion that the defendant therein was properly served with summons, and "it must be presumed in support of the action of the court that such service was shown to it, although it has not preserved any record thereof." *Eichhoff v. Eichhoff*, 107 Cal. 47, 40 Pac. 24, 48 Am. St. Rep. 110; *Canadian, etc., Co. v. Clarita, etc., Co.*, 140 Cal. 675, 74 Pac. 301.

[7] The judgment which forms the basis of this action having been established and received in evidence, without objection or controversy, is entitled to all the presumptions pertaining to judgments of courts of superior jurisdiction, and was in and of itself sufficient support for the finding upon which rests the judgment in the case at bar.

The judgment appealed from is affirmed.

We concur: HALL, J.; KERRIGAN, J.

16 Cal. App. 126

JUNE v. SUPERIOR COURT OF SONOMA COUNTY. (Civ. 865.)

(District Court of Appeal, Third District, California. May 2, 1911.)

1. JUSTICES OF THE PEACE (§ 155*)—APPEAL—PREMATURITY.

Under Code Civ. Proc. § 891, requiring entry of judgment of a justice of the peace in conformity to the verdict, under section 893, providing that judgment shall not be effective until entered, and under section 974, permitting appeal from a justice's judgment within 30 days after its rendition, an appeal taken before entry of the judgment confers no jurisdiction on the superior court.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 155.*]

2. JUSTICES OF THE PEACE (§ 125*)—JUDGMENT—REQUISITES.

Under Code Civ. Proc. § 891, requiring a justice of the peace to enter judgment in conformity to verdict, the judgment need not be formulated with the particularity required of superior court judgments, but he must make some entry in his docket showing that he has rendered judgment on the verdict.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 125.*]

3. MANDAMUS (§ 53*)—RIGHT TO REMEDY.

Since the superior court acquired no jurisdiction of an attempted appeal from a justice's court before judgment was entered, the District Court of Appeal cannot confer such jurisdiction, through writ of mandate, to set aside an order dismissing the appeal, though motion to dismiss in the superior court was not made on that ground.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 53.*]

Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Petition by John June for writ of mandate against the Superior Court of Sonoma County. Writ denied.

Rolfe L. Thompson, for appellant. John C. Ruddock, for respondent.

CHIPMAN, P. J. *Mandate.* Plaintiff prays for the writ of this court compelling defendant to set aside its order dismissing the appeal of plaintiff herein, in a certain action wherein J. J. Smalley is plaintiff and John June, plaintiff herein, is defendant, from an alleged judgment made and entered in the justice's court of Cloverdale township, Sonoma county, in favor of said Smalley, and directing defendant to proceed to the hearing and trial of said action of Smalley v. June.

It appears that in said action a trial was had by a jury, and, on July 20, 1910, the jury rendered the following verdict: "We, the jury, find for the plaintiff according to

the complaint. J. A. Linde, Foreman." In the justice's docket there is an entry of July 20, 1910, reciting that the case was called at 9 o'clock a. m. of that day, a jury impaneled to try the case (naming the members), and, "after argument by counsel, the case was submitted to the jury; after being out a half hour, the jury returned a verdict in favor of the plaintiff." No other proceedings were taken by the justice, and no other entry was made in his docket, except that it appears from defendant's answer herein that the said justice entered judgment on the verdict on December 30, 1910, and it is conceded that the justice neither rendered nor entered any judgment on the verdict, except as last above stated. On July 22, 1910, defendant in that action, plaintiff now here, filed his notice of appeal to the superior court, "on questions of both law and fact," and on July 23, 1910, filed with said justice an undertaking, reciting the amount of the alleged judgment, to wit, \$110.29, principal, and \$53, costs, and claiming a stay of execution and obligating the sureties in the sum of \$300, and reciting that said sureties "promise on the part of the said appellant that the said appellant will pay the amount of said judgment so appealed from and all costs, if the appeal is withdrawn or dismissed, or the amount of any judgment and all costs that may be recorded against him in the action in said superior court."

On July 26, 1910, the justice transmitted to said superior court a certified copy of his docket in said action, and the pleadings, all notices, motions, and other papers in said cause, the notice of appeal and the undertaking filed therein, all of which were received by the clerk of said superior court on said last-named day.

Defendant in the said action having failed to pay the clerk's fees, and having taken no further steps to prosecute his appeal, the plaintiff in that action paid the clerk's fees, on December 8, 1910, and served and filed his motion in said superior court that he would move to dismiss said appeal "for failure to prosecute the same, and for unnecessary delay in bringing the said action to hearing. The said motion will be heard on the papers in the case." On January 4, 1911, the court made an order dismissing the appeal, with costs.

It is claimed by respondent here that at the time defendant in the action, Smalley v. June, took his appeal, no judgment had been entered on the verdict, and the attempted appeal was ineffectual for any purpose, and the superior court was without jurisdiction to hear and determine the case and rightly dismissed the appeal. It is also claimed that the undertaking is insufficient; there being no separate bond to cover costs

on appeal, as required by section 978, Code of Civil Procedure.

[1] Section 974, Code of Civil Procedure, provides that: "Any person dissatisfied with a judgment, rendered in a civil action in a police or justice's court, may appeal therefrom to the superior court of the county, at any time within thirty days after the rendition of the judgment." And the notice must state whether "the appeal is taken from the whole or a part of the judgment."

Section 891, Code of Civil Procedure, reads: "When a trial by a jury has been had, judgment must be entered by the justice at once, in conformity with the verdict." And the judgment "must be entered substantially in the form required in section six hundred and sixty-seven. * * * No judgment shall have effect for any purpose until so entered." Section 893, Code Civ. Proc.

It seems to us that the appeal was prematurely taken, and that the superior court did not acquire jurisdiction thereby. *Montgomery v. Superior Court*, 68 Cal. 407, 9 Pac. 720, is cited by petitioner in support of the claim that the verdict was a judgment within the meaning of the statute. In that case the justice's docket contained the following entry: "Jury fees paid by defendant and judgment entered for the defendant for costs of suit. Defendant's costs being \$25 for witness and jury fees, and also the sum of \$1.75 for constable fees; total \$26.75. Plaintiff's costs being \$17." It further appears that the petitioner went to trial in the superior court, and, without objection to the regularity of any proceedings, defended the case on its merits. Said the court: "Having thus taken the chances of obtaining a verdict in his favor, we think his objection now comes too late." It was also held that the court had jurisdiction, because the justice's record showed "that a judgment had been entered in conformity with the verdict, and appears to be in all respects regular and sufficient."

[2] We do not think that the justice must formulate a judgment with that particularity required of judgments required to be entered in the superior court, but that he should make some entry in his docket, showing that he has rendered judgment on the verdict, we do think is essential to a substantial compliance with the statute. His duty to enter judgment is in a sense ministerial, and its performance could probably be enforced by mandate, but, nevertheless, the statute requires this of him. Until such entry is made, there is no judgment from which an appeal may be taken, and, if the appeal is taken before the justice enters judgment on the verdict, it confers no jurisdiction on the superior court.

[3] It follows that, as the superior court acquired no jurisdiction by the attempted

appeal, this court cannot give it jurisdiction through the means of the writ prayed for; and this is true, although the motion to dismiss was not made on this ground.

It is not necessary to pass upon the sufficiency of the undertaking.

The writ is denied.

We concur: BURNETT, J.; HART, J.

16 Cal. App. 143

IRWIN v. INSURANCE CO. OF NORTH AMERICA. (Civ. 874.)

(District Court of Appeal, Second District, California. May 3, 1911. Rehearing Denied by Supreme Court June 30, 1911.)

1. INSURANCE (§ 638*)—NONPAYMENT—PLEADING.

Allegation of neglect and refusal to pay fire insurance is a sufficient allegation of nonpayment.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1607; Dec. Dig. § 638.*]

2. INSURANCE (§ 645*)—FIRE POLICIES—WHEN PAYABLE—PLEADING.

In an action on a fire policy, a denial that the policy became payable on a certain date, or at any other time, or at all, raised an issue as to the time the loss was payable.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1632-1644; Dec. Dig. § 645.*]

3. PLEADING (§ 8*)—CONCLUSIONS OF LAW—"DUE"—"OWING"—"PAYABLE."

Ordinarily, the words "due," "owing," and "payable" are conclusions of law, denial of which raises no issue.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2213-2220; vol. 8, p. 7643; vol. 6, pp. 5129, 5130; vol. 6, pp. 5245, 5246.]

4. INSURANCE (§ 623*)—FIRE POLICIES—PAYMENT—TIME—WAIVER.

A provision in a fire policy, making loss not payable until 60 days after fire, was not waived by insurer refusing payment on the ground that plaintiff was not the owner of the premises and possessed no insurable interest.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1551-1553; Dec. Dig. § 623.*]

Appeal from Superior Court, San Diego County, W. R. Guy, Judge.

Action by I. Isaac Irwin against the Insurance Company of North America. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Patterson Sprigg, for appellant. Eugene Daney and M. H. Fleming, for respondent.

ALLEN, P. J. The action was upon a policy of insurance. The complaint averred ownership and an insurable interest in certain property in San Diego county on the 20th day of July, 1908; that on said date the defendant executed a contract and policy of insurance in writing upon said property, and by the terms of which contract and policy the defendant insured plaintiff against all loss or damage by fire from the 20th day of July, 1908, to the 20th day of July, 1909,

to an amount not exceeding \$1,200; that on the 22d day of September, 1908, the property was destroyed by fire and damaged to the extent of \$1,305; that on or about the 18th day of November, 1908, the plaintiff duly complied with all the terms, conditions, and requirements of said contract and insurance policy to be kept and performed by him, and the amount of said policy, to wit, the sum of \$1,200, became due and payable to the plaintiff from the defendant on the said 18th day of November, 1908. Neglect and refusal to pay the same is averred. The answer denied the ownership or insurable interest; admitted the issuance of the policy of insurance upon the express agreement and stipulation set forth in said agreement and contract, and not otherwise; admitted the destruction by fire; denied the loss as to the amount thereof; denied that the defendant was notified of the fire, or that on the 18th day of November, 1908, plaintiff duly complied with all the terms, conditions, and requirements, or any of the said terms, conditions, and requirements, of said contract of insurance to be kept and performed by plaintiff; and denied that the sum of \$1,200, or any other sum or amount, became due and payable on said 18th day of November, 1908, or at any other time or at all, or that said sum became due and payable by reason of said fire, or for any cause, or upon said contract, or upon any contract, or at all. The action was tried by the court, a jury being waived, after a motion for nonsuit was denied. Findings of fact and conclusions of law were waived, and judgment was entered by the court in favor of plaintiff in the amount sued for. From this judgment, defendant appealed upon a bill of exceptions.

[1] Upon a former hearing of this appeal, this court determined that the complaint was insufficient, basing such opinion upon the authority of *Scroufe v. Clay*, 71 Cal. 123, 11 Pac. 882, but overlooking certain subsequent decisions overruling such case, notably that of *Gardner v. Donnelly*, 86 Cal. 367, 24 Pac. 1072.

A rehearing was therefore granted. We take it that under these later decisions an allegation of neglect and refusal to pay is a sufficient allegation of nonpayment. It appears from the bill of exceptions that upon the trial plaintiff established ownership and an insurable interest, the destruction of the property by fire, and the loss and proof thereof, as in the complaint averred. He, however, introduced in evidence the policy of insurance, by the terms of which it was provided that the loss was not payable until 60 days after proof of loss.

[2] The material allegations of the complaint at issue were fully established without the introduction of the policy of insurance, unless it be said that the averment that the policy became payable on the 18th of November, 1908, was traversed by defendant's denial. We are of opinion that such de-

nial raised an issue as to the time when the loss was payable under the terms of the policy, and that it devolved upon plaintiff to establish by the policy the stipulated time of payment. Undertaking this duty through the introduction of the policy, he established beyond controversy that such loss was not payable until the lapse of 60 days after the 18th of November, 1908. This obviated any proof upon the part of defendant in that regard.

[3] Ordinarily, the words "due," "owing," and "payable" are said to be conclusions of law, a denial of which would raise no issue; but considering this complaint, which averred a contract of indemnity, and which in the absence of specific time of payment would become payable upon the happening of the event, plaintiff averred that it did not become payable until the 18th of November, 1908, which must be construed as an allegation that such time of maturity was evidenced by the policy; and the statement that it became payable upon a certain date is open to the construction that by the terms of the policy the defendant obligated itself on that date to pay the loss. Defendant's allegation that its promise to pay was contained in the policy and not otherwise, and its denial that the same became payable on the 18th of November, must be taken as a denial that by the terms of the policy it became payable upon that date; and hence the issue was raised as to the time when under the policy the loss became payable.

[4] Respondent contends that the condition of the policy as to the time of payment was waived by reason of the action of defendant in refusing payment on the ground that plaintiff was not the owner of the premises and possessed no insurable interest therein, the contrary of which was clearly established by the evidence, and for the further reason that by its answer it denied liability generally. We cannot construe such denial of liability, either before or after suit, as a waiver of the definite time fixed by contract for the payment of the loss. No breach of contract existed at the time the suit was brought; there was no sum due or payable to plaintiff. The terms of the contract gave to defendant 60 days, during which time it had a right to retain and use the money necessary to liquidate the loss. Within this time the defendant could make independent investigations in order to determine its liability. The loss was not payable until the time specified. A different rule might apply had the policy provided only that no action should be maintained for a period of 60 days; but we are not advised that a denial of liability before maturity can be said to have the effect to mature an obligation before the date fixed in the contract for its payment. *Tatum v. Ackerman*, 148 Cal. 360, 83 Pac. 151, 3 L. R. A. (N. S.) 908, 113 Am. St. Rep. 276.

In our opinion, the court erred in denying

the motion for a nonsuit made at the conclusion of plaintiff's testimony.

The judgment is therefore reversed, and cause remanded for further proceedings.

We concur: JAMES, J.; SHAW, J.

16 Cal. App. 59

ALLSTEAD v. LAUMEISTER. (Civ. 835.)
(District Court of Appeal, Third District, California. April 22, 1911.)

FRAUDULENT CONVEYANCES (§ 174*)—TRUSTS—ENFORCEMENT BY DEBTOR.

Complainant, a judgment debtor, desiring to purchase certain land in controversy, procured the title to be conveyed to his minor son on agreement to reconvey on demand, to protect the property from seizure by complainant's creditors. The son participated in the fraud, and thereafter conveyed the land to defendant without consideration on her agreement also to convey to complainant on demand. *Held*, that though defendant was not a bona fide purchaser, but took title subject to the same trust, complainant, because of the fraud, could not maintain a suit to compel defendant to convey, regardless of whether the parties were in pari delicto, under the rule that he who comes into equity must come with clean hands.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 530-542; Dec. Dig. § 174.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Gustave Allstead against Elizabeth Laumeister. Judgment for complainant, and defendant appeals. Reversed.

F. J. Castelhun and Walter J. Thompson, for appellant. James H. Boyer, for respondent.

HART, J. This action was brought to obtain a decree declaring certain real estate, situated in the city of San Francisco, to be held in trust by defendant for the plaintiff, and to compel said defendant to execute "a good and sufficient deed transferring and conveying to plaintiff said property." Plaintiff was awarded judgment as prayed for, and this appeal is prosecuted therefrom under the alternative method of taking such appeals prescribed by sections 941a, 941b, 953a, 953b, and 953c of the Code of Civil Procedure.

The facts, as alleged in the complaint and as proved by the evidence from which the findings of the court were made, may be stated as follows: On the 31st day of May, 1905, plaintiff purchased from William and Elise Marshall, his wife, a certain lot in the city of San Francisco, and caused the deed thereto to be executed by said Marshalls to his son, Van C. Allstead, then a minor, of the age of about 20 years; that plaintiff paid to said Marshalls the entire consideration supporting the transfer of said property; that, on said 31st day of May,

1905, said Van C. Allstead "agreed with and promised plaintiff that he would reconvey to plaintiff said real property at any time upon request of plaintiff"; that on the 20th day of January, 1906, said Van C. Allstead conveyed said property to the defendant, Elizabeth Laumeister, and it is charged in the complaint that said conveyance was brought about without the knowledge, acquiescence, or consent of plaintiff, and through the act of said defendant in fraudulently representing to said Van C. Allstead that "it was the will and desire of plaintiff that said Van C. Allstead transfer and convey said property to said Elizabeth Laumeister to be by her held in trust for said plaintiff, and by her reconveyed to plaintiff on demand." The complaint further states that said Van C. Allstead, for some six months prior to the date of the transfer of said property to said defendant, had resided with the latter at her home in San Francisco, and that "said Van C. Allstead and Elizabeth Laumeister during said time bore the relation to each other of foster mother and child; and during all of said time said Van C. Allstead reposed great trust and confidence in said Elizabeth Laumeister"; that by reason of the confidence and trust so reposed in said Laumeister by said Van Allstead, and relying upon and believing in "said false and fraudulent statements of said Elizabeth Laumeister," said Van Allstead, on the date heretofore mentioned, conveyed, by grant deed, said property to said Laumeister, without the knowledge, acquiescence, or consent of plaintiff. The complaint further charges that the transfer to defendant of said property by said Van Allstead was without any consideration whatever, and that the sole purpose of said defendant in thus fraudulently obtaining a deed and title to said property was to cheat and defraud plaintiff out of his equitable title to the same, and without any intent on her part to reconvey said property to plaintiff. On the 1st day of June, 1906, it is alleged, plaintiff demanded of defendant that she reconvey said property to plaintiff, but that defendant then and has ever since refused to convey said property to said plaintiff.

The answer specifically denies all the material averments of the complaint, and, additionally, sets up several special defenses, of which, except the one that follows, we deem it unnecessary, under our view of the case, to take special or any notice: "That, at the time said plaintiff caused said William Marshall and wife to execute and deliver to plaintiff a grant deed of the premises in the complaint described to Van C. Allstead, said plaintiff was indebted to various persons in divers sums of money, and that said plaintiff caused said deed from said William Marshall and wife to be made to said Van C. Allstead for the purpose and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

with the intent to hinder, delay, and defraud the creditors of said plaintiff, of all which said Van C. Allstead had knowledge."

The court's findings are in favor of plaintiff on all the material issues, except the one responding to the foregoing allegation of the answer, and except, further, that the court does not find that the defendant, as alleged in the complaint, procured Van C. Allstead to execute a transfer of the property to her by misrepresentation and fraud.

Several of the important findings of the court, essential to the support of the judgment, if the judgment could be upheld at all, are assailed by the appellant; but an examination of the record will disclose that all the findings derive sufficient support from the evidence, much, it may here be stated, to the disadvantage of the judgment in favor of the plaintiff, for the court found, upon the testimony of both the plaintiff and Van C. Allstead, as follows: "On and prior to May 31, 1905, plaintiff was indebted to the Mission Loan and Home Association of San Francisco upon a deficiency judgment made and entered in favor of said association and against said plaintiff; that on said 31st day of May, 1905, said plaintiff purchased said real property of and from said William Marshall and Elise Marshall, and thereupon caused said William Marshall and Elise Marshall to execute and deliver to plaintiff a grant deed transferring and conveying the legal title to said property to Van C. Allstead, who was then and there the minor child of said plaintiff, *to conceal the fact of his ownership of said property from said association.*"

In support of the foregoing findings, the record discloses the following testimony given by plaintiff: "I paid \$300 cash for the lot. * * * Had a conversation with my son, Van C. Allstead, immediately prior to the purchase of this property, relative to its purchase. * * * I told him I had a show to buy a nice cheap piece of property, and I thought I would take it, but I would make the deed in his name, as I had a little financial difficulty so I couldn't hold it myself. * * * There was a deficiency judgment lien against me. They had sold my place on a mortgage and didn't get enough for it, and they had a deficiency judgment against me."

Van C. Allstead testified: "Had a conversation with my father relative to the property in 1905, a few days before he purchased it. * * * Well, he said: 'Van, I am going to buy a piece of property. I got a good piece of property that I am going to purchase. I am going to have the Marshalls deed it over to you. I can't keep anything in my own name, as they are apt to take it away from me.' He said, 'I am going to make this deed over to you, and I want you to give it back to me any time I want it.' And I said, 'All right, you can have it.'"

It is plainly evident, from the foregoing testimony and the findings deduced there-

from, that the agreement between the plaintiff and his son, with respect to the property in controversy, comes within the maxim, "Ex turpi causa non oritur actio," and cannot be sustained or executed at the suit of plaintiff, without a clear violation of the fundamental conceptions of equity jurisprudence. Pomeroy's Eq. Juris. § 397. That author, in the same section, thus states the rule as to the application of the equitable maxim, "He who comes into equity must come with clean hands." "It says that whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy." As seen, the court did not find that the defendant procured the execution of the deed to her by Van Allstead by misrepresentation and fraud, as charged in the complaint, and it may be remarked that, so far as plaintiff is concerned, it would make no difference whether the court had so found. The plaintiff's conduct in making the arrangement with his son for a conveyance of the property to him whenever he might demand it was conceived and founded in fraud—in an intent to defraud creditors—and there was nothing that either the son or third parties might do with respect to the property or its disposition that could relieve him from the consequences of his unconscientious part in the transaction.

The court, however, found as follows with reference to the transfer of the property by Van Allstead to defendant: "That thereafter, and on the 20th day of January, 1906, at said city and county of San Francisco, said Van C. Allstead conveyed said property to Elizabeth Laumeister, to be by her held in trust for said plaintiff, and by her reconveyed to plaintiff on demand."

Thus it will be observed that the transaction between the defendant and Van Allstead merely resulted in transferring to her shoulders the obligations of the trust created by the plaintiff and accepted by his son. The son testified that he well knew and understood the purpose for which the plaintiff had the property put in his name. He knew the purpose of the trust was to defraud the creditors of the trustor and under those circumstances and to aid the trustor in perpetrating the fraud he accepted the trust. The defendant, having assumed the obligations of the trust—that is, having, according to the finding on that proposition, taken the property upon an agreement to execute the terms of the trust according to their original tenor—took the legal title for the purpose of executing such trust with all the infirmities characterizing said trust from its very inception. It may be true that, although Van

Allstead stood in *pari delicto* to the fraud, the defendant would not sustain that relation thereto unless she accepted the trust with notice or knowledge of its fraudulent character or that its purpose was to defraud third parties; still, nevertheless, the transaction between plaintiff and his son was so tainted with corruption that its nature as thus characterized could not be changed, however many times the property might be transferred, except where conveyed to an innocent purchaser for value and without notice or knowledge of the fraud. In other words, it is obviously immaterial, so far as the plaintiff—the actor in this suit—is concerned, whether the defendant stood or did not stand in *pari delicto* to the fraudulent creation of the trust which she accepted from Van Allstead and promised to execute. The question whether she stood in *pari delicto* to the fraudulent contract or as a *particeps criminis* in the fraud giving rise to it could be material only where she was also seeking affirmative relief as to the property, in which case, should she be found, equally with plaintiff, to be a party to the fraud, a court of equity would refuse to interfere in behalf of either.

But, in the case at bar, the plaintiff, according to his own admissions and the findings of the court, was a *particeps doli* in the transaction, and therefore, regardless of whether the defendant knew of the fraudulent creation of the trust when the duty of its execution was transferred to her, by her own consent, it may be, he is in no position to ask a court of equity to restore him to rights of which he, *ex industria*, divested himself in order to defraud others. "If a contract has been entered into through fraud, or to accomplish any fraudulent purpose, a court of equity will not, at the suit of one of the fraudulent parties—a *particeps doli*—while the agreement is still executory, either compel its execution or decree its cancellation, nor, after it has been executed, set it aside, and thus restore the plaintiff to the property or other interests which he had fraudulently transferred." *Pomeroy, Eq. Juris*. § 401, and cases cited in footnote thereof. In other words, as the same author declares, "any really unconscientious conduct, connected with the controversy to which he is a party, will repel him from the forum whose very foundation is good conscience." And in *Alaniz v. Casenave*, 91 Cal. 47, 27 Pac. 521, 523, Judge Temple said that "courts will not allow a trust to be proven by a party to the fraud, if the trust was created for a fraudulent purpose." Many other cases affirming the doctrine as thus stated may be found in the California reports.

It is very true that it may be looked upon as a harsh rule that will permit one not entitled to property to maintain a good title

thereto by reason of the fraud of the person from whom he has obtained it without having paid any consideration therefor. The effect of this decision, unless the plaintiff has some efficacious legal remedy that will relieve him of his dilemma, will in practical effect be to confirm title in the defendant, unless the claims of the creditors of plaintiff are yet alive, in which event the property may be pursued and seized to satisfy such claims. But even if, under the circumstances here, the defendant may in effect be sustained in her fraudulent claim to the title to the property in dispute, on the other hand the harshness of such consequence falls upon one who would fraudulently conceal his property so as to escape the just demands of those having a claim upon it. The lien of the deficiency judgment against plaintiff, presumably alive when the fraudulent trust was created, would have attached to this property immediately had the deed from the Marshalls been executed in his name. This proposition he well understood, and now, if a court of equity will not, as it cannot, lend its aid to the consummation of his fraud, the penalty he must suffer can hardly be said to be unjust, even though one not legally entitled to do so may reap the fruits thereof. If the defendant may claim that he has suffered through the perfidy of his trustee, his creditors can likewise say that they have suffered through his perfidy. In any event, as stated, a court of conscience cannot consistently with the very principles which have occasioned its existence lend its aid to relieve a party from the results of his own fraud.

The judgment is reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

16 Cal. App. 17

COOPER v. SPRING VALLEY WATER CO.
(Civ. 857.)

(District Court of Appeal, First District, California. April 14, 1911. Rehearing Denied by Supreme Court June 13, 1911.)

1. TRIAL (§ 235*)—INSTRUCTIONS—BURDEN OF PROOF.

In an action for conversion of corporate stock claimed to have been stolen by a third person, instructions that when the evidence is contradictory the decision on an issue must be according to the preponderance of the evidence; that to establish the theft plaintiff must produce satisfactory evidence; that it must be established by such positive proof as to preclude any other inference in the mind of a reasonable man; and that circumstances relied upon to establish the theft must be inconsistent with any other rational conclusion than that the stock was stolen—were erroneous as placing too great a burden of proof on plaintiff.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 539-548, 551; Dec. Dig. § 235.*]

2. EVIDENCE (§ 60*)—PRESUMPTIONS—INNOCENCE OF WRONG.

The presumption, in civil cases, that one is innocent of crime or wrong provided for by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Code Civ. Proc. § 1963, subd. 1, controls as evidence only to the point that it is overcome by a preponderance of evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 81; Dec. Dig. § 60.*]

3. TRIAL (§ 234*)—INSTRUCTIONS—PRESUMPTION OF INNOCENCE.

In an action for conversion of corporate stock claimed to have been stolen by a third person, the principle of presumption of innocence held sufficiently covered by an instruction that innocence is always presumed, and that the presumption can be overcome only by satisfactory proof.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 537; Dec. Dig. § 234.*]

4. APPEAL AND ERROR (§ 1031*)—PREJUDICIAL ERROR—INSTRUCTIONS.

Conflicting instructions on burden of proof are presumed to have been prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4043; Dec. Dig. § 1031.*]

5. APPEAL AND ERROR (§ 1063*)—REVIEW—PREJUDICE—INSTRUCTIONS.

Where error prejudicial to plaintiff-appellant, in instruction on the burden of proof, appears, and defendant-respondent challenges the sufficiency of the evidence to support a verdict in favor of appellant had one been rendered, the evidence must be tested by the rule applicable to a motion for nonsuit or a directed verdict; that is, truth of plaintiff's evidence is admitted, and every inference legitimately deducible therefrom should be interpreted most strongly against defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4227; Dec. Dig. § 1063.*]

6. APPEAL AND ERROR (§ 1011*)—REVIEW—SUFFICIENCY OF EVIDENCE.

A trial judge's determination on conflicting evidence cannot be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3983; Dec. Dig. § 1011.*]

7. TRIAL (§ 251*)—INSTRUCTIONS—APPLICABILITY TO ISSUES.

An instruction inapplicable to the issues is improper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

8. TRIAL (§ 252*)—INSTRUCTIONS—ASSUMPTION OF FACTS.

An instruction assuming a fact not in evidence is improper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

9. TROVER AND CONVERSION (§ 67*)—INSTRUCTIONS—NOTICE OF PLAINTIFF'S RIGHTS.

Where, in an action for converting stock claimed to have been stolen by a third person, defendant's attorney argued that the notice served by plaintiff on defendant of his right to the stock was insufficient, it was error to refuse to instruct that, upon receiving notice of the conflicting claims to the stock, defendant could lawfully have refused to transfer it, and could have maintained interpleader to compel litigation of such claims, but that defendant could decide without the aid of a court who it would recognize as the owner, taking the risk of having to pay the true owner the value of the stock on it appearing that the person recognizing it was not the true owner.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 295-303; Dec. Dig. § 67.*]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Erwin M. Cooper, executor, against the Spring Valley Water Company. From a judgment refusing a new trial on verdict for defendant, plaintiff appeals. Reversed and remanded.

W. C. Sharpstein, for appellant. Page, McCutchen & Knight, for respondent.

LENNON, P. J. In this action the plaintiff, as the executor of the last will and testament of John H. Lochhead, deceased, sought to recover damages of the defendant for the conversion of 40 shares of the capital stock of the "Spring Valley Water Works," alleged to have been the property of the estate of said deceased. Plaintiff's complaint is in the usual form, and the answer of the defendant consists of denials only. The case was tried with a jury. The verdict was for the defendant, and judgment was entered accordingly. From the order denying his motion for a new trial, plaintiff appeals. The appeal is prosecuted under the provisions of section 941b of the Code of Civil Procedure, and is presented to this court upon the engrossed statement of the case used upon appellant's motion for a new trial.

Appellant's assignments of error relate exclusively to the giving of certain instructions, and the refusal to give others requested by appellant. It is one of the contentions of respondent that the jury arrived at the only verdict possible under the evidence, and, therefore, assuming that the court erred to the prejudice of appellant in its charge to the jury, the judgment should not be disturbed.

This view of the case requires a statement of so much of the evidence as will illustrate the points presented by the respective parties; and inasmuch as appellant's résumé of the evidence given upon the whole case is clear, concise, and undisputed, we herewith quote and adopt it as a statement of the material facts of the case:

"The evidence on the part of plaintiff showed that the stock in controversy stood on the books of the company in the name of John H. Lochhead at the time of his death; that for a number of months prior to the death of said Lochhead one George M. Terrill collected the dividends on said stock pursuant to a written order given him by Lochhead more than a year prior to the latter's death; that these dividends were paid by Terrill to Lochhead to the date of the latter's death, which event occurred the 4th day of May, 1899; that the certificate evidencing these shares was in Lochhead's possession and indorsed as late as October, 1898; that, although Terrill had been attending Lochhead as the latter's physician for a number of years, he had on several occasions admitted that he was serving Lochhead without compensation because Lochhead was himself a physician; that as late

as April 1, 1899, about five weeks before Lochhead's death, and three months after Terrill claimed the stock had been transferred to him in payment of his services, Terrill, in a conversation with an intimate friend of Lochhead's, spoke as though he had not been paid; that immediately after Lochhead's death plaintiff had conversations with Terrill in which the latter did not claim ownership of the stock, but that he had it in his possession as security for the payment of his services; that thereupon plaintiff served a written notice on the company to the effect that the stock in question belonged to Lochhead's estate; that the certificate was indorsed and was believed to be in the possession of Terrill, and forbidding transfer of it; that Terrill presented the stock for transfer after the receipt of this notice, but transfer was refused; that subsequently it was presented by the First National Bank, and transfer was made to it; and that the value of the stock on the day of its cancellation and transfer to the First National Bank was \$102 a share.

"On the part of defendant the evidence showed that Terrill was Lochhead's physician and had been serving him for eight years; that in January, 1899, Lochhead indorsed and transferred the stock to Terrill in payment of his services and upon his promise to pay Lochhead the dividends on the stock as long as Lochhead lived; that in the same month Terrill pledged the stock to the First National Bank for a loan made him, where it remained until Lochhead's death."

Upon the impanelment of the jury plaintiff's attorney made an opening statement, wherein he said: "The theory of the plaintiff in this case is that the stock was stolen by Dr. Terrill either during Dr. Lochhead's last illness or after his death. * * * The testimony in regard to the theft of the stock will necessarily be what is known as 'circumstantial'; that is, we will not be able to produce any witness who saw the actual taking of the stock, but we expect to introduce evidence that will satisfy your minds of the fact that Dr. Terrill did steal the stock."

The defendant in turn claimed that the stock in controversy had been indorsed and transferred to Dr. Terrill for a valuable consideration.

[1] The court's charge to the jury included the following instructions:

"No. 2. In civil cases, and this is a civil case, the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be according to the preponderance of the evidence."

"No. 20. The court further instructs you that, if loss or damage must be suffered by one of two equally innocent parties, then and in that event the loss or damage must be borne by the party whose negligence has made the loss or damage possible, and, in this case, the court instructs you that the

plaintiff, as the executor of the last will of Dr. Lochhead, stands in the same position, relative to this stock, as Dr. Lochhead would stand if he were now living.

"No. 21. The court instructs you further that, in order to establish the theft of this stock by Terrill, the plaintiff must produce satisfactory evidence of that fact.

"No. 22. Suspicion will not warrant a verdict of theft; it must be established by such positive proof of actual theft or circumstances as to preclude any other inference so as to convince the mind of a reasonable man. Innocence is always presumed, and the presumption cannot be overcome except by satisfactory proof to the contrary. It is also presumed that the ordinary course of business has been followed until the contrary is shown by satisfactory evidence. If you believe that this stock came into the possession of the bank in January, 1899, and that during the life of Lochhead no claim was made by him that the stock had been stolen, you can consider that circumstance.

"No. 23. Circumstances relied on to establish the theft of this stock by Dr. Terrill must not only be consistent with the hypothesis that he stole such stock, but they must also be inconsistent with any other rational conclusion, and, where there is a failure of proof in a particular necessary to establish such theft, the whole chain of circumstances fails, and your verdict should be for defendant."

Appellant complains—and we think justly—that the charge of the court, in so far as it attempted to define the amount and quality of proof required of appellant in order to establish the alleged theft of the stock, imposed upon him a burden of proof greater than that required by law.

"In civil cases the affirmative must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of the evidence. * * *" Code Civ. Proc. § 2061, subd. 5. In other words, "the result should follow the preponderance of the evidence" (2 Whart. Crim. Ev. 1246), and this rule applies to all civil cases alike, even though the theory of the case involves, as it does here, an accusation of felony (*Brown v. Tourtelotte*, 24 Colo. 204, 50 Pac. 195; *Mead v. Husted*, 52 Conn. 56, 52 Am. Rep. 554). This was declared to be so by our Supreme Court as early as the case of *Ford v. Chambers*, 19 Cal. 143. Subsequently, in the case of *Merk v. Gelzhaeuser*, 50 Cal. 631, the court, without considering *Ford v. Chambers*, supra, declared that section 2061, subd. 5, of the Code of Civil Procedure, was but an affirmance of the general rule at common law, and announced the doctrine that, in a civil case involving an accusation of crime, the accused "would be entitled to the benefit of any reasonable doubt of his guilt in the minds of the jury, in the same manner as in a criminal trial."

This construction of the statute, however,

is in conflict with the rule prescribed in *Murphy v. Waterhouse*, 113 Cal. 467, 45 Pac. 866, 54 Am. St. Rep. 365, and it is expressly repudiated in *Hearne v. De Young*, 119 Cal. 670, 52 Pac. 150, 499.

It is the generally accepted doctrine in other jurisdictions that in civil cases, where a criminal act is directly pleaded or only incidentally involved, such criminal act may be established by a preponderance of evidence. *Kane v. Hibernia Ins. Co.*, 39 N. J. Law, 697, 23 Am. Rep. 239.

It may be safely asserted that there is no rule of law sanctioned by the weight of authority which requires the plaintiff in a civil action, even though the result thereof imputes a crime, to prove his case with the same certainty that is required in a criminal prosecution. *N. Y. & B. Ferry Co. v. Moore*, 102 N. Y. 667, 6 N. E. 293; *U. S. Ex. Co. v. Jenkins*, 73 Wis. 471, 41 N. W. 957.

The reason for the rule limiting the burden of a plaintiff's proof in such cases to a preponderance of evidence is founded largely "in the importance of preserving the distinction between civil and criminal cases with the growth of the criminal law. Almost every tortious act is by statute made indictable if done willfully or maliciously; and the courts should be reluctant to adopt, in civil cases, the rules peculiar to criminal law, lest wrongdoers be enabled to avoid civil liability, as well as escape criminal responsibility, under cover of the rules of criminal prosecution, the object of which is punishment only." *Kane v. Hibernia Ins. Co.*, supra.

Evidence sufficient to convince beyond a reasonable doubt necessarily excludes every other hypothesis but that of a defendant's guilt (*Stout v. State*, 90 Ind. 1, 2; *State v. Wilcox*, 132 N. C. 1120, 44 S. E. 625; *Com. v. Costley*, 118 Mass. 1, 2; *Carlton v. People*, 150 Ill. 181, 37 N. E. 244, 41 Am. St. Rep. 346; *Catasauqua v. Hopkins*, 141 Pa. 30, 21 Atl. 638); and therefore the trial court, in that portion of its charge herein quoted, in effect told the jury that the plaintiff must establish his case, as far as the alleged theft of the stock was concerned, beyond a reasonable doubt.

This is not only against what we conceive to be the settled rule of law, but it is opposed to the express language of the statute.

It is insisted upon behalf of respondent that the instructions numbered 22 and 23 simply told the jury that, inasmuch as the defendant's witness Terrill was incidentally charged with the commission of a crime, the presumption of innocence, which obtains in civil as well as criminal cases, should be given proper consideration, and that to overcome this presumption not only "satisfactory" but "convincing" proof was necessary; that, in any event, the charge of the court as a whole is free from prejudicial error because at the outset the court instructed the jury that "in civil cases the affirmative of

the issue must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of evidence."

[2] "That a person is innocent of crime or wrong" (Code Civ. Proc. § 1963, subd. 1) is a presumption of law which applies in civil and criminal cases (*Hunter v. Hunter*, 111 Cal. 267, 43 Pac. 756, 31 L. R. A. 411, 52 Am. St. Rep. 180), and the court or jury must find in accordance with this presumption unless it be controverted and overcome by other evidence (section 1961, Code Civ. Proc.; *Bickerdike v. State*, 144 Cal. 698, 78 Pac. 277). In other words, the presumption that a person is innocent of crime or wrong is itself evidence and controls only to the point that it is overcome in a civil case by a preponderance of evidence and in a criminal case by proof beyond a reasonable doubt. *Kurz v. Doerr*, 86 App. Div. 507, 83 N. Y. Supp. 738; *McBee v. Bowman*, 89 Tenn. 132, 14 S. W. 481.

[3] The general proposition of law with reference to the scope and effect of the presumption of innocence was sufficiently covered in that portion of the trial court's charge, wherein the jury was told that "innocence is always presumed, and the presumption cannot be overcome except by satisfactory proof to the contrary." Satisfactory evidence is defined by section 1835 of the Code of Civil Procedure, and declared to be sufficient of itself to justify a verdict, and it has been said that, "when a matter is proved to the satisfaction of a jury by a preponderance of evidence, then it can be affirmed that they are convinced of its truth, and being thus convinced of its truth they can base a verdict upon it." *Treadwell v. Whittier*, 80 Cal. 584, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175. All that followed in the charge of the court cannot be construed as a summarization of the rule by which the jury was to be governed in weighing the presumption of innocence. On the contrary, it was calculated to, and doubtless did, mislead the jury as to the quantity and quality of evidence which the law required of plaintiff to support his claim that the stock in controversy was stolen. It was an unauthorized enlargement of plaintiff's burden of proof, and to that extent gave to defendant an advantage greater than that granted by the mere presumption of innocence.

Counsel for respondent cites the case of *Hunter v. Hunter*, supra, in support of his assertion that the presumption of innocence, in a civil case, can be overcome only by "conclusive" proof. He relies largely upon an excerpt from the opinion of the cited case, which in turn was quoted from *Sharp v. Johnson*, 22 Ark. 79, and is as follows: "A charge of an act of immorality or of disobedience of a positive law will not be received unless supported by direct evidence. Circumstances showing probability merely

are not enough; the fact averred must be conclusively proved."

One phase of *Hunter v. Hunter* involved the question of the supremacy of conflicting presumptions, and it is apparent that the language quoted in the opinion, and now relied upon by respondent, was employed by the author of the opinion in passing and merely to point the discussion of the case. We do not understand the ultimate decision in that case to declare, as a rule of law, that the measure of proof required to overcome the presumption of innocence is the same in civil and criminal cases.

[4] The general instructions given in obedience to subdivision 5 of section 2061 of the Code of Civil Procedure, declaring that the preponderance of evidence should control the result, made no reference to the plaintiff's claim of theft, while that issue was specifically committed to the jury's consideration by the instruction complained of. It requires no argument to show that the charge of the court given upon the general issue is in irreconcilable conflict with the instructions upon the special incidental issue of the alleged theft of the stock. "In such a case it is impossible to determine which of the conflicting rules presented to them was followed by the jury, and the error * * * of the instructions must be deemed to be prejudicial." *Rathbun v. White*, 157 Cal. 253, 107 Pac. 309.

[5] Respondent's contention that the jury arrived at the only verdict possible under the evidence challenges the sufficiency of the evidence to support a verdict in favor of appellant had one been rendered in his favor. Therefore, as suggested by counsel, "the evidence must be tested by the rule applicable to a motion for a nonsuit or to a directed verdict at the close of the evidence."

Tested by this rule, the truth of plaintiff's evidence, for the purpose of this discussion, is admitted, and every inference of fact which can be legitimately drawn therefrom should be interpreted most strongly against the defendant. *Wright v. Roseberry*, 81 Cal. 87, 22 Pac. 336; *Warner v. Darrow*, 91 Cal. 312, 27 Pac. 737; *Goldstone v. Merchants', etc., Co.*, 123 Cal. 632, 56 Pac. 776; *Hanley v. Cal.*, etc., 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597. There was some conflict in the evidence (*Cooper v. Spring Valley Waterworks*, 145 Cal. 207, 78 Pac. 654), and we are not prepared to say that the evidence on behalf of appellant, if believed by the jury, was wholly insufficient to support a verdict in his favor. On the other hand, we do not wish to be understood as intimating that the evidence compelled a verdict against respondent.

[6] In the face of a conflict of evidence, we are not required, nor permitted, to speculate upon the sufficiency of the evidence to support a verdict in favor of either party. The determination of such a question rests

exclusively in the discretion of the trial judge.

[7] The subject-matter of instruction No. 20 hereinbefore quoted embraced the doctrine of equitable estoppel (generally cited and applied in support of the claims of innocent third party purchasers), the origin of which is to be found in the maxim, "Where one of two equally innocent persons must suffer from the fraud of a third, he who first trusted must first suffer." This instruction is vigorously assailed by counsel for appellant. Inasmuch, however, as counsel for respondent consider that the principle of law enunciated therein was inapplicable to any phase of the case, it will suffice to say that the instruction should not have been requested or given.

"Great caution should be exercised in applying this principle, and the court should be satisfied that the case is one calling for its application before the question is submitted to the jury as to which of the parties is entirely in delicto." *Davis v. Davis*, 26 Cal. 45, 85 Am. Dec. 157.

"It is good and useful in its place, but will always make trouble if not kept where it belongs." *Rapps v. Gottlieb*, 142 N. Y. 164, 36 N. E. 1052.

[8] A fact not in evidence (that Dr. Lochhead knew the stock in controversy was stolen) is assumed in instruction No. 22, and to this extent the instruction was erroneous.

[9] In his argument to the jury respondent's attorney contended that "the notice served by Mr. Cooper on the defendant was entirely insufficient because it was not stated in the notice that the stock had been stolen; that, if the plaintiff had notified the defendant that the stock had been stolen, of course the defendant would have refused to transfer the stock, but defendant had no right, upon the mere claim of plaintiff that the stock belonged to Dr. Lochhead's estate, to refuse to transfer it when the certificate was presented with the genuine indorsement of Dr. Lochhead upon it; that, if plaintiff believed that Dr. Lochhead's estate owned the stock, it was his duty to bring suit either against the defendant to enjoin the transfer, or against Dr. Terrill to recover the stock, but it was not the duty of defendant to take any action whatever; * * * that, if it had refused to transfer the stock, it would have been subjected to a suit by Dr. Terrill or the First National Bank."

In view of this argument, appellant's counsel requested the court to charge the jury that: "In this case, the evidence is undisputed that, before it canceled the certificate in controversy, defendant was notified by plaintiff that the stock belonged to Dr. Lochhead's estate, and was forbidden to permit a transfer of it. Upon receipt of this notice defendant could lawfully have refused to transfer the stock, and could have commenced an action without expense to itself

against the persons claiming to own the stock, to compel them to litigate their claims to it, and when the court had decided who the owner was defendant could have recognized such person as the owner without incurring any liability to any of the other claimants. It was not obliged to pursue this course, however; but it had the right to decide without the aid of the court who it would recognize as the owner of the stock; but it took the risk of having to pay the true owner the value of the stock if it turned out that the person it had recognized as the owner was not the true owner."

This requested instruction stated a correct legal principle. Code Civ. Proc. § 386; Dows v. Kidder, 84 N. Y. 121; Wetherly v. Straus, 93 Cal. 283, 28 Pac. 1045; Wilson v. Nugent, 125 Cal. 280, 57 Pac. 1008. And, in view of the argument of respondent's counsel, it was pertinent and should have been given. Todd v. Todd, 221 Ill. 410, 77 N. E. 680; Yore v. Mueller, etc., 147 Mo. 679, 49 S. W. 855; Pryor v. Morgan, 170 Pa. 568, 33 Atl. 98; Norton v. Galveston, etc. (Tex. Civ. App.) 108 S. W. 1044. It is true that certain instructions dealing with general principles of law applicable to the facts of the case ignored appellant's claim that the stock had been stolen; but this issue was elsewhere in the court's charge sufficiently covered, and we are satisfied that, upon this phase of the case, the charge of the court was not in conflict.

The order appealed from is reversed, and the cause remanded for a new trial.

We concur: HALL, J.; KERRIGAN, J.

16 Cal. App. 28

PEOPLE v. BALMAIN. (Cr. 307.)

(District Court of Appeal, First District, California. April 14, 1911.)

1. CRIMINAL LAW (§ 696*)—APPEAL—RULINGS ON EVIDENCE—OBJECTIONS WAIVED.

When evidence is admitted at a trial on condition that it be subsequently connected with other evidence in the case, the burden is on him objecting to move to strike it out if the connection be not made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1639-1644; Dec. Dig. § 696.*]

2. CRIMINAL LAW (§ 1120*)—REVIEW—RECORD.

Error in excluding a letter cannot be considered when it is not incorporated in the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2931-2937; Dec. Dig. § 1120.*]

3. CRIMINAL LAW (§ 1130*)—APPEAL—BRIEF.

When counsel fails to cite in his brief the folio or page of the record containing matter relied on as error, such part of the brief will be disregarded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2965-2970; Dec. Dig. § 1130.*]

4. CRIMINAL LAW (§ 400*)—EVIDENCE—PEDIGREE—FAMILY BIBLE.

Even in cases of pedigree, entries in a family Bible are but secondary evidence of the

facts stated, and are not admissible as evidence of the fact when the persons having actual knowledge of the fact are alive.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 880-882; Dec. Dig. § 400.*]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

William Balmain was convicted of abduction, and from the judgment, and an order denying him a new trial he appeals. Affirmed.

John T. Williams and Wm. A. Jackson, for appellant. Attorney General Webb, for respondent.

KERRIGAN, J. The defendant was convicted of abduction under the provisions of section 267 of the Penal Code. This appeal is from the judgment and from the order denying him a new trial.

The evidence in the case favorable to the prosecution is, very briefly, as follows: Some time early in the month of April, 1910, the defendant met Henrietta Nelson, a girl less than 17 years of age, at a "nickel dance" in San Francisco. Their relations became intimate, and not more than a week later she, at his earnest solicitation, left her home, where she resided with her mother, and became a prostitute and an inmate of a house of ill fame in the town of Point Arena.

The offense of which the defendant was convicted is defined by section 267 of the Penal Code, which reads as follows: "Every person who takes away any female under the age of eighteen years from her father, mother, guardian, or other person having the legal charge of her person, without their consent, for the purpose of prostitution, is punishable by imprisonment in the state prison not exceeding five years, and a fine not exceeding one thousand dollars." Defendant makes no claim that the verdict is not supported by the evidence; but he relies on certain rulings of the court relating to the admission and rejection of evidence.

1. The first objection is concerning the declaration of Henrietta Nelson on her direct examination that the defendant had received a letter from Point Arena. Defendant asserts that this statement was pure hearsay, and that his motion to strike it out should have prevailed. The point is not well taken. It was the theory of the prosecution that the defendant had taken the prosecutrix from her home, and had arranged to, and in fact did, place her in a house of prostitution. In attempting to sustain this theory the following took place: "Q. (By the district attorney): Now, then, did you ever have any conversation with him relative to your leaving home? A. Not right away we didn't. Q. You had some conversation later on? A. He didn't say right away

about going away, or anything; not until he got a letter of some kind. Q. Did he say anything to you about your going away? A. Not then. After he got a letter from Point Arena then he started in to talk about it. Q. Did he get a letter from Point Arena? A. That is what he said. I never seen it. Mr. Williams: I move to strike out the answer as being hearsay. Mr. Berry: I think I shall connect that. If the defendant himself stated he got a letter, and I connect it with the defendant, it will be quite material. Mr. Williams: I would like to have my objection acted upon. The Court: I will overrule the objection. Mr. Williams: Exception. Mr. Berry: Did he tell you from whom the letter came? A. He said from Point Arena. Mr. Williams: I make the same objection to this question that is now asked, and upon the further ground that there is no evidence upon which this question can be predicated. If the letter has been received, it has not been proved. The Court: The prosecuting attorney has said that he will make the connection. Upon that showing I will overrule the objection. Mr. Williams: Note an exception." No error was committed with reference to this testimony. The two answers which the defendant sought to have stricken out were, under the circumstances of the case, in the nature of admissions by the defendant covering competent and relevant matter, and were therefore admissible. But if this be not true, as the testimony was admitted conditionally, and as the defendant failed to move to strike it out on the ground that the promised connection of the testimony had not been made, any possible error in its admission must be deemed waived.

[1] When evidence is admitted at a trial on condition that it be subsequently connected with other evidence in the case, it is a principle of law too well settled to require the citation of authority that the burden is cast upon the person objecting to move to strike it out if the connection be not made, and failing to do so he is not in a position to complain of its admission.

[2] 2. Defendant next claims that a letter dated July 4, 1910, from the prosecutrix to May Taylor, the proprietress of the house of prostitution in Point Arena, should have been admitted in evidence. Defendant stated that this letter disclosed that at its date the prosecutrix was in San Francisco, and that she desired to return to the house of prostitution in Point Arena; and he argues that this circumstance tends to prove that she originally entered the said house voluntarily, and not at the instance of the defendant. This letter was written about two months and a half after the prosecutrix became an inmate of the house in question; and we are inclined to think that whatever tendency it had was to show that she had become accustomed to the life of a prostitute, and was willing, reluctantly perhaps,

to continue it. Assuming, however, that it had any tendency as suggested by defendant, still its bearing in that regard would have been too slight a circumstance upon which to base a reversal of the case. Furthermore, in order to properly raise the point, the defendant should have had the letter incorporated into the record. This he has not done.

3. Defendant also complains of the admission of the following testimony elicited by the district attorney from the mother of the prosecutrix: "Q. Did Henrietta discuss with you or state to you that the defendant in this case had talked with her about going away, or that he had endeavored to influence her to go away? A. Yes, sir. Mr. Williams: I object to that as hearsay. The Court: Overruled." The question called for hearsay testimony, but the answer was immaterial, and, moreover, the objection to the question came too late; and, as no motion was made to strike it out, the defendant cannot now be heard to complain.

4. Defendant, under heading numbered 5 of his brief, complains that the court allowed, over objection, certain leading questions. Accepting appellant's quotation of the testimony as correct, still there is no merit in his position. Another reason, however, for holding against this contention, is that no folio or page of the record is cited.

[3] Whenever counsel in a brief fails to comply with this requirement, that part of the brief will be disregarded. *People v. Chutnacut*, 141 Cal. 683, 75 Pac. 340.

5. On the day that the prosecutrix arrived at Point Arena, May Taylor wrote a letter to the former's mother, which was dated not at Point Arena, but at Fitchburg. Its evident purpose was to deceive the mother as to the whereabouts and occupation of her daughter. It read as follows: "Dear Madam: Your daughter was with me for a week. Would like to have her back as my husband is away, and babe and I are alone, and I always keep a girl when he is gone. Yours rep. Write me, Mrs. Taylor, Fitchburg, Calif. Alameda Co. P. S.—The reason why she did not come was that she wanted to get money to pay for her room, so she waited until I paid her." This letter was admitted upon the cross-examination of the witness, who was called for the defendant, and gave testimony tending to exculpate him. Defendant contends that there is nothing in the record indicating that the letter was written under the direction of the defendant, and that, therefore, its admission over his objection and exception was prejudicial error. If this letter did not tend to show the interest of the witness, or to contradict or discredit her testimony, as claimed by the prosecution, it had no bearing in the case either for or against the defendant, and therefore the error, if any, in admitting it, was purely abstract, and furnishes no ground for the reversal of the judgment. *People v.*

Winters, 125 Cal. 331, 57 Pac. 1067; People v. Glaze, 139 Cal. 161, 72 Pac. 965; People v. Stokes, 5 Cal. App. 213, 89 Pac. 997.

[4] 6. Defendant contends that the court erred in refusing his motion for the issuance of a subpoena duces tecum to be served in Alameda county on the grandmother of the prosecutrix, and having for its object the production of the family Bible of said grandmother then in her possession. The production of this Bible seems to have been desired in order that counsel for defendant might examine it, to ascertain if it contained any entry as to the date of the birth of the prosecutrix, and, if such entry should show the date of the birth to be as long as 18 years before the date of the alleged offense, to use the same as evidence of that fact. The motion was made upon an affidavit, but, as this affidavit is not contained in the record, we are confined to such matters as do appear and which bear upon the question involved. For a proper understanding of the question involved in all its aspects, a somewhat extended statement of the facts is necessary. The prosecutrix on Tuesday, the 18th day of October, 1910, testified on cross-examination that she was then 16 years of age, and would be 17 years of age on the 18th day of November, 1910. She also testified that a record of her birth was contained in the family Bible of her grandmother, which was then at the residence of her grandmother in East Oakland. On Thursday, October 20th, the mother of the prosecutrix testified to the age of said prosecutrix, and that she was born on the 18th day of November, 1893. (The offense was committed in April, 1910.) On cross-examination she testified that a record of such birth was in the Bible of her mother (grandmother of the prosecutrix). It further appears that she gave similar testimony as to the record of said birth at the preliminary examination of the defendant in the police court. On Friday, October 21st, the mother of the prosecutrix was recalled by the defense, and testified that she had been to the home of her mother since last on the witness stand, and had ascertained that the said Bible contained no record of the birth of the prosecutrix; that it contained only the record of the births of her mother's children, and no record of the births of grandchildren. Later, after the defense had examined several witnesses and rested its case, and the prosecution had examined several witnesses in rebuttal, including the mother of the prosecutrix, and immediately after she had stated that her mother was in court, defendant made the application for the subpoena for the production of the Bible. The court, however, directed the grandmother to take the witness stand, and the appellant stated that he would reserve the motion until the testimony was in. The grandmother thereupon testified that she had at her home a family Bible, and that it

contained only entries as to the births of her own children, and that there was no entry in said Bible as to the birth of the prosecutrix. She further testified that she was present at the birth of the prosecutrix, and that it occurred in November, 1893. Upon the close of her testimony defendant stated that he renewed his motion, and it was denied. It may be noted that, inasmuch as the grandmother was in court, it was quite unnecessary to obtain a subpoena, but the object sought could have been attained by an order to her from the court to produce the Bible; but looking to the substance of the motion rather than to its form we will now discuss the merits of the contention of the appellant.

In discussing the question before this court, as well as in presenting his motion to the trial court, appellant has made the fundamental error of assuming that an entry as to the birth of the prosecutrix in the Bible in question would be evidence as to the date of her birth. Such is not the law. Even in cases of pedigree (and this is not a case of pedigree, but only a case where the date of a birth is involved) entries in a family Bible are but secondary evidence of the facts stated, and are not admissible as evidence of the fact when the persons having actual knowledge of the fact are alive, and can be and are produced in court. This is the rule laid down, after a very full discussion of the law in *People v. Mayne*, 118 Cal. 516, 50 Pac. 654, 62 Am. St. Rep. 256, in which case a conviction of rape was reversed, because the court had allowed entries in a family Bible as to the date of the birth of the girl to be introduced in evidence when the mother was alive and present. The rule laid down in the *Mayne Case* is fully supported by the cases therein cited. *McCausland v. Fleming*, 63 Pa. 36; *Leggett v. Boyd*, 3 Wend. (N. Y.) 376; *Greenleaf v. Dubuque, etc.*, R. R. Co., 30 Iowa, 301; *Campbell v. Wilson*, 23 Tex. 252, 76 Am. Dec. 67; *Robinson v. Blakely*, 4 Rich. (S. C.) 586, 55 Am. Dec. 703. The mother of the prosecutrix had actual knowledge of the date of the birth of her child, and any entry in the Bible not made by her could not be used to contradict her testimony as to such date. If it be said that she testified that the Bible contained no entry on the subject, and that if it in fact did contain such entry the production of the Bible might contradict her testimony upon that point, the answer is that her testimony, simply that the Bible contained no entry on the subject, was as to a purely collateral matter brought out upon cross-examination, and she could not be contradicted thereon. There is no pretense that she made any entry in the Bible in question, or that she used it to refresh her memory, or based her testimony thereon. She had actual knowledge of the fact and date of the birth of

her child, and testified from such knowledge. Any entry or statement in such Bible made by any other person concerned neither her nor the prosecutrix. The only use that could be made of any entry as to the birth of the girl would be for the purpose of contradicting and thus impeaching the testimony of the person who made the entry, if it should prove to be inconsistent with the testimony of such person.

When the motion to obtain a production of the Bible was made, no one had testified who is in any way claimed to have made an entry therein. When the motion was made, it is apparent that it was only sought to procure an inspection of the Bible to ascertain, first, if it contained any entry of the birth of the prosecutrix, and if it did, and such entry was inconsistent with the testimony of the girl and her mother, to introduce it as substantive evidence of the fact as to the date of the birth in question. This could not be done. *People v. Mayne*, supra.

It may be said that, if the Bible did contain an entry made by the grandmother as to the birth of the girl, such entry might be used to contradict the testimony of the grandmother, if it in fact proved to be inconsistent with her testimony as to the date of such birth. But, when the motion was made, the grandmother had not testified. The purpose of the motion was thus not to obtain evidence that might possibly impeach her. She subsequently did testify, and the motion was renewed, on the original grounds, and no suggestion was made that the book was sought to obtain possibly impeaching testimony against the testimony of the grandmother.

There is nothing in the record to suggest that the age of the girl was not as testified to by herself, her mother, and her grandmother. According to the evidence, she was still under 17 years of age at the time of the trial, and was but 16 years and 5 months of age at the time of the commission of the offense. There is no evidence to the contrary, and there is nothing in the record that suggests that her appearance belied the testimony. If it did, the able and industrious counsel for defendant would doubtless have taken timely steps to procure evidence as to her age, even to the production of this Bible, for he had been apprised, not only of its existence, but that it might contain a record of her birth, as early as at the preliminary examination of defendant in the police court.

It is clear that the court did not err nor abuse its discretion in denying defendant's motion for the production of the Bible.

The judgment and order are affirmed.

We concur: LENNON, P. J.; HALL, J.

16 Cal. App. 96

CARGNANI v. CARGNANI. (Civ. 823.)

(District Court of Appeal, Third District, California. April 26, 1911.)

1. DIVORCE (§ 150*)—FINDINGS—SUFFICIENCY.

Under Code Civ. Proc. §§ 632, 633, requiring a decision to be in writing and to consist of facts found and conclusions of law separately stated, a finding in a divorce suit "that the defendant has been guilty of extreme cruelty towards the plaintiff" is a mere conclusion, and furnishes no basis for a judgment.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 506; Dec. Dig. § 150.*]

2. TRIAL (§ 392*)—FINDINGS—SCOPE.

A trial court must find on all the material issues independent of any request by either party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 916; Dec. Dig. § 392.*]

3. NEW TRIAL (§ 79*)—GROUNDS—"DECISION AGAINST LAW."

A judgment based upon findings not determining all the material issues is a "decision against the law," for which a new trial may be had.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 165½; Dec. Dig. § 79.*]

For other definitions, see Words and Phrases, vol. 8, p. 7629.]

4. APPEAL AND ERROR (§ 867*)—REVIEW—FINDINGS.

Appeal from an order denying a motion for a new trial on the ground the decision is against the law presents for review objection to the trial court's failure to find on all the material issues.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3480; Dec. Dig. § 867.*]

5. APPEAL AND ERROR (§ 864*) — WHEN PROPER.

Where a trial court's decision is unsupported by the facts found, the remedy is by appeal from the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 864.*]

6. APPEAL AND ERROR (§ 223*)—REVIEW—OBJECTIONS NOT MADE BELOW.

Objection that the findings do not support the judgment appealed from can be made for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 223.*]

7. DIVORCE (§ 150*)—FINDINGS ON CROSS-COMPLAINT—NECESSITY.

Failure to find upon the material allegations of a cross-complaint in a divorce suit is not excusable because the court found for plaintiff on the complaint.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 499-508; Dec. Dig. § 150.*]

8. APPEAL AND ERROR (§ 197*)—OBJECTIONS IN LOWER COURT — COMPLAINT — VARIANCE — WAIVER.

In a divorce suit, objections to testimony concerning instances of cruelty other than those alleged cannot be made by defendant for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1428-1441; Dec. Dig. § 197.*]

9. APPEAL AND ERROR (§ 931*)—REVIEW—PRESUMPTIONS.

It appearing that the trial court disbelieved defendant and her witnesses, it will be

presumed that the disbelief was justified by attending circumstances.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3762; Dec. Dig. § 931.*]

10. DIVORCE (§ 286*)—REVIEW—DISPOSITION OF PROPERTY.

Though under Civ. Code, § 146, subd. 1, one granted a divorce for extreme cruelty may be awarded all the property, under section 148, the appellate court can review the action and make such order as is deemed proper.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 769, 770; Dec. Dig. § 286.*]

11. DIVORCE (§ 194*)—COSTS—ALLOWANCE—"DISCRETION."

The discretion under Civ. Code, § 137, vested in the trial court in a divorce suit to allow the wife costs on appeal, is a discretion guided by law based upon sound judgment and inspired by the desire to promote justice, and must not be arbitrary or capricious.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 580; Dec. Dig. § 194.*]

12. DIVORCE (§ 194*)—COSTS OF APPEAL—ALLOWANCE—JUDICIAL DISCRETION.

On awarding a husband a divorce and all the property, it was an abuse of discretion to refuse to make some allowance for the wife's costs on appeal.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 580; Dec. Dig. § 194.*]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Michele Cargnani against Philomena Cargnani. From the judgment and from orders denying new trial and overruling motion to require plaintiff to pay defendant's costs and expenses of appeal, defendant appeals. Reversed.

A. A. Montague, for appellant. Crosby & Richardson, for respondent.

BURNETT, J. The appeal is from the judgment and order denying the motion for a new trial and also from an order denying defendant's motion to require plaintiff to pay said defendant's costs and expenses of appeal. An interlocutory decree of divorce was granted plaintiff on the ground of extreme cruelty, and all the community property, including a homestead, was assigned to him absolutely. Defendant, in her answer, denied all the specified acts of cruelty charged by plaintiff, and she filed a cross-complaint setting up a cause of action against him for divorce on the ground also of extreme cruelty.

Of the various contentions made by appellant, we consider first the question as to the sufficiency of the findings. These are very brief, and, aside from the formal recital of the conjugal relation, the place and date of marriage and a statutory residence in Oakland, county of Alameda, they are as follows: "(4) That the defendant has been guilty of extreme cruelty towards the plaintiff. (5) That the property herein mentioned and described in the cross-complaint is community property (describing it). (6) That the allegation of plaintiff alleging that adul-

tery was committed by the defendant and cross-complainant was not proven to the satisfaction of this court, for the reason that the testimony of the plaintiff regarding said allegation was not corroborated by other testimony as required by law, and for that reason the court finds that defendant did not commit adultery." Then follow the conclusions of law that the plaintiff is entitled to an interlocutory decree of divorce and to be awarded all of the property. The only finding, therefore, as to a disputed fact is in relation to the charge of adultery, and that is in favor of defendant.

[1] Plaintiff's complaint exhibits some nine distinct acts of cruelty, and the defendant's cross-complaint, twelve or thirteen, and, with the aforesaid exception, the court has entirely ignored them in its decision; for it cannot be, and is not, disputed that the so-called finding "that the defendant has been guilty of extreme cruelty towards the plaintiff" is but a mere conclusion, and it furnishes no basis for the judgment. A complaint containing merely such an allegation as a ground for divorce would manifestly fail to state facts sufficient to constitute a cause of action. Under our practice the decision of the court must be in writing and filed within 30 days after the cause is submitted. Section 632, Code Civ. Proc. It consists of the facts found and conclusions of law separately stated. Section 633, Code Civ. Proc.

[2, 3] It is settled beyond controversy that it is the duty of the court to find on all the material issues, and a failure in that respect is ground for a new trial as a "decision against law." "A judgment based upon findings which do not determine all such issues is, in our opinion, 'a decision against law' for which a new trial may be had. In such case a re-examination of the facts becomes necessary in order that the issues of fact may be determined." *Knight v. Roche*, 56 Cal. 15; *Adams v. Helbing*, 107 Cal. 298, 40 Pac. 422.

[4] That the "decision is against law" was one of the grounds urged in the court below, hence it is reviewable on an appeal from the order denying the motion. *Haight v. Tryon*, 112 Cal. 4, 44 Pac. 318. This duty of the court is entirely independent of any request of the parties or either of them. *Lamb v. Harbaugh*, 105 Cal. 680, 39 Pac. 56.

[5] This defect in the findings is also fatal to the judgment for the reason that no facts are found sufficient to support said judgment. When the conclusion of the court is unsupported by the facts found, the remedy is by appeal from the judgment. *Kirman v. Hunnewell*, 93 Cal. 519, 29 Pac. 124.

[6] The only answer made by respondent to this contention is "that it does not appear that any objection was made to the findings in the court below, and in view of that fact the objection thereto cannot be

*For other cases see same § 194 and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

urged in the appellate court for the first time." In support of this position the following cases are cited: *Moore v. Campbell*, 72 Cal. 253, 13 Pac. 689; *First National Bank v. Holt*, 87 Cal. 162, 25 Pac. 272; *Warner v. Holman*, 24 Cal. 228; *Cook v. De La Guerra*, 24 Cal. 237. The first two are not at all in point. Neither involved the sufficiency or want of findings of fact, but the claim was made that there was an unwarranted finding in each case—in the first because not within the issues; and in the second for the reason that there was no law authorizing it. In each instance the Supreme Court decided adversely to the contention. The *Warner* and *Cook* Cases, *supra*, are early decisions, prior to the adoption of the Codes, under a special statute requiring an objection to be made, and they are of no authority now. The procedure therein prescribed ceased to be operative when the Codes came into operation in 1873. *Lamb v. Harbaugh*, *supra*.

[7] Similarly the court erred in its failure to find upon the material allegations of the cross-complaint. Under some circumstances such omission would be excused, but that is not the case here. There was abundant evidence to support said allegations, and it cannot be said that a finding thereon was rendered immaterial by reason of the decision of the court in favor of plaintiff on the allegations of his complaint. Even if the court below had found the facts as alleged in the complaint, defendant would have been entitled to a specific finding as to her averments of cruel conduct. This follows from an application of the test whether a finding either way would or might have affected the judgment. If the finding had been in her favor as to her specific allegations, it is hardly probable, in view of the evidence in the record that the trial judge would have granted plaintiff a divorce at all. At least, the court would have assuredly awarded defendant a portion, if not all, of the community property.

There is nothing to the contrary in *McCourtney v. Fortune*, 57 Cal. 619, or *Murphy v. Bennett*, 68 Cal. 528, 9 Pac. 738. As stated by appellant, the *McCourtney* Case involved the ownership of real property, and the court found that plaintiff had at no time been the owner or in the possession or entitled to the possession of the property in controversy. Manifestly it was not prejudicially erroneous for the court to omit to find upon the plea of the statute of limitations. Since the plaintiff had no title at all, of course, there was nothing to be barred by the statute. In the *Murphy* Case the action was to recover damages from the defendant for tearing down a barn and converting the materials thereof to his own use. The court found that the plaintiff was not, and that the defendant was, the owner of the building. The Supreme Court very properly held that this rendered it of no moment whether there was any finding upon the affirmative

defense of justification. The finding as to ownership was necessarily decisive of the whole case.

[8] While the corroborative evidence in behalf of plaintiff seems somewhat feeble, we cannot say that it is not sufficient to meet the requirements of the Code. The testimony of plaintiff that was corroborated appears to have been addressed to other instances of cruelty than those specifically alleged in the complaint, but to this no objection was made at the trial by defendant and of this variance it is now too late to complain. *Anderson v. Black*, 70 Cal. 231, 11 Pac. 700. If the case was tried upon the theory that such evidence was admissible, and it was offered and received without objection, the losing party cannot be permitted in the appellate court for the first time to raise an objection on the ground suggested. *Carpenter v. Ewing*, 76 Cal. 488, 18 Pac. 432.

[9] Likewise, it is not for us to declare that the court was bound to find in favor of the allegations of the cross-complaint. The cold record exhibits a persuasive showing in favor of defendant. The court, however, manifestly disbelieved her and her witnesses, and we must assume that the disbelief was justified by the concomitant circumstances.

[10] To set apart all of the property to plaintiff seems rather harsh treatment of defendant. This, though, is permitted where a divorce is awarded on the ground of extreme cruelty. Section 146, Civ. Code, subd. 1. Under our practice the appellate court, however, has the right to review the action of the lower court in awarding property in actions for divorce, and to make such order thereupon as it may deem proper, independent of the question of discretion. Section 148, Civ. Code; *Reid v. Reid*, 112 Cal. 274, 44 Pac. 564; *Stroczynski v. Stroczynski*, 97 Cal. 189, 31 Pac. 1130. But, since a new trial may develop a different situation, it is deemed unnecessary to do more than to make the foregoing suggestions.

[11] Appellant complains bitterly of the action of the court in refusing to require plaintiff to pay defendant's costs of appeal. She contends that "no bad faith in this appeal can possibly be attributed to appellant; that she has no separate property; that the action of the court below has left her absolutely penniless; that the husband is not only a strong able-bodied man, but is as well in the full present enjoyment of all the community property, together with its rents and profits; that she has a right to defend herself against the attacks of her husband; that not only the immediate parties to an action for divorce, but as well the state is interested in the matrimonial relations of its citizens; and that, if she has a defense against her husband's accusations or an independent cause of action against him, public policy demands that she present the same for judicial determination, and that there be no

connivance on her part, and that there is no case reported in our California Reports where the wife in good faith defending herself against her husband, without personal means of her own, has been denied the right to an order for an allowance against the husband," and she asserts that the same consideration should have been shown her as has been the uniform practice in other cases.

In opposition to this contention it is claimed that the allowance of costs of appeal is purely discretionary with the court below, and there is no showing that there was any abuse of discretion in this case. Section 137, Civ. Code; *Gay v. Gay*, 146 Cal. 237, 79 Pac. 885. The "discretion," though, as has been often held, means discretion guided by law and based upon sound judgment and inspired by a desire to promote justice. It must not be arbitrary nor capricious. It was said by Chief Justice Marshall in *Osborne v. U. S. Bank*, 22 U. S. 738, 6 L. Ed. 204: "Courts are mere instruments of the law and can will nothing. When they are said to exercise a discretion, it is a legal discretion, a discretion to be exercised in discovering the course prescribed by law, and when that is discovered, it is the duty of the court to follow it."

[12] While the law here, it is true, does not in terms make it mandatory for the court to allow such costs, yet, in view of the reported cases in which the law has been construed and of the uncontradicted averments of defendant's affidavit, we think the discretion of the court should have been exercised in making some allowance to defendant for her costs on appeal.

For the foregoing reasons the judgments and orders are reversed.

We concur: CHIPMAN, P. J.; HART, J.

16 Cal. App. 156

REEVES v. KINNEY. (Civ. 943.)

(District Court of Appeal, Second District, California. May 5, 1911.)

SALES (§ 359*) — ACTION FOR PRICE — EVIDENCE.

Evidence held to justify a finding for plaintiff in an action to recover the reasonable value of refreshments furnished by her to persons receiving them at a club house in accordance with defendant's promise to pay.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1056-1059; Dec. Dig. § 359.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by M. A. Reeves against Abbot Kinney. Judgment for plaintiff, and defendant appeals. Affirmed.

Gurney E. Newlin (Roy V. Reppy, of counsel), for appellant. Anderson & Anderson, for respondent.

SHAW, J. Action to recover for services alleged to have been rendered at the special

instance and request of defendant. Judgment went for plaintiff. Defendant appeals from an order of court denying his motion for a new trial. His sole contention is that the finding of the court is not supported by the evidence.

The evidence clearly supports the finding. It tends to prove that plaintiff, while in charge of the Country Club House at Ocean Park and conducting a restaurant in connection therewith, was requested by defendant to furnish to the members of certain designated parties accustomed to gather at said club house lunches and such refreshments as they might require, the actual cost of which should be charged to defendant, who promised and agreed to pay the same each month; that plaintiff performed the services and furnished the refreshments so requested, charging therefor actual cost; that she rendered defendant a final statement of account in the sum of \$525.70, which was the actual cost to her of furnishing said lunches and refreshments, and requested him to pay the amount thereof, which he agreed to pay on the following Saturday, but failed to do so, promising it at a future date. Defendant never disputed the bill, but failed to pay the same. The fact that the testimony of the plaintiff is contradicted by defendant constitutes no ground for reversing the order of the court in denying a new trial.

There is no merit in the appeal, and the order is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

16 Cal. App. 113

WAKEFIELD v. WAKEFIELD. (Civ. 847.)

(District Court of Appeal, Second District, California. April 29, 1911.)

1. DIVORCE (§ 160*)—DEFAULT JUDGMENT—FORMAL ENTRY.

Where plaintiff in an action for divorce did not answer defendant's cross-complaint, and more than 30 days after the time to answer having expired, the record showed that both parties appeared by counsel, that defendant obtained leave to withdraw her original cross-complaint, that evidence was heard in support of the amended cross-complaint, and, plaintiff offering no evidence in support of his complaint, judgment was ordered in accordance with the amended cross-complaint, it would be assumed that notice of the trial was regularly given, or that the cause was heard by consent; and hence plaintiff was estopped to question the regularity of the judgment, because no formal entry of his default in failing to answer had been made before an interlocutory judgment was ordered.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 521; Dec. Dig. § 160.*]

2. JUDGMENT (§ 131*)—FORMAL ENTRY.

Formal entry of a default need not be made to confer jurisdiction to enter judgment against the defaulting party, even in the absence of notice of hearing.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 160, 245; Dec. Dig. § 131.*]

3. DIVORCE (§ 101*)—CROSS-COMPLAINT—ESTOPPEL.

Where plaintiff in a suit for divorce at no time objected in the trial court to defendant's filing a cross-complaint or to the filing of an amended cross-complaint, and not only failed to answer the latter, but appeared at the trial and waived the right to make any proof of the allegations of his complaint, or in defense of those of the amended cross-complaint, he was estopped thereafter to object that the action was not of a kind permitting the filing of a cross-complaint praying judgment for divorce.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 101.*]

4. DIVORCE (§ 104*)—AMENDED CROSS-COMPLAINT—PRAYER.

Where an original cross-complaint was attached to the answer, and in the amended cross-complaint the prayer of the original answer and cross-complaint was referred to for the relief demanded, the original cross-complaint remained on file and continued as a part of the amended cross-complaint, though the original cross-complaint was withdrawn by leave of court.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 328-339; Dec. Dig. § 104.*]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by Franklin W. Wakefield against Lena H. Wakefield. From an interlocutory judgment in favor of defendant, plaintiff appeals. Motion to dismiss appeal denied, and judgment affirmed.

Anderson & Anderson and A. J. Treat, for appellant. Stearns & Sweet, for respondent.

JAMES, J. An appeal is taken by plaintiff from an interlocutory judgment of divorce entered in favor of defendant. Plaintiff instituted this action for the purpose of obtaining the custody of one Franklin Webster Wakefield, Jr., and also prayed for an order giving him the right to visit Joseph Sefton Wakefield. Plaintiff and defendant were husband and wife; the two persons above named were minor children of plaintiff and defendant, and at the time this action was instituted were in the custody of the wife, who was then living separate and apart from her husband. An answer was filed to plaintiff's complaint, denying the allegations thereof, and, by way of cross-complaint for divorce, the defendant charged the plaintiff with having committed adultery. Plaintiff answered the cross-complaint of defendant, and on June 19, 1909, an amended cross-complaint was filed, wherein the defendant set up a different cause of action for divorce, charging the plaintiff with having failed to provide for her the common necessities of life for more than one year prior to the filing of said cross-complaint. This amended cross-complaint was served upon the attorney for plaintiff on the 10th day of June, 1909. No answer was made thereto, and on July 22, 1909, after the time allowed by law for the defendant to appear and make answer to the cross-complaint had expired, the cause came on for hearing before the

court. The minute entry of the court, made on July 22, 1909, is shown, and it appears therefrom that both parties were represented in court, and that the defendant asked and received leave to withdraw her cross-complaint as first filed, and that evidence was heard in support of the allegations contained in the amended cross-complaint; plaintiff offering no evidence at all in support of his complaint. The minute entry further shows that after the hearing of the testimony an interlocutory decree of divorce was ordered entered in favor of the defendant, in accordance with the prayer of her amended cross-complaint.

[1, 2] On this appeal plaintiff, among other points urged, contends that, as the record does not show that a formal entry of the default of the plaintiff for not answering the amended cross-complaint was made, the court was without right to proceed and render judgment. The record does show that issues had been made up on the complaint and the answer of the defendant, and that the cause came on regularly for hearing; that both parties were present in court, the plaintiff by his attorney and the defendant with her counsel. The time within which the defendant was allowed to make answer to the amended cross-complaint had expired about 30 days prior to the time of trial. It does not appear that the plaintiff at any time, at or prior to the date of hearing, offered or asked leave to file an answer to the amended cross-complaint. He was present by counsel in court when the matter came on for hearing and did not then, so far as the record shows, offer any evidence, either in support of the allegations of his complaint or in denial of the allegations of the amended cross-complaint. Under this state of facts, plaintiff is not in a position to question the regularity of the judgment on the ground that a formal entry of his default in failing to answer the amended cross-complaint should have been made before the interlocutory judgment was ordered. It must be assumed from the record as it is here presented that notice of trial was regularly given, or that the cause was heard on the date mentioned by the consent of the parties. It is very evident that the plaintiff had notice of the hearing, for the record shows that his counsel was in court to represent him. It has been held, however, even in cases where no notice of hearing is given, that a formal entry of default need not be first made in order that the court shall have jurisdiction to enter judgment against a defaulting party. *Hibernia Savings & Loan Society v. Matthal*, 116 Cal. 424, 48 Pac. 370.

[3] It is further objected by the plaintiff that this action was not of a kind permitting the filing of a cross-complaint wherein a divorce is prayed for, and for that reason that the court was without authority to enter the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

judgment as made. Whether or not the filing of a cross-complaint is an appropriate proceeding in an action of this kind seems immaterial, for the reason that plaintiff by his conduct has estopped himself from now raising that question. At no time in the superior court did the plaintiff object to the filing of the cross-complaint or to the filing of the amended cross-complaint. As before stated, he not only made no answer to the amended cross-complaint, but appeared at the trial and waived the right to make any proof in substantiation of the allegations of his complaint, or in defense of the allegations of the amended cross-complaint. By his action in so doing, he conceded the right in the defendant to pursue the remedy which she sought by her pleading. *Riverside Heights, etc., Co. v. Trust Co.*, 148 Cal. 457, 83 Pac. 1003. The amended cross-complaint set out in sufficient form and substance a cause of action in favor of defendant against the plaintiff.

[4] The prayer attached to the amended cross-complaint was in the following words: "Wherefore, defendant prays judgment as prayed for in her original answer and cross-complaint on file herein." Appellant further argues that this prayer is insufficient to sustain the judgment awarded, because the original cross-complaint was withdrawn by leave of court, and therefore that there was no pleading on file to which the prayer of the amended cross-complaint could refer. The original cross-complaint was attached to the answer of the defendant, and the prayer in conclusion was as much a part of the answer as of the cross-complaint. The prayer of the original cross-complaint, so considered, remained as a part of the files of the case and was undoubtedly sufficient, by reference thereto, in aid of the prayer of the amended cross-complaint. Moreover, it would seem that as the cause of action presented by the amended cross-complaint was of equitable character, and the facts pleaded were sufficient to support the decree rendered by the court, the prayer might be disregarded. In *re De Leon*, 102 Cal. 541, 36 Pac. 864; *Johnson v. Polhemus*, 99 Cal. 245, 33 Pac. 908. In the case last cited it is true that an answer had been filed by the defendant, but for that reason the case should not be distinguished from this one, because here the parties appeared and proceeded to trial in all respects as though an answer had been filed to the amended cross-complaint.

The motion of respondent to dismiss the appeal on the ground that notice thereof was served more than six months after the entry of judgment must be denied. The transcript shows that the judgment was entered in the judgment book on December 15, 1909, and the notice of appeal was filed on March 24, 1910. Under the provisions of section 131, Civil Code, an appeal may be taken from an

interlocutory judgment of divorce within six months after the entry of the decree.

The motion to dismiss the appeal is denied; the judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

16 Cal. App. 141

FIRST STATE BANK OF CALEXICO v.
BLACKINTON. (Civ. 986.)
(District Court of Appeal, Second District,
California, May 3, 1911.)

1. JUDGMENT (§ 101*)—DEFAULT—PLEADING.
A complaint in an action on a note, which treats the principal and interest separately, and which alleges that interest has been paid to a designated date, and that no part of the principal has been paid, but which is silent as to whether interest subsequently accruing has been paid, does not support a default judgment for interest from the designated date to the filing of the complaint.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 163-170; Dec. Dig. § 101.*]

2. APPEAL AND ERROR (§ 1151*)—DEFAULT JUDGMENT—REVERSAL.

Where a default judgment is for a sum in excess of that justified by the complaint, and the amount of the excess is not ascertainable by the record, the judgment cannot be modified, but must be reversed, and the cause remanded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498-4506; Dec. Dig. § 1151.*]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the First State Bank of Calexico against J. C. Blackinton. From a default judgment for plaintiff, defendant appeals. Reversed and remanded.

Conkling & Brown, for appellant. F. P. Willard, for respondent.

SHAW, J. Action to recover upon a promissory note. The complaint alleges that defendant made and delivered to plaintiff his certain promissory note, dated October 21, 1908, due on or before one year after date, and bearing interest at the rate of 10 per cent. per annum, payable quarterly; that interest thereon had been paid up to October 21, 1909, and that no part of the principal of the note had been paid. The prayer was for the principal sum of \$5,000 and interest thereon from October 21, 1909, at the rate of 10 per cent. per annum, as provided by the terms of the note. Defendant failed to answer, and judgment was rendered on default in accordance with the prayer of the complaint.

Defendant appeals from the judgment and insists upon reversal for the reason that, in addition to the rendition of judgment for the principal sum of \$5,000, the court gave judgment for interest accruing subsequent to October 21, 1909, in the sum of \$229.16.

[1] The verified complaint treats the principal and interest specified in the note sep-

arately, it being alleged that no part of the principal has been paid, but is silent as to whether or not the interest accruing after October 21, 1909, for the amount of which the court gave judgment, remained unpaid. There is neither direct allegation of nonpayment of interest, nor an allegation from which such fact is implied. *Penrose v. Winter*, 135 Cal. 289, 67 Pac. 772; *Ward v. Clay*, 82 Cal. 502, 23 Pac. 50, 227. Hence there is nothing in the complaint upon which to base judgment for the amount of this interest. It follows that the judgment, in so far as it pertains to interest accrued from October 21, 1909, to the date of the filing of the complaint, is erroneous.

[2] It is impossible to order a modification of the judgment, because the record does not disclose when the complaint was filed. Inasmuch as the default judgment is for a sum in excess of that justified by the complaint, the amount of which excess, for the reason given, is not ascertainable upon the record, it must therefore be reversed and remanded for such further action as to the parties may seem advisable; and it is so ordered.

We concur: ALLEN, P. J.; JAMES, J.

(16 Cal. App. 164)

OLIVER v. WARREN. (Civ. 774.)

(District Court of Appeal, Third District, California. May 5, 1911.)

1. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.

Findings on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

2. APPEAL AND ERROR (§ 1048*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where a witness, in an action to cancel a deed by plaintiff's intestate, on the ground of his mental incapacity, had testified as to the mental condition of deceased, questions on cross-examination to fix the time of the last visit of the witness to deceased, while not within the rules governing cross-examinations, are harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4145; Dec. Dig. § 1048.*]

3. EVIDENCE (§ 278*)—DECLARATIONS BY DECEASED AGAINST INTEREST.

In an action by an administrator to cancel a deed executed by his intestate on the ground of mental incapacity, the testimony of a witness as to declarations made to him by the deceased, favorable to the validity of the deed, were properly admitted.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1137, 1138; Dec. Dig. § 278.*]

4. WITNESSES (§ 198*)—COMPETENCY—PRIVILEGED COMMUNICATIONS.

Under Code Civ. Proc. § 1881, subd. 2, making communications between attorney and client privileged, the testimony of an attorney who had prepared a deed and taken the grantor's acknowledgment to it, as to his impression of the grantor's mental condition at that time, is

not inadmissible as a communication between attorney and client.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 753; Dec. Dig. § 198.*]

5. APPEAL AND ERROR (§ 1050*) REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where, in view of the other facts in an action to cancel a deed on the ground of the deceased grantor's mental incapacity, it was not important to show the money value of the grantor's support, which was one of the considerations of the deed, the admission of evidence of such value is not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.*]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by J. N. Oliver, administrator of the estate of J. K. Oliver, deceased, against Thekla Warren. Judgment for defendant, and plaintiff appeals. Affirmed.

F. P. Otis and C. M. C. Peters, for appellant. J. B. Curtin and Rowan Hardin, for respondent.

CHIPMAN, P. J. This is an action to set aside a certain deed made by J. K. Oliver, plaintiff's intestate, to defendant, to the surface of the Table Mountain Alpha Gravel Placer Mining Claim, designated for convenience the Alpha Mine, and for a reconveyance of the same to plaintiff. Defendant had judgment, from which and from the order denying his motion for a new trial, plaintiff appeals.

On April 9, 1906, plaintiff's said intestate was the owner of the placer mining ground described in the complaint, and on that day executed and delivered to defendant a deed conveying to her "the surface of that certain placer mining claim [describing it] for and in consideration of the sum of \$389.35 * * * and other valuable considerations." The grantor granted to the grantee "the use of the water from the tunnel upon said premises," not, however, to interfere with mining the claim, reserving to himself all the minerals in the land and the right to remove the same, with the right of ingress and egress to and from said premises for mining purposes, and also reserving certain pasturing privileges for his stock. The deed contained the following provision: "In consideration of this conveyance, the party of the second part agrees that the party of the first part shall remain upon and occupy the cabin now occupied by him upon said premises, or a room in the dwelling house to be constructed upon said premises by the party of the second part, and the party of the second part agrees to care for, board, and suitably support and maintain the party of the first part for and during his natural life."

It is averred in the complaint that at the time this conveyance was made the grantor was very old, being about 80 years of age, was infirm in body and mentally weak, and

unable to understand the nature of the deed executed by him; that defendant knew of his said weakened condition, mentally and physically; "that said defendant wholly failed and refused to suitably support and maintain said J. K. Oliver during his natural life, and that said defendant has utterly failed and refused to comply with the terms and conditions of said deed and to carry out the provisions therein made, and that defendant made said promises without any intent on her part to perform the same."

The court found against plaintiff on the issue of the alleged mental incapacity of the said J. K. Oliver at the time he executed said deed, finding that he was then mentally competent to transact said business; that defendant paid as consideration for said deed the sum named in the complaint and also the further sum of \$50; that the said land embraced 76.37 acres, and that the value of the interest conveyed by said deed did not exceed \$439.35, the amount of the money consideration paid therefor, and was not of greater value than \$1.75 per acre; that defendant and her husband built a dwelling on said land shortly after April 9, 1906, and occupied the same and offered to the said Oliver a room therein, which he declined, preferring to remain in his cabin near by; that he continued to occupy said cabin from April 9, 1906, until January 22, 1908, during all which time "said defendant and her husband did care for, board, and suitably support and maintain the said J. K. Oliver in a good and proper manner and at their own cost and expense, the reasonable value of which board and maintenance was the sum of \$20 per month from the 9th day of April, 1906, to the 22d day of January, 1908," and that during that entire period the said Oliver "was sound of mind and well able to attend to any business whatever, and not in any weakened condition, and said J. K. Oliver was not induced by defendant to convey said property to defendant, but said J. K. Oliver entered into said contract freely and voluntarily, with a full understanding of his act in so doing, and said transaction was unaccompanied by any inequitable incident; that all of the promises made by the defendant to said J. K. Oliver were made with intent on her part to fully perform the same, and defendant never did at any time or at all refuse to keep any promise or perform any promise by her made to said J. K. Oliver." It is then found that on January 22, 1908, "without the knowledge, consent, or connivance of the said defendant, the said J. K. Oliver, at the request of J. N. Oliver, the individual who is administrator of said estate and plaintiff herein, left the said premises * * * and did not again return to or live upon said lands and premises, and defendant was thereby prevented from caring for, boarding, and suitably supporting and maintaining the said J. K. Oliver on the said premises; and said J. K. Oliver left

said premises through no fault or neglect of said defendant or her husband." It was admitted that said J. K. Oliver died on November 9, 1908.

[1] There were other findings, but the foregoing cover the principal controverted issues. The case does not seem to call for an analysis of the evidence. There was some conflict in the testimony as to the mental capacity of plaintiff's intestate during the period found by the court. There was, however, sufficient evidence to support the findings, which, having been accepted by the court, is conclusive upon us.

Aside from certain rulings at the trial, appellant confines his argument to the insufficiency of the evidence to support the findings. The most that can be said upon this question is that the testimony is conflicting upon all the findings challenged, and we need go no further than to make this discovery.

[2] Exceptions numbered in the transcript as 1, 2, and 3 relate to the same matter. Witness Fitzgerald was called by plaintiff to testify as to the mental condition of deceased in 1906 and down to January 22, 1908. On cross-examination witness was asked if he knew about the deed to J. N. Oliver, made in January, 1908, and answered, without objection, that plaintiff told him about it. He was then asked when, with reference to the date of the deed, he told him. Other questions followed, apparently for the purpose of fixing the time of the last visit of the witness to the cabin of deceased. This was probably not within the rules governing cross-examination, but the questions were harmless. Exceptions 4, 5, 6, and 7 relate to the same matter, and are of the same character.

[3] Witness Slonicker was called by defendant and testified that he knew J. K. Oliver about the 9th of April, 1906, and afterwards, and "thought he was perfectly sane at that time." He was then asked several questions as to statements made to witness concerning the treatment of Oliver by defendant; and also about the contract he had with defendant. The court allowed the answers, over plaintiff's objection, noted as exceptions 8, 9, 10, and 11, on the ground that they were hearsay declarations made by a deceased. He answered: "He appeared well satisfied; he said he never was treated so well in his life as he was after he got with the Warrens." We think the ruling was correct.

[4] Attorney F. W. Street was a witness for defendant, and testified to his having prepared the deed from Oliver to defendant and to facts occurring at the time. He also testified to Oliver's soundness of mind at that time—April 9, 1906. He was shown the deed from J. K. to J. N. Oliver, dated January 22, 1908, of which he took the acknowledgment on that day. He was then asked: "Q. Now on that date I will ask you if John

K. Oliver was mentally competent?" Counsel for defendant objected, as inadmissible under subdivision 2, § 1881, of the Code of Civil Procedure. We do not think Mr. Street's observations of Oliver's mental condition at that time and his testimony as to the impressions he then received of Oliver's mental condition could be said to fall within the class of communications between client and attorney which the law will not allow to be disclosed, if the parties can be said to have sustained that relation, which we doubt. Mr. Street could testify as to his opinion of Oliver's mental condition without divulging any communications between him and his client.

[5] Exceptions 14 and 15 arose out of objections to evidence of the reasonable value of the care and support given Oliver by defendant. One of the considerations mentioned in the deed to defendant was the support of Oliver. In view of other facts established, it was not important to fix a money value on the support given Oliver, but it was not prejudicial to allow it. Generally it may be observed that the alleged errors, if conceded to be such, were of too little consequence to have produced any substantial prejudice.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

16 Cal. App. 77

STANDARD INVESTMENT CO. v. KINGSBURY, Surveyor General. (Civ. 784.)

(District Court of Appeal, Third District, California. April 24, 1911.)

PUBLIC LANDS (§ 54*)—SCHOOL LAND—SALE—PAYMENT OF PRICE.

Pol. Code, § 3494, provides that school lands shall be sold at the rate of \$1.25 per acre, payable 20 per cent. of the principal within 50 days from the date of the certificate of location issued to the purchaser, and the balance, bearing interest at the rate of 7 per cent. per annum in advance, within one year after the passage of any act requiring such payment, or before, if desired by the purchaser. Section 3427 declares that the county treasurer shall compute interest on all sales from the date of the approval of the survey or the date of the certificate of location to the 1st of January following on which the interest falls due, after which time all payments of principal or interest fall due on the 1st day of January. *Held* that, while payments of the principal in the absence of a legislative act requiring payments may be made whenever the purchaser desires, interest payments must be made in advance on all deferred payments on the 1st day of January following the date of the approval of the location, and on each 1st day of January thereafter, so that where an assignee of the certificate omitted to pay interest due on the certificate on January 1, 1910, and on March 8th desired to pay the full amount remaining due, he was not entitled to a rebate of interest for the balance of that year, but was required to pay the principal and interest for that entire year.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 152-169; Dec. Dig. § 54.*]

Appeal from Superior Court, Sacramento County; P. J. Shields, Judge.

Application by the Standard Investment Company for a writ of mandamus against W. S. Kingsbury, as Surveyor General, and ex officio register of the State Land Office. From an order denying the writ, petitioner appeals. Affirmed.

M. W. McIntosh, for appellant. U. S. Webb, Atty. Gen., and Malcolm C. Glenn, Asst. Atty. Gen., for respondent.

BURNETT, J. Plaintiff, being the owner, by assignment, of a certificate of purchase of state school lands, which had been purchased on credit, omitted to pay in advance the annual 7 per cent. interest due thereon the 1st day of January, 1910, but on the 8th day of March, 1910, paid to the county treasurer of the proper county the full amount of principal and interest accrued to the latter date, and on or about said time surrendered the certificate and requested the Surveyor General to prepare and cause to be issued to plaintiff a patent for said lands, which the Surveyor General refused to do, assigning as a reason therefor that the plaintiff did not on January 1, 1910, pay the year's interest to January 1, 1911. Upon the filing of a complaint setting forth these facts, an alternative writ of mandate was issued in accordance with the order of the court below. Upon the hearing a general demurrer filed by respondent was sustained and the plaintiff allowed 20 days to amend its complaint. Plaintiff declined to amend, and a judgment of dismissal was entered, from which the appeal has been taken.

Section 3494 of the Political Code provides that "the unsold portion of the 500,000 acres granted to the state for school purposes, the sixteenth and thirty-sixth sections and lands selected in lieu thereof, must be sold at the rate of \$1.25 per acre, in gold coin, payable: 20 per cent. of the principal within fifty days from the date of the certificate of location issued to the purchaser; the balance, bearing interest at the rate of seven per cent. per annum, in advance, is due and payable within one year after the passage of any act by the Legislature requiring such payment, or before, if desired by the purchaser." It is to be observed that, except the 20 per cent. required to be paid within 50 days from the issuance of the certificate of location, the time for the payment of the principal is optional with the purchaser. He may pay it all at any time. The Legislature may provide also that the balance of the principal must be paid within one year, but it has enacted no such statute. The section expresses also, as clearly as can be, the legislative intent that the interest on whatever balance of principal may be due shall be paid in advance.

The rule providing specifically how inter-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

est on deferred payments for all state lands shall be computed and when payable is found in section 3427 of the Political Code as follows: "The county treasurer must compute interest on all sales from the date of the approval of the survey, or the date of the certificate of location to the 1st of January following the day upon which the interest falls due; after which time all payments of principal or interest fall due on the 1st day of January." Without doing violence to the simple and explicit language employed by the Legislature in a matter admittedly within its control, it is impossible, therefore, to avoid the conclusion that on the 1st day of January, 1910, there was due from plaintiff to the state interest on the balance of the principal for one year at the rate of 7 per cent. per annum. Since it was not paid, it would still be due on the 8th day of March following. It is, indeed, conceded by appellant that said condition existed on the 1st of January, but it is contended that by the subsequent tender of the balance of the principal plaintiff become entitled to an abatement of over three-fourths of the interest that was due on said 1st day of January. There is no warrant in the statute for such contention. Neither the county treasurer, Surveyor General, nor any one else is authorized to waive the payment of any portion of this interest. Indeed, if the interest is not paid by the 1st day of May, the land is included in the delinquent list which is required to be furnished by the register to the district attorney of the county in which the land is situated. Section 3546, Pol. Code. The district attorney thereupon is required to give notice that, if the amount due is not paid within 50 days thereafter, he will commence suit to foreclose the interest of the purchaser in the land. Id., § 3547. The holder of the certificate, however, at any time before the filing of the decree of foreclosure may pay the amount due the state and the costs of suit to the time of payment and thereby be restored to his rights in the premises. Sec. 3551. In all these sections the "amount due" unmistakably contemplates one year's interest in advance computed on the 1st day of January, and there is not a word to indicate a purpose to relinquish any part of the interest if a complete settlement be made subsequent to said date. The position of appellant really amounts to the contention that by a failure to comply with its statutory duty to pay the interest on the 1st day of January a portion of its obligation is remitted as a reward for its dilatory payment of the principal. This is hardly consonant with conventional business principles or a rational view of the legislative intent.

The infirmity of appellant's claim is further shown in the circumstance that, if the year's interest is not paid prior to the 1st day of May, foreclosure will follow, and the only way to avoid the decree is to pay all

that is due the state, together with accrued costs. It is not provided that the payment of the principal alone subsequent to January the 1st will excuse the Surveyor General from reporting the nonpayment of the interest nor relieve the district attorney of the duty of foreclosure. Since the land, therefore, after the first day of the year is burdened with a debt to the state for interest that renders it liable to be sold under foreclosure, it is obvious that the state, while this interest remains unliquidated, is in no position to execute a patent, and thereby waive its claim to assert any incumbance.

Appellant has apparently proceeded upon the theory that the Legislature has already passed an act requiring the payment of the balance of the principal within one year. If such a statute had been enacted, the situation might be different. As suggested by respondent, if the Legislature, in March, 1909, had passed an act requiring the payment of the balance within a year, or by March, 1910, the last payment of interest would probably be reduced proportionately; the final payment having been made a matter of compulsion, and not of discretion. But as the law exists now the payment of the balance of the principal is a mere privilege, which the purchaser may or may not exercise. The difference is aptly illustrated by reference to two promissory notes. In the case of a note, made in March, 1910, payable two years after date, the first payment of interest to be made in advance to January, 1911, and thereafter the interest to be payable yearly in advance on the 1st day of January of each year, the principal, of course, would be due in March, 1912. If the principal is paid when due, the last installment of interest that could be exacted would probably not extend beyond that date. But if a promissory note provided that the interest should be payable yearly in advance, on January 1st, and the principal might be paid on or before 10 years after date, then, of course, the maker might pay the principal at any time within the year, but it would not relieve him of the duty of paying the whole year's interest, which became due on the first day of the year.

There is nothing unreasonable, unjust, or oppressive in the requirement of the statute. It provides for uniformity in the purchase of these public lands, and contemplates that the payment of the balance of the purchase price as well as the interest due on any unpaid balance shall be made on any first of the year. The purchaser can easily escape the payment of a year's interest in advance by liquidating the principal on the first day of the year, but if he defers, as in the case at bar, the payment of the balance of the principal, he cannot complain that the Surveyor General exacts what the statute demands and with which all purchasers must be deemed familiar.

There is manifestly no inconsistency between this position and the direction contained in the form of approval issued by the Surveyor General as follows: "The county treasurer of said county will, within fifty days of this date, receive from applicant the sum of ——— dollars, being payment in full for said land, or the county treasurer will, at the option of said applicant, receive the sum of ——— dollars, being twenty per cent. of the purchase money, with interest on the balance at the rate of seven per cent. per annum in advance from the date of this approval to the first day of January next." The law gives the purchaser the privilege of paying the entire principal within 50 days without interest, the statute requiring interest only on the balance of the principal remaining unpaid. Appellant sees, in this interpretation of the law, an example of penalty or forfeiture, in that it requires the payment of interest in advance upon money that the purchaser is not using. By calling it a penalty or forfeiture we cannot disguise nor obscure the plain, simple fact that the law does demand the interest in advance, that this is one of the terms of the contract to which the purchaser has agreed, and there can be no question that the Legislature has the right to impose such conditions for the disposition of the state lands.

Respondent, in his brief, calls attention to the various statutes upon the subject, beginning with the act of 1855, all exhibiting the same purpose to hold the purchaser strictly to the payment of the interest in advance. For instance, the act of 1855 (Stats. 1855, p. 189) for the sale of swamp and overflowed lands provided that the purchaser, if he desired, might have a credit of five years within which to pay the purchase price "by paying interest at the rate of ten per cent. per annum upon the purchase money, the interest in all cases to be paid one year in advance." It provided, also, that, if the purchaser "shall fail or neglect to pay the interest as required by this act for the space of one year from the time such interest may become due, * * * such neglect or failure shall work a forfeiture of such lands, and the same shall be resold as if no purchase had been made." In *Borland v. Lewis*, 43 Cal. 572. It is said, in reference to this provision, that "in our judgment it was intended by the sixth section to make the failure to pay the interest for one year after it became due operate as a complete forfeiture of the purchaser's right in and to the land."

Without specific reference to them, it may be said that the other statutes are similar in their requirement as to the interest; the only difference being the date from which the interest should be computed. Since 1868 the rule has been to compute the interest to the 1st day of January following the date of the approval, or the date of the certificate of location, or, in case of lands purchased

prior to the enactment of the statute, to the 1st of the following January. The purpose of the change was undoubtedly to make the interest on the various locations fall due at the same time, thereby simplifying and facilitating the work of the Surveyor General in his reports and of the district attorneys in their proceedings against delinquent purchasers.

The suggestion is made by appellant that the practice for many years has been in accordance with his construction of the statute, and it is urged that the practical interpretation of the law by those charged with its administration is entitled to great weight. In this connection the following is quoted from Sutherland's Statutory Construction, § 309: "A practical construction of long standing by those for whom the law was enacted will not be lightly questioned, especially in matters of form, though it will not be allowed to defeat the manifest purpose of the statute. * * * The practical construction given to a doubtful statute by the public officers of the state and acted upon by the people thereof is to be considered—it is perhaps, decisive, in a case of doubt. This is similar in effect to a course of judicial opinions. The Legislature is presumed to be cognizant of such construction, and, after long continuance without any legislation evincing its dissent, courts will consider themselves warranted in adopting that construction. Contemporaneous construction and official usage for a long period, by the persons charged with the administration of the law, are among the legitimate aids in the construction of statutes." But, granting that the practice has been as claimed by appellant and that the courts must take judicial notice of it, still, as stated above, this would simply be an aid to the construction of a doubtful statute, and it could not be allowed to defeat the manifest purpose of the Legislature. We think there is no doubt in the case before us as to what the law requires of respondent, and, in recapitulation, we adopt substantially his language, as follows: First. Section 3494 of the Political Code provides for the payment of interest in advance on deferred payments. Second. Section 3427 provides for the payment of the first interest in advance up to the 1st day of January following the date of the approval, and all subsequent payments fall due on the 1st day of January. Third. By section 3513, if payment is not made within 50 days after approval, the location is void. This payment must be either in full of \$1.25 per acre, or 20 per cent. and interest in advance till the following January. Fourth. If the subsequent payments of interest are not made on the 1st day of January, when due, no forfeiture is provided, but in May of each year a delinquent list is sent to each of the various district attorneys, containing a statement of such fact, and, after publication thereof, foreclosure is made. Before filing judgment in such foreclosure proceedings, the purchaser

may be restored to his rights by paying the amount due. This would include the interest which became due in advance on the preceding January. Fifth. The privilege given to an applicant to pay the balance remaining unpaid before an act of the Legislature requiring such payment, in no manner relieves a purchaser from paying interest on January 1st of each year, in advance, if the principal be not paid before that time. Sixth. The adoption of the theory of appellant would mean the waiver of payment of interest after it became due and payable, which the state has not authorized. Seventh. The construction adopted by the trial court gives harmonious effect to all of the said sections of the Code, follows the unequivocal direction of the statute, and therefore should be upheld.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

16 Cal. App. 72

SWIFT et al. v. BOARD OF SUP'RS OF
SANTA BARBARA COUNTY (OOTH-
CUT, Intervener). (Civ. 941.)

(District Court of Appeal, Second District, California. April 24, 1911.)

1. HIGHWAYS (§ 77*) — DISCONTINUANCE — PROCEEDINGS—NOTICE TO LANDOWNERS.

Pol. Code, § 2681, provides that any 10 freeholders may petition the board of supervisors to alter or discontinue any road or lay out a new road. Section 2684 declares that on the filing of a petition and bond viewers shall be appointed to view and survey any proposed alterations of an old or opening of a new road, and submit an estimate, including the purchase of a right of way and their views of the necessity thereof. Section 2688 provides that on the filing of the viewers' report the board shall fix a day for hearing the same, and that the board shall hear the evidence offered for or against the proposed alterations or new road, and declare the damages awarded to each nonconsenting landowner over whose land they shall order the road to be opened. Section 2643, subd. 3, makes it the duty of the board without hearing evidence to abandon by proper order such roads as are not necessary for public use. *Held*, that since no provision is made for the appointment of viewers except in the case of the establishment of a new road, or the alteration of an old one, and section 2688 provides for notice and hearing only in cases where viewers are appointed, jurisdiction of the board in a proceeding contemplating only the abandonment of a road between designated termini does not depend on the giving of notice under section 2688.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 263-276; Dec. Dig. § 77.*]

2. CONSTITUTIONAL LAW (§ 291*) — DUE PROCESS OF LAW—DEPRIVATION OF PROPERTY—ABANDONMENT OF HIGHWAY.

An abutting owner has no property right in a country road; and hence an abandonment thereof without notice by the constituted authorities does not constitute a deprivation of such abutting owner's property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 870-876; Dec. Dig. § 291.*]

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

The Board of Supervisors of Santa Barbara having abandoned a public road, Louis F. Swift and another applied for a writ of review, and Helen R. Oothcut intervened. From a denial of such application, Swift and others appeal. Affirmed.

O. F. Carrier and Richards & Carrier, for appellants. W. S. Day, for respondent Board of Sup'rs of Santa Barbara County. G. H. Gould, for respondent Oothcut.

SHAW, J. Appeal from an order denying an application for a writ to review the action of the board of supervisors of Santa Barbara county in abandoning a public road without notice to the owners of property abutting thereon.

Pepper lane was, and for a number of years had been, a public highway extending from the east line of Sycamore Canyon road in a northeasterly direction to the west line of Hot Springs avenue. Petitioners were the owners of the land on the south side of Pepper lane, the lands of one fronting and abutting on Sycamore Canyon road and that of the other fronting and abutting on Hot Springs avenue. Swift's ownership of the fee extended to the center of Pepper lane, from which he had an entrance to his property. Faulkner did not own any part of the fee in said land and maintained no entrance from said highway to her premises. On Saturday, the 2d day of October, 1909, a petition sufficient in form and substance as provided by section 2681, Political Code, and signed by more than 10 freeholders, was filed with the clerk of the board of supervisors, praying for an order whereby the road known as Pepper lane should be vacated and abandoned. On the following Monday, October 4, 1909, at a regular meeting of the board of supervisors, and without any notice of the filing of the petition or time and place of the hearing thereof, the board made an order as prayed for abandoning said road between the points named as a public highway. Thereafter petitioners applied to the superior court for a writ of review of the proceedings, alleging that the action of the board of supervisors was had and taken without jurisdiction. In response to an order to show cause, the board appeared by its attorney and made answer to the petition, and by leave of court Helen R. Oothcut, respondent herein, appeared as an intervener and filed her complaint in intervention, denying the allegations of the petition and alleging that the board had jurisdiction in the proceedings. At the hearing the court made an order denying the application, and petitioners appeal therefrom.

[1] Appellants insist that the making of the order abandoning the road as a public

highway was and is void for the reason that it was made without a reference to viewers and in the absence of any notice of the hearing given in the manner prescribed by section 2688, Political Code. This section is one of a number of sections found under the title of "Laying out, Altering, and Discontinuing Roads," and constituting article 6, part 3, title 6, chapter 2, Political Code. Referring briefly to these sections, we find that "any ten freeholders who will be accommodated by the proposed road * * * may petition, in writing, the board of supervisors to alter or discontinue any road, or to lay out a new road therein" (section 2681), which "petition must set forth the general route of the road to be abandoned, discontinued, altered, laid out, or constructed, and the names of the persons over whose land the same is to run, if known" (section 2682). The petition must be accompanied with a bond in double the amount of the cost of viewing, laying out, or altering of the road, conditioned for the payment of the costs of viewing and surveying the same (section 2683). Upon the filing of the petition and bond, viewers are to be appointed by the board of supervisors, whose duty it shall be to view and survey any proposed alteration of an old or opening of a new road, and submit an estimate of the change, alteration, or opening, including the purchase of the right of way, and their views of the necessity thereof (section 2684). They must view and lay out the proposed alterations or new road over the most practicable route (section 2685); and, when the view and survey of the proposed alteration or new road is completed, must report to the board of supervisors the course, termini, length, and probable cost of construction of the proposed road, an estimate of damage to the owner of any land over which it is proposed to run the road, the names of owners who consent to give the right of way therefor, together with the names of owners who do not consent, and the amount of damage claimed by each (section 2686). Section 2688 provides that, upon the filing of the report, the board must fix a day for hearing the same, and must give notice of the time and place of such hearing in the manner therein prescribed. "Said notice shall intelligibly describe the road to be abandoned, discontinued, altered, laid out, or constructed, and the lands over which the same is to run. * * *

* * * The board must, on the day fixed for the hearing, or to which it may be postponed or continued, hear the evidence offered by parties interested for or against the proposed alterations or new road; and must ascertain and by order declare the amount of damage awarded to each nonconsenting landowner over whose land they shall order the road to be opened." It will thus be seen that section 2688 provides for notice of a hearing only in those cases where viewers are appointed, whose duty it is to make a

report to the board as required by the preceding sections. No provision is made for the appointment of viewers, save and except in those cases where a new road is proposed, or it is proposed to change or alter the old one, which alteration may necessitate the abandonment of a part thereof and the taking in of new territory for the purpose of widening or straightening. It will also be noted that section 2688 makes no provision at the hearing for the introduction of any evidence offered by parties interested for or against abandonment merely, but only for or against proposed alterations or the opening of a new road. We are therefore of the opinion that where the proceeding contemplates the abandonment only of a road between designated termini, jurisdiction of the board to make the order does not depend upon the giving of notice of the hearing required by section 2688, Political Code. This construction is further strengthened by the fact that by subdivision 3 of section 2643, Political Code, it is made the duty of the board, of its own motion and without hearing evidence, to abandon by proper order such roads as are not necessary for the public use, and thus relieve the county of the expense and burden of their maintenance.

[2] As thus construed, appellants insist that the act is unconstitutional, in that it deprives the abutting owner of his property without due process of law. "The question, therefore, is," says counsel for appellants, "has the abutting owner a property right in a country road? It has been held to the contrary in *Levee District v. Farmer*, 101 Cal. 178 [35 Pac. 569, 23 L. R. A. 388]." The opinion in that case contains an extended discussion of the question and holds that the "vacation of a highway does not take from the individual residing thereon his property, either for public or private use, and that he cannot recover damages therefor, although he may sustain inconvenience and loss therefrom"—citing *Barr v. City of Oskaloosa*, 45 Iowa, 275. In 15 *American and English Encyclopedia of Law*, p. 402, it is said: "It is generally held that, in the absence of statutory provision, one whose land abuts on a highway is not entitled to damages on account of the discontinuance of the highway, his rights therein not being considered property within the protective clauses of the constitution." To same effect, see *Paul v. Carver*, 24 Pa. 207, 64 Am. Dec. 649; *State v. Deer Lodge Co.*, 19 Mont. 582, 49 Pac. 147; *Coffey Co. v. Venard*, 10 Kan. 95. Appellants endeavor to avoid the effect of the decision in *Levee District v. Farmer*, supra, by citing a number of authorities wherein it is held that a municipality cannot vacate a city street as against nonconsenting owners of property abutting thereon without compensation. There is a marked distinction between the rights of an abutting property owner upon a city street and one

upon a country road. As said in *Bradbury v. Walton*, 94 Ky. 167, 21 S. W. 869: "The streets of a town or city are acquired by grant with the implied right of ingress and egress to the abutting lot owner, the grantor, or the party making the dedication saying to the owners of lots, 'This right of ingress and egress you shall have'; but not so with an ordinary public road. The state creates the easement for the entire public. Its use is that of the public, one citizen having as much right to this use as the other; and, when its abandonment or nonuser is deemed necessary for the public good, the county court may discontinue." The board of supervisors in making the order abandoning the road merely surrender the rights which have been acquired by the public. If, by grant or otherwise, rights have been acquired by an abutting property owner, such rights are unaffected by the order (*Leverone v. Weakley*, 155 Cal. 395, 101 Pac. 304), but such owner may not insist that the public shall maintain a road for his private convenience and use. As disclosed by the record, Pepper lane was not necessary nor used for the purpose of ingress and egress to the property of Faulkner, and, while Swift had access therefrom to his property, it appears that by the abandonment he acquires exclusive dominion over the land to the center of the road, thus affording him a continued means of ingress and egress to his property from the abandoned public highway.

Under these circumstances, and upon the authority of *Levee District v. Farmer*, supra, we are compelled to hold that the order appealed from should be affirmed, and it is so ordered.

We concur: ALLEN, P. J.; JAMES, J.

16 Cal. App. 157

CONDE et al. v. SWEENEY, Sheriff.
(Civ. 772.)

(District Court of Appeal, Third District, California. May 5, 1911.)

1. FIXTURES (§ 21*)—MINING MACHINERY—VENDOR OF LAND AND CLAIMANT OF CHATELS—"AFFIXED TO LAND."

Civ. Code, § 660, provides that a thing is deemed affixed to land when it is imbedded in it, as in the case of walls; or permanently resting on it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws. Section 661 declares that sluice boxes and all other machinery or tools used in working or developing a mine are deemed affixed to the mine, and section 1013 provides that, when a person affixes his property to the land of another without an agreement permitting him to remove it, the thing affixed belongs to the owner, unless he chooses to require the former owner to remove it. Held that where mining machinery, consisting of electric motors, etc., was bolted to a concrete foundation placed in the earth or to a wood foundation, and the lighting transformer was on a pole

which was fixed in the ground, and an electric pump was bolted down in the mine, and all were used in working and developing the mine, such machinery and appliances, though placed on the premises by an assignee of the vendee of the mine, were fixtures as between creditors of such assignee and the vendor, holding title to the mine as security for unpaid purchase money; the contract of sale containing no provisions for removal.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 47-56; Dec. Dig. § 21.*]

For other definitions, see *Words and Phrases*, vol. 1, p. 249.]

2. ATTACHMENT (§ 178*)—EFFECT—INTERESTS AFFECTED—FIXTURES.

Where mining machinery and appliances were fixtures as between the vendor of the mine and the vendee's assignee, and such assignee made default in payment of the purchase price, for which the contract was forfeited, such fixtures were not subject to attachment at the instance of the assignee's creditors as against the vendor, though the attachment was levied three days prior to the expiration of the assignee's rights under the contract of sale; the attachment at most covering only the assignee's right to possession of the land and fixtures before default.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. §§ 528-534; Dec. Dig. § 178.*]

3. FIXTURES (§ 21*)—CREDITORS OF VENDEE'S ASSIGNEE—RIGHTS.

Where a vendor of a mine held the title as security for payment of the price by the vendee's assignee within a specified time, the assignee's possession before default did not confer on its creditors the right to remove fixtures which had become a part of the land as against the vendor; and this, notwithstanding the mines would be as valuable without the fixtures as they were at the time the contract of sale was executed.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 47-56; Dec. Dig. § 21.*]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Suit by James E. Conde and others against William Sweeney, as sheriff of Tuolumne county. From an order granting a permanent injunction, and from another order denying defendant's motion for new trial, he appeals. Affirmed.

J. B. Curtin, for appellant. F. P. Otis, for respondent.

BURNETT, J. There have been two appeals in this case; the first, from an order "granting plaintiffs an injunction pendente lite as prayed for in the complaint," and the present appeal from the judgment awarding a permanent injunction and from the order denying defendant's motion for a new trial. In the decision on the former appeal (110 Pac. 973) may be found a full statement of the facts, and it is deemed unnecessary to repeat them here. On said appeal, it may be said, also, two questions discussed herein by appellant were decided adversely to his contention, and as to them the decision must now be considered the law of the case. They involve the action of the court in allowing the supplemental complaint to be filed and

the sufficiency of the complaint in its statement of a cause of action. The only vital point to be determined on this appeal relates to the support for the findings furnished by the evidence. It may be stated that the cause was submitted upon the evidence taken at the hearing for a preliminary injunction, but that evidence was not brought up on the former appeal.

[1] Plaintiff James E. Conde testified that the machinery described in the complaint was placed upon the mine after he and his wife had entered into the contract for the sale of said land; that the electric motors were bolted to a concrete foundation which was placed in the earth, except the one in the blacksmith shop, and that was bolted to a wood foundation; that the lighting transformer was on a pole which was fixed in the ground, and the electric pump was also bolted down in the mine; that all the machinery was used in working and developing the Dreisam mines. It furthermore appears that the agreements as to the sale of the mine were silent as to the disposition of the machinery that might be placed thereon. There was no agreement nor understanding that any of said machinery might be removed. It necessarily results from the foregoing that the machinery became fixtures and a part of the real property. "A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws." Section 660, Civ. Code. "Sluice boxes * * * and all other machinery or tools used in working or developing a mine, are to be deemed affixed to the mine." Section 661, Id. Being fixtures, of course, they are included in the ownership of the real property. "When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed, except as provided in section ten hundred and nineteen, belongs to the owner of the land, unless he chooses to require the former to remove it." Section 1013, Civ. Code. The exception provided by section 1019 has no application here. It relates to certain fixtures, which have not become "an integral part of the premises," that a tenant may remove. In the case at bar there was no relation of landlord and tenant at any time.

As to these propositions, the situation before us is covered by the decision of the Supreme Court in *Pomeroy v. Bell*, 118 Cal. 635, 50 Pac. 683. Therein it is said: "The court finds that all of the property placed upon the land by the defendant Bell was permanently attached and affixed to the land, and that it was so affixed by him without any agreement with the plaintiffs, or either of them, permitting him to remove any por-

tion of the same. The property thus became a part of the land (Civ. Code, §§ 658-661), and under the provisions of section 1013 of the Civil Code belonged to the plaintiff."

[2] It is not controverted here that at the time of the trial the land was the property of plaintiffs, as the defendant had utterly failed to comply with the terms of the executory contract for its purchase. The fixtures, also, therefore, belonged to plaintiffs.

It is manifestly beside the question that the fixtures were placed upon the land by the Parlin Mining Company instead of by the Parlin Gold Mining Company. With the latter the plaintiffs entered into the contract for the sale of the land, and the said company executed a similar contract with the Parlin Mining Company for the purchase of the property without any agreement as to the fixtures, and under that contract the Parlin Mining Company entered into possession and placed said machinery. The latter company would, of course, have no greater right to the fixtures than would the original vendee had it made the improvements.

As the machinery belonged to plaintiffs, no one would contend that at the time of the trial, November 2, 1909, it could be taken under an attachment issued against the Parlin Mining Company; but it is claimed that the situation was different when the writ of attachment was actually levied, on the 29th day of August, 1909, as the contract for the purchase of said mine did not expire till three days later.

It is clear, however, that the attaching creditor could have no greater right than the Parlin Mining Company. The latter could not remove the machinery, as it had become a part of the realty, and the title of the company to the realty was simply a conditional, defeasible one that was actually defeated and terminated by the default in the payment of the purchase price. This very question was decided in the *Pomeroy Case*, supra, wherein it was held that the entry of the vendee "is by reason of the estate in the land which he claims in himself, and the improvements which he makes thereon are made in contemplation of his becoming the owner, and if permanently affixed to the land become a part of the realty as fully as if he were the absolute owner. Such improvements belong to the vendor in case the vendee subsequently declines to comply with his contract of purchase and the vendee has no right to remove them from the land." In that case the vendee attempted to remove them prior to the expiration of the time within which the purchase was to be completed, and here the attaching creditor of the vendee was attempting a similar removal.

Viewing the matter in a little different light, it is plain, since the machinery was a part of the land, that the levy of the attachment, if it could affect anything, would reach only the interest of the Parlin Mining Com-

pany in the realty, and that was simply the right of possession of the mines and to prospect and develop them. 110 Pac. 973; *Pomerooy v. Bell*, supra. But, since this right ceased on the 1st day of September, there would be no interest upon which the attachment could operate thereafter.

But the whole case of appellant rests upon the assumption that the machinery was personal property and belonged to the Parlin Mining Company at the time the levy was made. This, as already shown, is entirely untenable, and the injunction was properly issued to restrain the sheriff from removing any part of the real property the title to which was vested absolutely in plaintiffs. In fine, the situation is as follows: A., owning a mine, enters into a contract with B. for its purchase on certain terms, B. thereafter executes a contract to sell it to C. for a certain amount, and C. enters into possession and places thereon certain fixtures which become a part of the realty. While B. and C., respectively, have the right to the use and enjoyment of the property while the said executory contracts are in force, neither, nor his creditor, has the right at any time to take away any part of said realty, and much less would he have such right after all claim under the contract with A. had terminated by reason of the failure to pay the purchase price of the property.

Some contention is made that the complaint, findings, and evidence are conflicting in material parts; but it will be found that the considerations are not of vital importance. It was sufficient for the court to find that James E. Conde was and is the owner of the property, describing it; that plaintiffs entered into the agreement in writing with the Parlin Gold Mining Company, setting out the agreement; that said company entered into the exhibited agreement with the Parlin Mining Company; that, after entering into said agreement, said Parlin Mining Company placed upon the property the machinery in question; and that said machinery was bolted and fastened so as to become fixtures and all of it was actually used in working and developing said Dreisam mines; "that on the 29th day of August, 1909, the defendant, as sheriff of the said county of Tuolumne, under and by virtue of a writ of attachment issued out of the superior court of said county in an action wherein Charles H. Clayter is plaintiff and the Parlin Mining Company, a corporation, as defendant did levy upon" said machinery and commenced to remove it and threatens to continue to remove all of it from said mines; that neither the Parlin Gold Mining Company nor the Parlin Mining Company paid to plaintiffs or either of them the purchase price agreed to be paid for the mines on the 1st day of September, 1909, or at any time, or at all; and that neither of them has since the 1st day of September,

1909, had any right, title, or interest whatever in and to said Dreisam mines. In view of the principles already discussed, the foregoing findings, which are supported by the evidence, justify the conclusions of law in favor of respondents.

[3] There is also a finding that plaintiff James E. Conde was at all times in possession of said mine. But this may be entirely disregarded. The fact is that the Parlin Mining Company was actually in possession from July 15, 1908, to and including September 1, 1909; but the possession did not and could not confer upon it or its creditor the right to take away any part of the realty.

Again, the court found that the removal of the machinery "will cause these plaintiffs great and irreparable injury." They certainly would be entitled to an injunction to restrain the defendant from taking away without right a part of their realty, whether in a pecuniary sense they would be greatly damaged or not by the removal. If the property had merely a nominal value, the owner surely could legally oppose its conversion to satisfy another person's debt. But, if material, the truth is that the machinery here was of value, and its removal would reduce the value of the mine, and there was evidence to that effect.

Appellant suggests that the mines would be as valuable without the machinery as they were at the time of the execution of the contract of sale to the vendee. This, however, is a false quantity, as we are not dealing with a case involving simply the commission of waste or the impairment of security. In *Miller v. Waddingham*, 91 Cal. 377, 27 Pac. 750, 13 L. R. A. 680, it is indeed held that: "It is a well-recognized principle in equity that a mortgagee cannot maintain an action to restrain waste without showing that thereby his security will be impaired. And by parity of reasoning the vendor who holds the legal title as security for the fulfillment of the contract of purchase by the vendee in possession should show that he will sustain some injury before he can maintain an action like the present. So long as the sufficiency of the security is unimpaired, he has no right to disturb the vendee in any use or enjoyment which he may make of the land." But it is plain that the case has no application, for the reason that there the contract of sale was still in force, the vendee was still rightfully in possession, the improvements were not found to be fixtures and therefore a part of the realty, but, to the contrary, it was assumed in favor of the judgment that the court below determined that the buildings were not fixtures, and, furthermore, it was assumed that the vendee "is not only able to comply with his obligations, but that he will fully and promptly meet them as they mature."

The foregoing seems to cover all the points

made that we deem worthy of specific notice. We think there can be no question that the conclusion of the lower court is right.

The judgment and order are therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

16 Cal. App. 13

PEOPLE v. PIERCY. (Cr. 226.)

(District Court of Appeal, First District, California. April 14, 1911.)

1. HOMICIDE (§ 88*)—ASSAULT WITH INTENT TO KILL—ABILITY TO EXECUTE INTENT.

That accused was thwarted in his attempt to kill another before he had committed any actual violence is no defense, where, when he made the attempt, he had the ability to execute his intent.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 114; Dec. Dig. § 88.*]

2. CRIMINAL LAW (§ 1137*)—APPEAL—PERSONS ENTITLED TO ALLEGE ERROR.

Accused cannot complain of an instruction given at his request.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3009; Dec. Dig. § 1137.*]

3. CRIMINAL LAW (§ 814*)—INSTRUCTIONS—APPLICABILITY TO ISSUES.

Where an information would not have supported a conviction of the crime of exhibiting a deadly weapon in a rude and threatening manner, as defined by Pen. Code, § 417, an instruction upon that crime was properly refused, even though the evidence would have justified such conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1980; Dec. Dig. § 814.*]

4. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS.

The refusal of accused's requested instructions is not error, where other correct instructions have been given on those points.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

5. HOMICIDE (§ 166*)—EVIDENCE—MOTIVE—PREVIOUS QUARRELS.

In a prosecution for assault with intent to murder, evidence that accused had on a previous occasion quarreled with and expressed hostility towards the complaining witness is admissible to show malice and motive.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 321; Dec. Dig. § 166.*]

6. CRIMINAL LAW (§ 384*)—EVIDENCE—PREVIOUS QUARRELS—REMOTENESS.

In a prosecution for assault with intent to murder, the objection that evidence of a quarrel between accused and the complaining witness, and accused's expression of hostility, was inadmissible, for remoteness goes to the weight of the evidence, rather than its competency.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 848; Dec. Dig. § 384.*]

Appeal from Superior Court, Santa Clara County; M. T. Dooling, Judge.

Edward M. Piercy was convicted of an assault with a deadly weapon, and appeals. Affirmed.

C. D. Wright, for appellant. Attorney General Webb and Jas. P. Sex, Asst. Dist. Atty., for the People.

LENNON, P. J. The defendant was charged with the crime of assault with intent to commit murder. He was found guilty of the crime of assault with a deadly weapon, and the judgment and sentence of the court was that he pay a fine of \$500 with the alternative of imprisonment in the county jail. This appeal is from the judgment and the order of the court denying the defendant's motion for a new trial.

The information charged that the defendant made an assault upon the person of W. A. Beasley with a loaded revolver with intent to murder; and counsel for the defendant, in support of the appeal, asserts that the evidence is insufficient to justify the verdict; that the verdict is against law; and that the court erred upon questions of law occurring during the trial and in its instructions to the jury.

In substance, the facts upon which the information was based and the conviction had are these: On July 14, 1910, the defendant entered the office of the complaining witness in the city of San Jose in an intoxicated condition and evidently in an angry mood. Without provocation, he abused and ridiculed the complaining witness because of a real or fancied grievance arising out of a past business transaction. Finally the defendant "reached around to his hip pocket and pulled out a gun." The gun, it will be noted, was loaded. At this juncture the complaining witness shouted to one Laurensen, who was present and standing immediately behind the defendant, "Take the gun away from him." Laurensen closed in on the defendant, and despite his resistance disarmed him.

[1] This evidence as related by the witnesses for the people was somewhat clouded on cross-examination, and partially disputed by one witness for the defense. However, upon a review of the whole case it is clear that there is ample evidence to support the finding of the jury, implied from the verdict, that the defendant made an attempt to use a deadly weapon with the intent to commit a violent injury upon the person of the complaining witness, and that at the moment when he made the attempt the defendant had the ability to execute his intent. The fact that the defendant was thwarted in his attempt before it resulted in actual violence did not render his conduct any the less criminal. *People v. McMakin*, 8 Cal. 548; *People v. Yslas*, 27 Cal. 631; *People v. Lee Kong*, 95 Cal. 666, 30 Pac. 800, 17 L. R. A. 626, 29 Am. St. Rep. 165; *People v. Johnson*, 131 Cal. 512, 63 Pac. 842.

[2] The trial court, at the request of counsel for the defendant, charged the jury, in the language of section 22 of the Penal Code, with reference to the voluntary intoxication of the defendant, and its effect in determining the intent with which he committed the act charged against him. The contention of

counsel for the defendant that the intoxication of the defendant was not voluntary, because the evidence shows that the brandy which produced the intoxication was taken for medicinal purposes, is unworthy of serious consideration. In any event, he cannot now be heard to complain of an instruction which the record shows was given at his request. *People v. Rodley*, 131 Cal. 240, 63 Pac. 351; *People v. Hite*, 135 Cal. 76, 67 Pac. 57.

[3] It may be, as suggested by counsel for the defense, that the evidence would have justified a verdict finding the defendant guilty of the crime of exhibiting a deadly weapon in a rude and threatening manner; but the allegations of the information would not have supported a judgment of conviction based upon such a verdict, and therefore the court did not err in refusing to charge the jury upon the subject-matter of section 417 of the Penal Code.

[4] Defendant's requested instruction No. 8 was properly refused. The subject-matter of this instruction was substantially and sufficiently covered, not only in the charge of the court given of its own motion, but in defendant's requested instructions Nos. 6 and 7 which were given to the jury.

The charge of the court is not susceptible to the criticism that it omitted to define the essentials of the crime of which the defendant was found guilty. As a whole the charge of the court fairly and correctly stated the law of the case, and the court was not required to include in every paragraph of its instructions a reference to the essentials of the crime charged in the information, or of any lesser offense included therein.

[5, 6] Objection was made at the trial to the introduction of certain testimony to the effect that defendant had on a previous occasion quarreled with and expressed hostility towards the complaining witness. The objection was properly overruled. The testimony was admissible as tending in some degree to show malice and motive. *People v. Kern*, 61 Cal. 244; *People v. Chaves*, 122 Cal. 143, 54 Pac. 596. The objection that the occurrence was too remote from the time of the commission of the offense charged went to the weight, rather than to the admissibility, of the evidence. *People v. Brown*, 76 Cal. 573, 18 Pac. 678.

The judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; HALL, J.

16 Cal. App. 130

PEOPLE v. BOYD. (Cr. 150.)

(District Court of Appeal, Third District, California. May 2, 1911.)

1. CRIMINAL LAW (§ 543*)—EVIDENCE—ABSENT WITNESS—DEPOSITION AT PRELIMINARY EXAMINATION—DILIGENCE.

Pen. Code, § 686, subd. 3, provides that, where a witness has been examined and cross-

examined at a preliminary examination of accused, and it is satisfactorily shown that with due diligence he cannot be found within the state, the evidence taken in the preliminary examination may be read. A witness, to whom it was claimed defendant had confessed, was suspected of being connected with the same robbery, or other crimes committed in the vicinity, and it was shown that an officer sent to subpoena him could not find him at his residence within the county, and was informed by his wife that she did not know exactly where he was, but thought he had gone to certain springs for treatment for rheumatism; that thereafter the sheriff and district attorney telephoned to various mineral springs and were informed that no such person was there. *Held* to authorize a finding by the trial court, in its discretion, that sufficient diligence had been used to procure the witness' attendance to authorize the introduction of his testimony at the preliminary examination; it not being essential that a subpoena for the witness shall have been sent to every county in the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1236; Dec. Dig. § 543.*]

2. CRIMINAL LAW (§ 1153*)—APPEAL—DISCRETION.

Where a trial court, in its discretion, admitted the testimony of an absent witness, given at a preliminary hearing, it must be presumed on appeal that the discretion was properly exercised.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3066; Dec. Dig. § 1153.*]

3. CRIMINAL LAW (§ 1169*)—APPEAL—PREJUDICE.

Accused was not prejudiced by the admission of testimony of an absent witness, given at the preliminary hearing, where such testimony was merely cumulative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3138; Dec. Dig. § 1169.*]

4. CRIMINAL LAW (§ 1158*)—APPEAL—FINDINGS—NEW TRIAL—MISCONDUCT OF JUROR.

Where affidavits as to a juror's intoxication during the trial were conflicting, the trial court's refusal of a new trial because of the juror's alleged intoxication will not be reversed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3071; Dec. Dig. § 1158.*]

5. CRIMINAL LAW (§ 1158*)—APPEAL—NEW TRIAL—REVIEW.

Where affidavits that a juror discussed the merits of the case against accused before it was submitted were flatly contradicted by the juror, a finding by the trial court as to the fact would not be reversed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3071; Dec. Dig. § 1158.*]

6. ROBBERY (§ 24*)—EVIDENCE.

Evidence held to sustain a conviction of robbery.

[Ed. Note.—For other cases, see Robbery, Dec. Dig. § 24.*]

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Charles A. Boyd was convicted of robbery, and he appeals. Affirmed.

Gillis & Gillis, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

HART, J. The defendant, having been informed against by the district attorney of Siskiyou county for the crime of rob-

bery, was tried therefor, convicted of said crime, and thereupon sentenced by the court to imprisonment in the state prison for the term of 2½ years. This appeal is from the judgment and the order denying his motion for a new trial.

The points made by the appellant for a reversal are: (1) Errors in the decision of questions of law arising during the course of the trial; (2) that the jury were "guilty of misconduct by which a fair and due consideration of the case has been prevented"; (3) "that the verdict is contrary to the law and the evidence in the case."

1. The claim that the court erred in the decision of questions of law grows out of the admission in evidence, over the objection of the defendant, of the deposition of one George L. Weston, who was a witness at the preliminary examination and who could not be found by the sheriff and his presence at the trial secured. The ground of the objection to said deposition was that a sufficient showing of diligence in an effort to subpoena and procure the attendance of said witness at the trial had not been made to justify the ruling of the court in permitting it to be read to the jury.

[1] By section 686, subd. 3, of the Penal Code, it is provided that, where the charge has been preliminarily examined before a committing magistrate, and the testimony taken down by question and answer, in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, the deposition of such witness may be read, upon its being satisfactorily shown to the court that he cannot with due diligence be found within the state.

Upon the question of diligence, it was shown that the case was set for trial for the 31st day of October, 1910; that, on the 27th day of September, 1910, a subpoena for Weston was issued by the district attorney and delivered into the hands of the sheriff for service; that the sheriff went to the home of the witness at the town of Etna Mills, in Siskiyou county, and that that officer was informed by the wife of the witness that the latter was not at home, and that she did not know exactly where he was; that she declared that, suffering from rheumatism, the witness left home some days before, saying that he intended going to Neyes Springs, in said county, and that if, upon arriving at said springs, he found them closed for the season, his intention was to go to Tuscan Springs, in Tehama county. It was shown that the sheriff addressed letters to all his deputies, located in various parts of Siskiyou county, commanding them to search for Weston; that a deputy sheriff went to Neyes Springs and failed to find him there; that the district attorney personally telephoned to Tuscan Springs, giving the name and description of the witness and inquiring whether he was there, or had been there,

"and the management at Tuscan Springs informed me there was no man by that name there." The district attorney further testified: "I telephoned up to Garretson Springs, a mineral spring up on the mountain here, thinking probably if he was going to a mineral spring he might go there, and was informed that there was no man by that name there."

Besides the foregoing, it appears from the record that the officers entertained some suspicion that Weston might be connected either with the robbery of which the defendant was accused or with some other crimes that had been perpetrated in and about the town of Etna Mills. It is evident from this fact that the witness was purposely avoiding the service of process, thus hoping to escape the ordeal of such a cross-examination as that to which he was subjected at the preliminary hearing.

We cannot say, upon the showing made, that the court abused its discretion in allowing the deposition of Weston to be read.

Counsel for appellant seem to think that, in order to disclose the "due diligence" contemplated by the statute, and necessary to be shown before the deposition of an absent witness, taken at the preliminary hearing, may be read in evidence at the trial, it must appear that a subpoena for such witness has been sent to every county in the state. In this they are mistaken.

[2] As is said in *Heintz v. Cooper*, 104 Cal. 670, 38 Pac. 512, "diligence is a relative term incapable of exact definition. What would amount to due diligence under one state of facts would fall absolutely short of it under another and different state of facts. It depends, therefore, so essentially upon the particular circumstances of each case, with all their distinct and varying phases and bearings, as they have appeared to the lower court at the trial and throughout the conduct of the cause, in determining whether diligence has been used in any particular instance, that this court should hesitate to disturb a ruling upon this ground where it has any substance whatever upon which to rest. The presumption is that the discretion has been properly exercised, and that presumption must be overcome by a clear want of facts, before the order will be disturbed." See *Jones v. Singleton*, 45 Cal. 92; *Baker v. Joseph*, 16 Cal. 180; *Kenezleber v. Wahl*, 92 Cal. 202, 28 Pac. 225; *People v. Johnson*, 13 Cal. App. 779, 110 Pac. 965.

In the case at bar, we have seen that the witness was a resident of Siskiyou county, was a married man, and that his wife, at the time the sheriff sought to serve a subpoena upon him, was at their home at Etna Mills; that she pretended to know nothing of his precise whereabouts at the time the sheriff called at their home in search of him. These circumstances were such as to make it manifest to the mind of any reason-

able person that he had not permanently abandoned Siskiyou county, and such as to indicate that the witness was trying to avoid service of the subpoena, and to that end was in hiding. The officers, in their efforts to find him, searched and inquired for him at all the places where, according to information obtained from all the available sources, there was any likelihood that he might be found. If the witness was purposely keeping out of the way of the officers, so that he might not be subpoenaed, as the circumstances very strongly tend to show was the fact, it would then have been perfectly futile to have sent subpoenas to other counties, for, if his purpose was to elude the officers, he would have been very particular to conceal his identity, so far as he could, wherever he might be or go.

If the witness had been at the time without a family in Siskiyou county or some other strong incentive for his return to that county, and it was not made to appear, as it certainly was made to appear, that he was endeavoring to avoid the service of process calling for his appearance as a witness at the trial, we cannot say but that, perhaps, a better showing than was made here might be required. Under all the circumstances disclosed here, however, we think that the court made no error in its ruling admitting the deposition.

[3] But, conceding that the showing of diligence does not quite measure up to the requirements of the statute, we are of the opinion that the ruling was without prejudice, since the testimony thus brought to the attention of the jury involved, in substantial effect, only a repetition of the testimony given by the witnesses, Lowe, Moxley, and Sovy. Weston testified at the preliminary hearing to an alleged confession by the defendant, made to the witness a short time subsequently to the commission of the robbery. Said confession was the only subject concerning which Weston testified. Lowe testified at the trial that the defendant likewise confessed to him that he was the author of the crime. Moxley and Sovy testified that they overheard a conversation between the defendant and Weston, in which the accused confessed to having committed the crime. The deposition of Weston was therefore, as stated, only corroboratory and, in fact, cumulative of other testimony disclosing substantially the identical facts to which the deposition related, and, as before suggested, we cannot perceive how it could, under such circumstances, have prejudiced the defendant. In view of the cross-examination of Weston at the hearing before the magistrate, which cast no little suspicion about him in connection with certain transactions of a dubious character, his deposition could have added little force to the testimony of the confessions as given by the other witnesses. The testimony of Lowe, Moxley, and Sovy (the last two constable

and city marshal, respectively) is sufficient, without the deposition of Weston, to sustain the verdict.

[4] 2. It is, secondly, contended that the alleged misconduct of the jury consisted in the inebriety, during the progress of the trial, of Juror Fowler. In support of said charge, the defendant filed a number of affidavits in which the affiants declared that, during the recesses of the court while the trial was in progress, said juror so freely used intoxicating liquor that, on several different occasions, he was in an intoxicated condition. One of the affidavits charged that, on a certain day while the trial was going on, but during an adjournment of the court, said juror was so much under the influence of liquor that "he talked at random and acted like an insane or wild man," etc.

A counter showing upon this issue was made by the people in the form of affidavits made by the other jurors. In each of these affidavits it is declared that Fowler did not appear to be under the influence of liquor at any time during the trial, when the jury were actively engaged in the discharge of their duties; that, to the contrary, he at all times when so engaged bore every appearance of sobriety; and that, after the jury retired to deliberate upon the case, he discussed the testimony and various phases of the record in an intelligent manner.

There is absolutely no evidence showing that the juror was not sober while he was actually engaged in performing his duties as a juror. No evidence was introduced that the trial judge or the attorneys observed anything unusual in the conduct of the juror while he was in the jury box, or that he was in a condition of inebriety. In brief, assuming that the affidavits filed by the defendant tended to prove, by reason of the quantity of liquor the juror was then shown to have consumed during the adjournments of the court while the trial was in progress, that he was or must have been still under its influence while in the jury box, there is presented upon the issue thus made a conflict in the evidence, and therefore upon that proposition the ruling of the trial court cannot be overturned by this court. See *People v. Emmons*, 7 Cal. App. 698, 95 Pac. 1032, and cases therein cited.

[5] An attempt was also made to show, by affidavits, that the same juror discussed the merits of the case with certain parties before the cause was submitted. These affidavits were flatly contradicted by the juror, and, of course, it was for the trial court to determine the truth of the matter between the conflicting testimony thus advanced upon the point.

[6] 3. It is lastly contended that the evidence does not support the verdict. This contention is not maintainable.

The facts, briefly, are: That on the night of the 2d day of May, 1910, a masked man

appeared at the Blake Hotel, in said town of Etna Mills, a few minutes before the hour of 12 o'clock, and, leveling a pistol on the night clerk, who was alone in the barroom at the time, forced the latter to deliver over all the cash then behind the bar. The clerk had just closed and locked the doors leading from the street and a hallway into the hotel preparatory to closing the establishment for the night, when some one attempted to enter the barroom by way of the door leading from said hallway into the barroom. Thinking that the party at the door was a transient lodger who had but a few minutes previously been in conversation with him in the barroom, the clerk spoke, saying, "Hold on, I will open the door," and thereupon unbolted the door and opened it, only to be confronted by a man whose face was concealed by a mask and who leveled a pistol on the clerk. The latter yelled for Mr. Blake, the landlord, whose room was located on the first floor and across the hall from the barroom. Blake immediately put in an appearance in the barroom, but, observing the weapon in the masked man's hand, leveled at the clerk, he hastily made his exit from the barroom. As stated, the clerk, at the command of the highwayman, delivered the latter all the money then behind the bar. This consisted of about \$28, in various denominations, and was contained in a dice box, which, with the money, the robber carried away; he having left the barroom by way of one of the doors leading to the street, and turned, as he reached the sidewalk, in the direction of a house of ill fame.

Some time after the robbery the defendant, as seen, admitted to the witnesses, Weston and Lowe, that he was the author of the crime. Weston, it appears, reported this information to Constable Moxley and City Marshal Sovy. Thereupon it was arranged between Weston and the officers that the latter, at a certain hour of the night of the day on which Weston communicated to them the fact of the defendant's confession, should secrete themselves behind a high board fence in the rear of another hotel in Etna, and that, upon some pretext, Weston should induce the defendant to accompany him to a point directly opposite the spot at which the officers were to station themselves. This scheme was carried out. Weston and the defendant stood against the fence on one side thereof, and the officers were against the fence directly opposite. Weston started the conversation by telling the defendant that the people were suspicious that he (defendant) had committed the Blake Hotel robbery, and advising him to leave Etna. It is unnecessary to detail this conversation; it being sufficient to say that he therein admitted, according to the testimony of Moxley and Sovy, that he committed the robbery.

The clerk of the hotel testified that he could not identify his assailant, but expressed the opinion that the man who robbed him

corresponded in size and build with the defendant.

The witness Single testified that, at about 15 minutes before 12 o'clock, midnight, on the night of the robbery, the defendant came into a house of ill fame, situated about 500 yards from the Blake Hotel. Single further testified that he gave a bunch of keys to the defendant, and requested him to deliver them to the witness Lowe, who was a barkeeper in the saloon in the Barrenden Hotel.

Lowe testified that, shortly after he had retired, the defendant came to his room and delivered to him said bunch of keys, and then asked whether he could secure a room in the hotel, and, replying to this question, Lowe told him to take "Room 17."

The testimony given by Weston, Moxley, Sovy, and Lowe, all relating to the confessions of the accused, constituted the principal evidence brought out by the people directly connecting the defendant with the commission of the crime.

The defendant undertook to sustain an alibi, and in support of this contention testified that he went to the room of a Mrs. Willard, in the Barrenden Hotel, in Etna, at about the hour of 10 o'clock on the night of the robbery, and remained in said room with Mrs. Willard continuously until the hour of 2 o'clock the next morning. Mrs. Willard corroborated the defendant, declaring that, from 10 o'clock on the night of the robbery until 2 o'clock the next morning, the defendant was not for a moment out of her room.

Relative to the alleged confessions, the defendant admitted having made them, but explained that after the robbery the officers had received information that certain parties had planned the robbery of the local bank, and that he was employed by the marshal to do detective work, not only in connection with the alleged contemplated robbery of the bank, but also to work on the Blake Hotel robbery. Defendant's employment as a detective was to be kept a secret, or from the public, so that he could the more effectively execute his duties as such. He testified that his statements to Weston implicating himself in the hotel robbery were untrue, but that they were prompted entirely by the hope that thus he might be able to obtain information which would lead to the discovery and apprehension of the perpetrator of that crime. He denied having admitted his guilt to Lowe, saying that the conversation with the latter, about the robbery occurred in the saloon where Lowe worked, and could have been heard by a number of other persons then in said saloon. Sovy corroborated the defendant as to the hiring of the latter by him to do detective work, both in connection with the hotel robbery and the alleged proposed bank robbery.

It is insisted by counsel for the appellant that the testimony produced on behalf of their client clearly shows that the defendant's alleged confessions, by which, principal-

ly, his conviction was accomplished, were only made for the purpose of carrying out defendant's plan for apprehending the real perpetrator of the crime committed at the Blake Hotel.

The evidence, it must be admitted, presents a strange and unusual situation, for it is difficult to account for the fact, developed in this case, upon the hypothesis that the defendant is possessed of ordinary common sense, that he would voluntarily, when not under arrest or even under suspicion then, and when, therefore, there was no apparent reason for him to do so, confess that he had committed the crime of robbery—a fact which, under some circumstances, might be satisfactorily accounted for upon the theory upon which explanation was, without success, attempted by defendant before the jury. But we think there were developed, in connection with the confessions, some circumstances which place the jury's determination of the value of said confessions as evidence of defendant's guilt beyond the power of this court to disturb it.

In the first place, it may be mentioned as a fact worthy of note that the defendant, although claiming, after his arrest and while incarcerated in the local jail, to have obtained, while acting as a detective for the city marshal, considerable information concerning other thefts and crimes occurring in and about Etna, never conveyed such information to his superior officer until after his arrest. Nor did he say anything to the officers before his arrest about his interview with Weston, which was overheard by said officers. Secondly, it is to be noted that, when the interview between defendant and Weston that was overheard by the officers was in progress, several men stepped from the rear of the hotel near which said interview was taking place, and passed by and near the back of the point at which Weston and the defendant were standing, whereupon the latter remarked, after looking over the fence to see if he could identify the men or determine where they were going, "we had better get out of here; some one will hear us." This circumstance could well have been regarded by the jury as possessing some incriminatory force, or as impeaching the explanation by defendant that his confession to Weston was feigned for the purpose stated by him.

It is further argued that, accepting the night clerk's statement as to the hour at which the robbery occurred and the statement of the witness Single as to the hour at which the defendant made his appearance in the house of ill fame on the night of the robbery as precisely accurate, it would be impossible for the defendant to have committed the crime. The hotel clerk testified that the hotel clock always ran ahead of time from 5 to 10 minutes, and, according

to his statement, the robbery occurred at about 5 minutes to 12 by said clock, which, assuming it to have been running fast or ahead of the actual time from 5 to 10 minutes, would make the precise time of the robbery from 10 to 15 minutes to 12 o'clock. Single said that the defendant came into the bawdyhouse at about 15 minutes to 12 o'clock. The defendant testified that he did not go to said house until after 2 o'clock the next morning. Said house was situated, as seen, about 500 yards from the Blake Hotel.

All the testimony for the prosecution regarding the times at which the various events referred to occurred no doubt involved, to a great extent, mere conjectures, or at least only approximations. The trial occurred several months after the robbery, and the jury could well have concluded that the witnesses were not precisely accurate upon these points. But, if the jury believed the evidence of the confessions and further believed that, by those confessions, the defendant told the truth, then they were obviously thus satisfied of his guilt beyond a reasonable doubt, notwithstanding that, taken at its face value, the testimony with respect to the times of the happening of the several events, as affecting the defendant, on the night of the robbery, might have a strong tendency to confirm the alibi for which the accused contended at the trial.

At any rate, there is sufficient evidence to support the verdict, and we cannot, therefore, set it aside on the ground that there may appear in the record some testimony favorable to defendant. The jury, presumably—indeed, presumptively—gave due attention and consideration to all the important facts brought out by the evidence, those favorable to, as well as those condemnatory of, the defendant, and their verdict must be interpreted to mean that their conclusion was that either the hotel clerk or Single, or perhaps both, were mistaken as to the hours of the night that the events to which those witnesses, respectively, testified occurred.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

16 Cal. App. 117

PEOPLE v. SHIMONAKA. (Cr. 147.)

(District Court of Appeal, Third District, California. May 2, 1911.)

1. HOMICIDE (§ 255*)—MANSLAUGHTER—EVIDENCE.

Where the evidence showed that the killing was without apparent cause and unlawful, and under circumstances implying a criminal intent, a conviction of manslaughter would not be disturbed on the ground that the jury found accused guilty of a lesser crime than the one proved.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 255.*]

2. HOMICIDE (§ 7*)—ELEMENTS OF OFFENSE—MURDER—MANSLAUGHTER.

The crime of murder includes manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 12; Dec. Dig. § 7.*]

3. CRIMINAL LAW (§ 1159*)—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3076; Dec. Dig. § 1159.*]

4. HOMICIDE (§ 300*)—SELF-DEFENSE—INSTRUCTIONS.

An instruction that one who reasonably believes that another intends and is about to commit some great bodily injury on him may pursue and slay his adversary, but his pursuit must be prosecuted in good faith to the end of securing his life, and must be carried no further than is reasonably necessary to free oneself from danger, and that the law favors accused and justifies his conduct in taking life under circumstances indicating real or apparent danger of bodily injury, etc., is sufficiently favorable to accused, and is not objectionable as precluding the jury from an acquittal, regardless of the facts.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

5. HOMICIDE (§§ 119, 116*)—SELF-DEFENSE—REPELLING ATTACK—APPREHENSION OF DANGER.

A person assaulted is justified in using so much force as is necessary to his defense, and to repel a slight assault the person assaulted may not resort to measures of great violence, and he is not justified in doing acts calculated to destroy the life of assailant, unless the assault is of such a character as to excite fears, as a reasonable man, of danger to life or great bodily injury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 172-174, 158-163; Dec. Dig. §§ 119, 116.*]

6. HOMICIDE (§ 116*)—SELF-DEFENSE.

The danger which will justify one in law for killing his assailant is not such as does not reasonably indicate real or apparent danger of great bodily injury, and accused, relying on self-defense, is not entitled to a charge which leaves the jeopardy under which he may shield himself undefined.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 158-163; Dec. Dig. § 116.*]

7. HOMICIDE (§ 340*)—APPEAL—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where accused was convicted of manslaughter, errors in instructions on murder are not prejudicial to accused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 720; Dec. Dig. § 340.*]

8. HOMICIDE (§ 116*)—SELF-DEFENSE—APPREHENSION OF DANGER.

A requested charge that one may, while engaged in a sudden quarrel, be justified in killing another in self-defense, but the mere fact that the parties are engaged in a sudden quarrel, which may be a mere wordy altercation, cannot deprive one of the right to defend himself against a real or apparent assailant, is properly modified by adding that mere words, whether used in a sudden quarrel or otherwise, do not justify or excuse one in taking life, but there must be some overt act or demonstration of force, reasonably sufficient to cause accused to believe, as a reasonable man, that his own life is in danger, or that he is in imminent peril of great bodily injury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 158-163; Dec. Dig. § 116.*]

9. CRIMINAL LAW (§ 789*)—REASONABLE DOUBT—INSTRUCTIONS.

A requested charge that it is not necessary that reasonable doubt should result from the testimony affirmatively produced at the trial by accused, but it may arise from the testimony of the prosecution, is properly modified by adding that a doubt to be reasonable is one arising from a consideration of all the evidence in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1906; Dec. Dig. § 789.*]

10. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS—REFUSAL TO GIVE REQUESTED INSTRUCTIONS COVERED BY THE CHARGE GIVEN.

It is not error to refuse a requested charge substantially covered by the charge given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Kiju Shimonaka was convicted of manslaughter, and he appeals. Affirmed.

Ben Berry and John Wilson, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

CHIPMAN, P. J. Defendant was accused of the crime of murder and was found guilty of manslaughter; the jury recommending him to the mercy of the court. Defendant's motion for a new trial was denied by the court, and it thereupon sentenced him to be imprisoned for the term of four years.

1. Defendant and deceased, Hikotaro Tenouye, Japanese laborers, were working on a ranch near the city of Stockton, being farmed by another Japanese, named Yosaka Noguchi. About 8 o'clock on the evening of June 8, 1910, they were in a so-called bunkhouse, where, with some other Japanese, they lodged. They got into a verbal controversy over the trifling question as to how many pounds constituted a load of hay, which led to an encounter, but neither being injured. The bystanders separated them, and defendant left the bunkhouse. So far as appears, nothing had occurred, before this affray, to arouse a feeling of hostility towards each other. They had been acquainted only about three weeks. After defendant left the room, Tenouye sat down for a minute or two and then got up and followed after defendant, remarking as he left, that he was going to "hit" defendant, but this was not said in defendant's hearing. Tenouye had no clothing on his person at the time except an overshirt and defendant wore only an overshirt and undershirt. There was evidence that neither of them had any weapon at the time they left the bunkhouse. Defendant went towards a shed where there were arrangements for bathing, passing through a building used as a dining room and kitchen on his way. Tenouye followed after defendant, and witness Matsuyama followed Tenouye not far behind him. Defend-

ant passed out of the kitchen at the door opposite to the door where the three entered the kitchen. Matsuyama testified that as Tenouye passed out of the kitchen door towards the bathhouse he saw defendant strike Tenouye with an ax, felling him to the ground, and while lying on the ground he struck him with the ax on the head, and ran away. The first blow was in the lower part of the abdomen, cutting a wide and deep gash, though not necessarily fatal, as testified by the medical witnesses. The second blow crushed the skull and inflicted a mortal wound. Matsuyama, who was the only eyewitness to the homicide, called for help, and Noguchi, the tenant of the farm, and others came at once and carried Tenouye into the house, where he died the next morning from the effects of the blow on his head, as testified to by the medical witnesses. Defendant fled on striking the second blow, and was arrested the next day several miles from the scene of the homicide. Defendant testified that he had reached the bathhouse and was preparing to take a bath when Tenouye came at him in a threatening manner with a club or stick, and said, "I am going to kill you," or, "I am going to kill you one strike," and that he thereupon struck him in self-defense. Matsuyama testified that Tenouye had no club or stick, or other means of injuring defendant in his hands; that he was only a few feet from Tenouye when the blow was struck and heard no words between them. It appeared that the body of Tenouye was found a few feet from the kitchen; that the bathhouse was 15 or 20 feet further away. Defendant's account of the homicide cannot be reconciled with Matsuyama's. The jury must have accepted Matsuyama's testimony, and they might well have found defendant guilty of a higher degree of crime than manslaughter.

[1, 2] Defendant's counsel advance the rather singular contention that the verdict is not supported because the evidence does not bring the case within the definition of manslaughter, first, because the killing was not involuntary; and, second, it was not voluntary manslaughter, which consists of the unlawful killing of a human being without malice upon a sudden quarrel or in the heat of passion. "If, then," says the brief, "there does not appear to have been a sudden quarrel, and the defendant did not act in the heat of passion, the verdict would be unsupported by the evidence." Just what impelled defendant to kill Tenouye can only be surmised. The evidence justified the jury in finding that he killed him without apparent cause; that the killing was unlawful and under circumstances implying criminal intent. It would be a strange condition of the law that would acquit defendant because the jury found him guilty of a lesser crime than the one charged and proved. It is settled that the crime of murder necessarily includes the

crime of manslaughter. *People v. McFarlane*, 138 Cal. 481, 71 Pac. 568, 72 Pac. 48, 61 L. R. A. 245.

[3] Upon the issue of self-defense, the verdict of the jury was against defendant, and is conclusive upon this court, there having been some evidence from which the jury might have concluded that defendant did not kill his adversary under circumstances such as the law would have justified under the plea of self-defense. Defendant complains of error in giving certain instructions for the people, in refusing certain instructions requested by him, and in modifying certain others before giving them.

[4] 2. The instructions principally made the subject of objection relate to the law of self-defense. Instruction marked 12, requested by defendant, was as follows: "You are instructed that where one reasonably believes that another intends, and is about to commit some great bodily injury upon him, he may, in his defense, pursue and slay his adversary. But his pursuit must not be revenge, but must be prosecuted in good faith to the sole end of winning his safety and securing his life." To which the court added: "(And must be carried no further than is reasonably necessary to free oneself from danger.)"

Instruction marked 23, given at the request of the prosecution, is referred to by defendant in this connection as being likewise objectionable, as shown in clause in brackets. It is as follows: "On the subject of self-defense or justifiable homicide, the court further charges the jury that one of the prime objects of the law is the preservation of human life. That no human life shall be taken unnecessarily is the policy of the law. Every individual is entitled to his life, unless forfeited thereunder. He may forfeit the right to his life by the commission of a crime, or by such conduct towards another individual as will justify that individual in taking his life then and there. A person taking the life of another, under such circumstances, must be justified in doing it by the law of necessity. This necessity must be real, or apparently real. A person so taking life must believe that he is in danger of losing his own, or receiving great bodily injury. This belief must be founded on reason and entertained in good faith. In the effort to save his own life, or to avoid the infliction of great bodily injury upon him, the person in danger, real or apparently real [may use so much force as is necessary to meet such danger, and no more. If he goes beyond this limit, he transcends the law of self-defense, and becomes himself a wrongdoer]. He would not be justified under the law in taking life unless such taking of life was really or apparently necessary to save his own, or to avoid the infliction of great bodily injury upon him. But, while the law is interested in the preservation of human life, still, as

between a wrongdoer and an innocent person acting in good faith, and in a reasonable manner, the law will favor the latter and justify his conduct in taking life under such circumstances, if it were really or apparently necessary, and done in good faith, under an honest apprehension of danger to his own life, or of receiving great bodily harm."

The argument is that under these instructions the jury were precluded from rendering a verdict of acquittal regardless of the facts, and that under no circumstances would one ever be justified in slaying his assailant, that he must act at his peril, carefully avoiding the use of more force than is necessary to disable his assailant, and, if in striking the blow for his protection he should happen to use more than was necessary and kill his assailant, he would be accountable regardless of what the facts might be. We cannot see that these instructions can reasonably be said to so direct the jury. It will be noted that the court, very plainly, said to the jury, in the concluding part of instruction 23, that "the law will favor the latter (the accused) and justify his conduct in taking life under such circumstances (i. e., circumstances indicating real or apparent danger of bodily injury), if it were really or apparently necessary, and done in good faith under an honest apprehension of danger to his own life, or of receiving great bodily injury."

[5] The Supreme Court, in *People v. Campbell*, 30 Cal. 314, states the law as follows: "It is an elementary principle in criminal law that the person assaulted is justified in using so much force as is necessary to his defense. To repel a slight assault the person assaulted is not authorized to resort to measures of great violence. He will not be justified in doing those acts that are calculated to destroy the life of the assailant unless the assault is of such a character as to endanger his life or inflict on him great bodily injury, or to excite his fears as a reasonable man that such would be the result of the assault. The law limits him to such acts as are necessary to self-defense. The law does measure the degree of the force that may be used to repel the assault; and, although it will not make the measurement with a nice hand and hold the person assaulted to accountability for force slightly disproportioned to the assault, yet it will hold him responsible for a clearly marked excess."

The instructions complained of do not, when fairly considered in their entirety, lay down a rule at variance with the foregoing and we think were properly given.

[6] 3. Error is claimed because the court refused instruction marked 33, requested by defendant, as follows: "The law does not weigh in too nice scales the conduct of the defendant, and say he shall not be justified because he might have resorted to other means to secure his safety, and while an assault with intent to kill must be under absolute necessity, actual or apparent, as a mat-

ter of law that absolute necessity is deemed to exist when one without fault is placed in sudden jeopardy." The court refused the instruction because "argumentative and fully covered by other instructions." We do not think it a correct statement of the rule that the absolute necessity, justifying the taking of life, referred to, is, "as matter of law, deemed to exist when one without fault is placed in sudden jeopardy." One may find himself in jeopardy which does not reasonably indicate real or apparent danger of his receiving great bodily injury. But this is not the jeopardy contemplated by the law which would justify the killing of one's assailant. The defendant was not entitled to an instruction which left the jeopardy under which he would shield himself, entirely undefined.

[7] 4. Defendant requested an instruction declaring, with considerable particularity, the essential element of the crime of murder to be malice, and defining malice. The court refused the instruction and gave the following: "The words 'malice' and 'maliciously' import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law." It is conceded that as an abstract proposition this is correct, but it is contended that, "as the court further instructed the jury that a malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another is conclusively presumed," there was prejudicial error in the instruction. The question is immaterial, since the verdict was for manslaughter in which the element of malice is not involved. An erroneous instruction touching the crime of murder, of which defendant was acquitted, was without prejudice.

[8] 5. The following instruction, marked 10, was asked by defendant and was given as modified by the court: "A person may while engaged in a sudden quarrel be justified in killing another in self-defense, as, for instance, one party may assail another under such circumstances as to make it necessary for the other to kill in self-defense, or, such person being the aggressor, he may so conduct himself as to justify the other as a reasonable man in believing that it is necessary to so do in order to save himself from death or great bodily injury. In either event, the mere fact that the parties are engaged in a sudden quarrel, which may be a mere altercation of words, cannot deprive one of the right to defend himself against a real or apparent assailant." Added by court: "But mere words whether used in a sudden quarrel, or otherwise, never justify or excuse one in taking life. There must be some overt act or demonstration of force reasonably sufficient to cause the one doing the killing to believe, as a reasonable person that his own life is in danger, or that he is in imminent peril of some great bodily injury."

It is contended that under this instruction

the taking of life would never under any circumstances be justified because of words spoken; that the assailant might be known to be armed and prepared to carry out his threat to commit some great bodily injury, but before the other party would be justified in going to extreme measures to protect himself he would have to wait until it was too late and his right would become unavailable. The court did not convey this meaning. The instruction, as requested, referred to the existence of circumstances which would justify the taking of life to save oneself from great bodily injury, and, in the event of those circumstances appearing, "the mere fact that the parties are engaged in a sudden quarrel, which may be a mere altercation of words, cannot deprive one of the right to defend himself against a real or apparent assailant." The court simply makes it clearer that there must be some accompanying circumstances or acts of the assailant besides mere words before the taking of life in self-defense would be justified. In the case of *People v. Thomson*, 145 Cal. 717, 721, 79 Pac. 435, the court uses the language quoted in the concluding paragraph of the instruction as asked by defendant. But it must be read in the light of the facts in that case, and there appeared much besides "a mere altercation of words" as the ground for defendant's action.

[9] 6. The defendant requested the following instruction which was modified, and given as follows: "In order for the jury to have a reasonable doubt of the defendant's guilt, it is not necessary that such doubt should result from the testimony affirmatively produced at the trial on the part of the defendant. It may arise as well from, and be founded upon the weakness or defect in the testimony introduced on the part of the prosecution. *A doubt to be reasonable is one which results or arises from a consideration of all the evidence in the case as heretofore defined in these instructions.*" Defendant objects to the modification of the instruction as shown in italics. Defendant states his point thus: "If a doubt to be reasonable must result from a consideration of all the evidence, an acquittal would become impossible irrespective of what the facts may be. The jury are required to consider all the evidence, but a reasonable doubt may arise out of any part of the evidence upon a consideration of all the evidence."

The point sought to be impressed upon the jury by defendant was that he was not called upon to produce affirmatively any evidence in order to create a reasonable doubt in the minds of the jury, but that such doubt might arise from the weakness of the case made by the people. It was proper for the court to remind the jury that a doubt to be reasonable must arise from a consideration of all the evidence, as the court had pre-

viously and very fully explained to the jury.

[10] 7. The court refused to give the following instruction, marked 32, requested by defendant: "The court instructs you that when a man exercises his right of self-defense he must be understood to act on the facts as they appear to him, and if without fault or carelessness he is misled concerning them, and defends himself correctly according to what he supposes the facts to be, he is justifiable, though the facts are in truth otherwise, and he really has no occasion for the extreme measure." The court properly refused to give this instruction because included in instructions elsewhere given. It is urged that being admittedly a correct statement of the law it should have been given notwithstanding the principles contained in it had been elsewhere given. The court did not err. When a principle or proposition of law is once correctly and clearly stated in an instruction, it is not error to refuse its repetition in some other form, unless this other form is necessary to a proper conception of the principle as applicable to some phase of the case not covered by other instructions.

Discovering no prejudicial error in the record, the judgment and order are affirmed.

We concur: HART, J., BURNETT, J.

16 Cal. App. 41

ERVING v. NAPA VALLEY BREWING CO.
(Civ. 861.)

(District Court of Appeal, Third District, California. April 18, 1911.)

1. APPEAL AND ERROR (§ 628*)—TRANSCRIPT OF RECORD—FAILURE TO FILE IN TIME—EXCUSE.

Where appellant's attorney did not file the transcript of the record within the time required by rule 2 of the Supreme Court (78 Pac. vii), the appellant cannot excuse his failure by showing that the clerk agreed with the attorney to prepare the transcript as he had done in a different case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2750-2764; Dec. Dig. § 628.*]

2. APPEAL AND ERROR (§ 629*)—TRANSCRIPT OF RECORD—FAILURE TO FILE IN TIME—EXCUSE.

Where appellant failed to show that he had reason to believe there was merit in his appeal, the court, in view of Code Civ. Proc. § 473, providing for the relieving from judgments when a furtherance of justice requires it, will not excuse a default in filing a transcript of the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2765; Dec. Dig. § 629.*]

Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

Action by W. F. Erving against the Napa Valley Brewing Company. From a judgment for plaintiff, defendant appeals. Appeal dismissed.

Nathan Coombs, John T. York, and Frank L. Coombs, for appellant. F. E. Johnston and L. E. Johnston, for respondent.

BURNETT, J. [1] Respondent has moved to dismiss the appeal on the ground that "the appellant, Napa Valley Brewing Company, a corporation, has failed to serve and file the printed transcript of the record within the time prescribed by rule 2 [78 Pac. vii] of the Supreme Court." The motion is supported by the certified statement of the county clerk, setting forth the facts required by rule 6 (78 Pac. ix) of said Supreme Court. By said certificate, it appears that the notice of appeal was filed on January 11, 1911; "that no bill of exceptions or statement on appeal has been made or filed; that appellant has not requested the clerk to certify to a correct, or to any transcript of the record; and no motion or notice of intention to move for a new trial in said action is pending or has been filed in said cause." Notice of the motion to dismiss the appeal was served on March 13th and filed herein on March 15th.

The matter has been submitted without argument, and the only showing made by appellant in opposition to the motion is contained in an affidavit of Hon. Frank L. Coombs, who declares therein that "he acted for the attorney of appellant in filing the notice of appeal in the said cause; that affiant had previously taken an appeal under section 941b of the Code of Civil Procedure, and in this appeal he followed the same course adopted by the clerk of the superior court of the county of Napa in the said previous case; that upon the filing of the notice of appeal in the above-entitled case he requested the clerk to prepare a transcript of the judgment roll and papers necessary upon said appeal, and to transmit the same to the clerk of the said Court of Appeal with the necessary certificate, agreeing to pay the said clerk the expenses therefor; that the said clerk consented to do the same; that thereafter and upon several occasions affiant called the attention of the said clerk to said matter of preparing and transmitting said transcript, and understood and supposed the same would be done within the time required by law." It is thus not disputed that under the rule it was the duty of appellant to file the printed transcript within the 40 days, but it is sought to excuse the default on the ground that the attorney depended upon the clerk of the court to perform that duty. It was supposed that he would pursue the same course that he did under another appeal taken under a different section of the Code of Civil Procedure.

To accept this as a legal justification for the failure to comply with a rule of court designed to expedite and facilitate the disposition of causes upon their merits would be to discourage diligence in the prosecution of appeals, and establish a precedent that might

lead to vexatious delays in the future. The following cases, though different in their facts, serve to illustrate the view of this same question taken by the appellate courts of the state.

In *Union Lumber Co. v. Metropolis Construction Co.*, 13 Cal. App. 584, 110 Pac. 329, it is held that a failure to serve and file the transcript is not excused by a showing of the pendency of an appeal from the order denying a motion for the change of the place of trial of such action, and an intention to obtain leave to incorporate in the record of appeal from the order; the record also constituting the transcript on appeal from the judgment.

In *Gervais v. Joyce*, 114 Pac. 409, it is held that the failure to file the transcript is not excused by reason of the fact that the transcript was left with the attorney for respondent for examination, and it was returned within ample time for filing, but the attorney for appellant "was unaware of the exact time that the same was signed, and through his inadvertence and neglect overlooked the time required within which to file the same in the appellate court."

In *Hamaker v. Keating* (Sup.) 110 Pac. 109, for failure to file the transcript, the excuse was offered that the attorney, "after filing the notice of appeal, elected to have the record prepared in accordance with section 953a, and thereupon conceived the idea that the notice to be given to the clerk for the preparation of the transcript under that section would not have any effect and would not be mandatory upon the clerk, unless there was on file in his office at the time a duly served notice to the appellant's attorney of the entry of the order appealed from, and that with this idea in mind he deferred giving any notice to the clerk, and awaited the service of notice to himself of the entry of the order from which the appeal was taken and of which he already had full knowledge." It was held that such a mistake did not constitute a ground for relief.

[2] But, for another reason set out in the *Keating Case*, supra, the default should not be set aside. Therein the Supreme Court declares: "Lastly, if rules similar to those governing applications for relief under section 473 of the Code of Civil Procedure are to be applied here, the party asking relief from his default must at least show that he has consulted counsel and has been advised by them that in their opinion he has reasonable grounds to expect a reversal of the order appealed from, if the appeal were considered on the merits." As therein, so here, "no assertion of this character is made. The appellant stands contending merely for the technical right," not even the attorney in his affidavit intimating that he believes there is any merit in the appeal.

The appeal is therefore dismissed.

We concur: CHIPMAN, P. J.; HART, J.

16 Cal. App. 147

PEOPLE v. GROW. (Cr. 194.)

(District Court of Appeal, Second District, California. May 4, 1911. Rehearing Denied by Supreme Court, July 3, 1911.)

1. ASSAULT AND BATTERY (§ 87*)—EVIDENCE—MOTIVE.

In a prosecution for assault on prosecutor, a strike breaker, evidence that a strike was in progress in the works of prosecutor's employer, that he was employed there, and that defendant was a member of a union conducting the strike, and was engaged in assisting in the maintenance of a line of pickets around the employer's works, and that prosecutor had never seen him before, was admissible to prove motive.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 132; Dec. Dig. § 87.*]

2. CRIMINAL LAW (§ 371*)—OTHER OFFENSES—EVIDENCE.

In a criminal prosecution, evidence of collateral facts tending to prove a distinct, substantive offense is admissible, if it has a direct tendency, in view of the surrounding circumstances, to prove the motive, intent, or other material fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.*]

3. CRIMINAL LAW (§ 806*)—INSTRUCTIONS—REASONABLE DOUBT—REPETITION.

Where, in a prosecution for assault, the court charged that the burden was on the prosecution to prove every element of the offense beyond a reasonable doubt, an instruction that, if the jury found from the evidence that some other person willfully, feloniously, and with malice aforethought assaulted prosecutor or committed any one of the lesser offenses included in that charge, and defendant aided and abetted in the commission of the offense, then he was himself guilty of the same crime was not objectionable for failure to require that such aiding and abetting must have been proved beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1991; Dec. Dig. § 806.*]

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

C. F. Grow was convicted of assault, and he appeals. Affirmed.

George Appell, Fred J. Spring, and Geo. F. Snyder, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was charged by information with the crime of assault with a deadly weapon with intent to commit murder. At the trial upon this charge, he was convicted of the crime of assault and sentenced to 90 days in jail. He appeals from the judgment and an order of court denying his motion for a new trial.

On September 19, 1910, Edward C. Hoffman, the prosecuting witness, was and had been for several months engaged in work as an iron moulder for the Keystone Iron Works in Los Angeles, Cal. He resided at a station on the Long Beach electric railway line, known as Latin Station, from which, over said railway line, he traveled to and from the place of his employment in Los Angeles. About 6 o'clock on the evening of

September 19th, upon arriving at Latin Station, he left the car line and was proceeding along the sidewalk to his home, when, without warning and without seeing his assailants, he was, as shown by the evidence of those who witnessed the attack, assaulted by four men, knocked from the sidewalk into the roadway, and beaten into an insensible condition. While the evidence is conflicting upon the question, it clearly tends to establish the fact that defendant was one of the four persons who committed the assault. Hoffman was unacquainted with the defendant, and testified that, so far as he knew, he had never seen him until after the date of the assault.

For the purpose of showing a motive for the assault, evidence was introduced, over defendant's objection, tending to prove that Hoffman was a nonunion iron moulder employed by the Keystone Iron Works, which for several months had pursued a policy of refusing to employ men who were members of the iron moulders' union; that defendant was a member of the iron moulders' union, which at the time of the attack upon Hoffman was, and for some time had been, engaged in maintaining a strike declared against the Keystone Iron Works; that he was actively connected with the strike, associating with and encouraging others engaged in keeping a line of pickets at the plant of the Keystone Iron Works.

[1] Appellant insists that the court erred in admitting this evidence, for the reason that the facts sought to be established were collateral to the issue being tried and could have no bearing upon the guilt or innocence of defendant. In our opinion, the ruling of the court was proper. The motive with which a crime is committed is always material and a proper subject of inquiry. That it is established by proof of collateral matters prejudicial to defendant does not render the evidence incompetent. The fact that defendant was actively engaged with others in prosecuting a strike against the Keystone Iron Company, and that Hoffman accepted employment with such company, thus placing himself in a position antagonistic to the hostile attitude of defendant's union toward such employer, clearly and logically tended to show a motive on the part of defendant in committing the assault, and, since the identity of the person who committed the crime was a fact in dispute, evidence of motive was peculiarly material. *People v. Soeder*, 150 Cal. 14, 87 Pac. 1016; *People v. Donnelly*, 143 Cal. 394, 77 Pac. 177.

[2] Even where the evidence of collateral facts tends to prove the commission of a distinct, substantive offense, it is nevertheless admissible, if it has "a direct tendency, in view of the surrounding circumstances, to prove the motive or intent or other material fact." *People v. Cook*, 148 Cal. 341, 83 Pac.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

43. There is nothing in the case of *People v. Lane*, 100 Cal. 379, 34 Pac. 856, cited by appellant, contrary to the view here expressed. It was there held that the evidence admitted did not tend to prove any material fact involved in the issues.

[3] Appellant next contends that the court erred in instructing the jury as follows: "If you find from the evidence in this case that some other person, at the time and place mentioned in the information, did willfully, feloniously, and with malice aforethought assault the said Edward Hoffman with a deadly weapon with intent then and there him (the said Hoffman) to kill and murder, or did commit any one of the aforesaid lesser offenses necessarily included in that which is charged (and as to which the court had instructed the jury), and that the defendant now on trial was present and aided and abetted in the commission of such assault, then, under the law, this defendant is himself guilty of the crime so committed." Appellant's objection to this instruction is that the court omitted therefrom a statement that, in order to establish defendant's guilt as aider and abettor in the commission of the assault, such fact must be proven beyond a reasonable doubt. The court, however, fully instructed the jury upon this point in elsewhere stating: "The defendant's presence and participation in the crime are affirmative and material facts that the prosecution must show beyond a reasonable doubt to sustain a conviction; and, if, from a careful consideration of all the evidence in this case, you have a reasonable doubt of the defendant's presence at the time and place where the assault is charged to have been committed, it will be your duty to acquit him." And again told them that: "Every person is presumed to be innocent until he is proven guilty. If, upon such proof, there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal." Under the instructions, considered as a whole (*People v. Jailles*, 146 Cal. 307, 79 Pac. 965; *People v. Stevens*, 114 Pac. 800), it is impossible to conceive of the jury finding defendant guilty as an aider and abettor in the commission of the crime, if the members thereof entertained a reasonable doubt as to the proof of such fact (*People v. Neber*, 125 Cal. 562, 58 Pac. 133).

The judgment and order are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

16 Cal. App. 211

Ex parte HAYTER. (Cr. 161.)
(District Court of Appeal, Third District, California. May 10, 1911.)

1. CRIMINAL LAW (§ 170*)—FORMER JEOPARDY—STATUTORY PROVISIONS—"ORDER."

Under Pen. Code, § 1008, providing that, if a demurrer is allowed, the judgment is final on

the indictment or information, and is a bar to another prosecution for the same offense, unless the court, being of the opinion that the objection may be avoided in a new indictment or information, directs the case to be resubmitted or directs a new information to be filed, provided that, after such order, the defendant may be examined before a magistrate, and discharged or committed by him as in other cases, and section 1009 providing that if the court does not permit the information to be amended, nor direct that a new information be filed, the defendant must be discharged, the court's minutes reciting that, the demurrer to the information having been argued and submitted, the court expressed the opinion that the demurrer should be sustained, but that the defect in the information might be corrected by a new information, did not constitute an order within section 1008, authorizing proceedings de novo and a new information against the accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 313; Dec. Dig. § 170.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5017-5023; vol. 8, p. 7739.]

2. CRIMINAL LAW (§ 170*)—FORMER JEOPARDY—STATUTORY PROVISION.

Pen. Code, § 1008, providing that, if a demurrer is allowed, the judgment is final on the indictment or information, and is a bar to another prosecution unless the court directs the case to be resubmitted, or a new information to be filed, is not limited in its application to cases where the original indictment or information states a public offense, but applies also where it does not state any offense whatsoever.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 313; Dec. Dig. § 170.*]

3. DISTRICT AND PROSECUTING ATTORNEYS (§ 10*)—DUTIES—ORDER OF COURT.

Under Pen. Code, § 1008, providing that, if a demurrer is allowed, the judgment is final on the indictment and information, and is a bar to another prosecution unless the court directs the case to be resubmitted or directs a new information to be filed, the court's order to the district attorney to proceed further in such a case is mandatory, and failure to obey it would involve a violation of duty on his part for which he could be removed from office.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Dec. Dig. § 10.*]

4. HABEAS CORPUS (§ 4*)—NATURE OF REMEDY—EXISTENCE OF REMEDY BY APPEAL.

Where, on sustaining a demurrer to an information, the accused is detained, and proceedings de novo are prosecuted against him without an order of court required by Pen. Code, § 1008, the remedy by appeal is not speedy and adequate, and does not bar his right to release by habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 4; Dec. Dig. § 4.*]

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Application by James Hayter for a writ of habeas corpus. Petitioner discharged.

B. F. Fowler, for petitioner. J. Chas. Jones, Asst. Atty. Gen., for the People.

HART, J. The petition alleges that on the 26th day of October, 1910, a complaint was filed in the justice's court of township No. 2, in the county of Merced, jointly charging the petitioner and one Walter Hayter with the crime of obtaining property from

one A. Dastrevigne by false and fraudulent representations. A warrant was thereupon issued by the magistrate, and on the 5th day of November, 1910, said warrant was served on the petitioner, who was brought before said magistrate, by whom petitioner was on the 15th day of December, 1910, preliminarily examined on said charge and an order made holding him to trial in the superior court of said county. Upon said order the district attorney, in due time, filed an information, thereby attempting to inform against petitioner for the crime for which he was ordered held by the magistrate. After several postponements of the matter, the defendant appeared for arraignment upon the information thus filed on the 23d day of January, 1911. The petitioner moved to set aside said information on certain statutory grounds. This motion was denied by the court, and thereupon the petitioner interposed to the information a demurrer, which, after argument, was on the 28th day of January, 1911, ordered sustained by the court. The order sustaining the demurrer reads as follows: "The demurrer to the information herein having been heretofore argued and submitted is now ordered sustained." The petition further alleges that immediately upon the making of the foregoing order sustaining the demurrer the clerk of said court entered the same upon the minutes of said court "in the Minute Book kept by said clerk for recording the proceedings had in said court in such matters as come before said court." Immediately after the making of said order sustaining said demurrer, the petition proceeds, "as the defendant, James Hayter, petitioner herein, was leaving the courtroom of said court, he was arrested by the sheriff of said county, without any warrant of arrest being read to him, by order and direction of the district attorney of said county, and immediately taken to and confined in the county jail of said county, wherein he is now and has ever since been confined and restrained of his liberty." The petition discloses that on the afternoon of the day on which the court made the order sustaining the demurrer to said information, and after the petitioner had been rearrested as described, the district attorney caused another complaint to be verified and filed with said justice's court of township No. 2, charging the petitioner with the identical offense for which he was informed against by the information to which, as explained, a demurrer was sustained.

The petitioner, claiming, as he does here, that since the court at the time of making the order sustaining the demurrer to the information referred to did not "direct a new information to be filed," as required by section 1008 of the Penal Code, the action of the district attorney in causing him to be rearrested and proceedings de novo taken and had before the magistrate upon a com-

plaint filed before said magistrate accusing him of the identical offense with which he was charged by the information that fell under the force of a demurrer was in excess of his authority and jurisdiction, under the terms of the section of the Code just mentioned, petitioned the superior court of Merced county for his restoration to liberty through a writ of habeas corpus. The petition for said writ, as here, stated, as the ground upon which petitioner claimed the right to his release from imprisonment, that upon sustaining the demurrer to the information the court did not make an order directing the district attorney either to file a new information or otherwise to proceed de novo, as required by the statute, against the defendant upon the charge alleged against him in said information. Said writ was granted and made returnable before said superior court on the 2d day of February, 1911, at 5 o'clock p. m.

Argument upon the petition for said writ was had on the 3d day of February, 1911, and it appears that the court took the matter, after its submission, under advisement. On the 25th day of February, 1911, the matter of petitioner's application to be discharged from custody being still undecided, the court made an order correcting its minutes of the proceedings had on the 28th day of January, 1911, on which date the demurrer to the said information was sustained. The proceedings by which said minutes were corrected are recorded as follows in the minute book kept by the clerk of said court: "Whereas, the minutes of the superior court of Merced county, state of California, for the 28th day of January, 1911, in the matter of the application of James Hayter and Walter Hayter for a writ of habeas corpus read as follows: 'People vs. James Hayter and Walter Hayter, No. 630. January 28th, 1911. The District Attorney, the defendant, James Hayter and his counsel, B. F. Fowler, Esq., appear in court. The demurrer to the information herein having been heretofore argued and submitted is now sustained.' And, whereas, said minutes do not fully set forth the actions and judgment of said court had in said matter, said minutes are amended to read as follows: 'People vs. James Hayter and Walter Hayter. No. 630. January 28th, 1911. The District Attorney, the defendant and his counsel, B. F. Fowler, Esq., appear in court. The demurrer to the information having been heretofore argued and submitted, the court expressed the opinion that the demurrer should be sustained and it is so ordered and the court also expressed the opinion that the defect in said information existing through failure to set forth the intent to defraud, might be corrected by properly setting forth said intent in a new information.'" The minutes disclosing the foregoing correction of the order sustaining the demurrer also show that at the time said correction was made the dis-

trict attorney declared that "he intended to file immediately a new information and to proceed further against the said James Hayter by issuance of new process." It also appears from said last-mentioned minutes that counsel for petitioner "requested the court to discharge the prisoner" upon the showing made on the application for the writ of habeas corpus theretofore issued by said court; but that "the district attorney objected to the making of such order, stating that he intended to file a new information, and the court, upon the objection of the district attorney, refused to order the discharge of the petitioner in order that said new information might be filed." Thereafter, the petitioner was preliminarily examined on the second complaint filed before the magistrate, charging him with the crime which was attempted to be stated against him in the first information, and for which he was originally or in the first instance held to trial. Thereafter the magistrate again examined the charge against petitioner and thereupon made an order holding him to trial upon said charge, and the district attorney subsequently filed an information against petitioner upon the order so made.

[1] Upon the record as disclosed by the foregoing recital of the history of the proceedings by which he is restrained of his liberty, the petitioner contends that he is entitled to be restored to freedom, and we think that it is very clear that there is no alternative left to this court, but to sustain his contention. Section 1008 of the Penal Code reads as follows: "If the demurrer is allowed, the judgment is final upon the indictment or information demurred to, and is a bar to another prosecution for the same offense, unless the court, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment or information, directs the case to be resubmitted to the same or another grand jury, or directs a new information to be filed; provided, that after such order or resubmission, the defendant may be examined before a magistrate, and discharged or committed by him, as in other cases." The succeeding section provides that "if the court does not permit the information to be amended, nor direct that an information be filed, or that the case be resubmitted, as provided in the preceding section, the defendant, if in custody, must be discharged, or if admitted to bail, his bail is exonerated, or if he has deposited money instead of bail, the money must be refunded to him." Whether in point of fact the court failed, as the petition charges, to direct the district attorney to proceed further against the petitioner by any of the modes prescribed by section 1008 of the Penal Code at the time it made its order allowing the demurrer is unimportant, since in our opinion even the *nunc pro tunc* proceedings by which the minutes of the proceedings of the court sus-

taining the demurrer were corrected fail to disclose that the court made an order, as required by said section, investing the district attorney with authority either to amend the information or to cause to be re-examined before a magistrate the charge attempted to be alleged in the defective information against the petitioner.

According to the minutes of the court as corrected, the court, upon sustaining the demurrer, merely expressed the opinion that "the defect in said information might be corrected," but nowhere is there any language to be found in said corrected minutes indicating that the court directed or intended to direct the district attorney to amend the information or to proceed *de novo* before a magistrate or otherwise to proceed further against the petitioner upon the charge attempted to be stated against him in said information. Obviously, the mere expression of an opinion by the court that "the defect in the information might be corrected" is not within the contemplation of section 1008 of the Penal Code a direction to the district attorney to file an amended information or to otherwise proceed further against the accused. The statute requires more than that. In addition to the entertainment and expression of an opinion by the court that "the objection on which the demurrer is allowed may be avoided in a new indictment or information," the Code section makes it requisite, in order to authorize the district attorney to proceed with the prosecution of the accused for the "same offense," that the court make an order directing that official to so proceed against the defendant. In *Ex parte Williams*, 116 Cal. 512, 48 Pac. 499, the court below sustained a demurrer to the information, "with leave to the district attorney to file a new information." Holding that under such an order the district attorney was without the power or right to proceed further against the accused for the offense charged in the information to which the demurrer was sustained, the Supreme Court says: "It cannot be held, therefore, that the order here given is equivalent to the order which the statute contemplates should be made. The 'leave' given to a party to file an amended pleading after demurrer sustained is never an order or direction to the party that he must file such pleading. As the only order which the court could properly make was an order directing a new information to be filed, and as the order in fact made by the court cannot be considered to be equivalent thereto, it follows, under sections 1008 and 1009 of the Penal Code, that the prosecution is at an end and that the prisoner must be discharged."

In the case at bar the language of the court, as evidenced by the corrected minutes of the proceedings in which the demurrer was allowed, does not even disclose a permissive order or such an order as is held in

Ex parte Williams to be insufficient, under the terms of section 1008, to confer upon the district attorney the authority to proceed further against the prisoner for the offense with which he was charged or attempted to be charged by the defective information. Indeed, as we have seen, there was no order, nor anything approximating an order, but simply an expression of the opinion of the court that the defect could be corrected or avoided in a new information. Of course, if section 1008 of the Penal Code means anything at all, there was a total failure on the part of the court, even if it intended to do so, to make such an order as is absolutely essential to the justification of the proceedings taken in this case by the district attorney after the order sustaining the demurrer was made.

[2] But it is earnestly contended by the Attorney General that the mandates of section 1008 of the Penal Code have no application to a case where a demurrer is sustained to an information which, as in this case, does not state any offense whatsoever. The argument is that it is only where the accused is placed in jeopardy, in the common-law sense of that term, that the section becomes operative or has application, and that, the original information here having altogether failed to state any offense, the petitioner was never in jeopardy, and that, therefore, the district attorney was authorized to proceed further against the accused without an order by the court directing him to do so. This precise point, so far as we are advised to the contrary, has never before arisen in this state, and, while there is language in a New York case (*People v. Rosenthal*, 197 N. Y. 401, 90 N. E. 991) which appears to lend some support to the position of the Attorney General, we are not inclined to assent to that construction of section 1008 of the Penal Code.

The section of the New York Criminal Code with respect to the subject with which we are dealing is in language precisely the same as that of our section 1008. In the case cited the court says: "By the express command of the statute a judgment sustaining a demurrer is a bar to a further prosecution for the same offense unless such an order is made. *No order to resubmit is required, however, unless the defendant has been put in jeopardy under a former indictment.*" From the language italicized in the foregoing excerpt from the opinion, it is argued that unless the indictment or information states a public offense—not merely attempts but fails to state it—section 1008 does not require that an order directing the district attorney to proceed further against the accused shall be made by the court as a prerequisite to the right or authority of the prosecuting official to so proceed.

As stated, the language referred to seems to be susceptible of the interpretation given it by the Attorney General, although it is

not clear to us that such was the meaning intended. The first part of the quotation appears to hold that by virtue of the statute itself, without regard to whether the pleading states or simply attempts but fails to state a crime, a further prosecution of the accused upon the charge stated or attempted to be stated is barred in the absence of an order by the court, at the time of the making of the order allowing the demurrer, directing the district attorney to resubmit the case to the same or another grand jury. And we think, as stated, such to be the proper construction and true meaning of our statute. In other words, we are of the opinion that the question of common-law jeopardy does not arise here. The sole question propounded is whether the Legislature intended, by the enactment of section 1008, to place it with the court in any case where a demurrer to a criminal pleading has been sustained to say whether the charge designated in the defective pleading shall or shall not be further prosecuted by the district attorney. In our opinion the statute can mean nothing else without being absolutely purposeless.

We are unable to think of any occasion when there would arise a case to which section 1008 of the Penal Code would be applicable if the contention of the Attorney General were maintainable. We can conceive of very few cases in which a demurrer to an indictment or an information would be properly allowable where sufficient facts were stated to constitute a public offense. Indeed, we can now recall but three grounds upon which a demurrer would be sustainable in a case where the accusatory pleading stated a public offense according to the rules of criminal pleading, viz.: (1) Where, upon the face of the pleading, it appears that the court is without jurisdiction because of the improper laying of venue or disclosing that the place of the commission of the offense was outside or beyond the territorial jurisdiction of the court in which the pleading has been filed; (2) where it appears from the face of the pleading that the statute of limitations has barred a prosecution of the accused for the offense charged; (3) where, possibly, an act might be denounced as a crime for which no penalty has been provided. But obviously section 1008 of the Code can have no reference or application to such cases, for, where a demurrer is sustained either on the ground that the venue of the crime was not within the territorial jurisdiction of the court in which the accusatory pleading has been filed or on the ground that the statute of limitations has barred a prosecution of the accused for the crime therein charged, or on the ground that no penalty is prescribed for the act denounced as a crime, the court would have no legal right or jurisdiction to make the order authorized by section 1008 of the Penal Code directing the district attorney to proceed further against

the accused. In all those cases there would manifestly be no other course for the court to pursue but to dismiss the indictment or information and order the discharge of the prisoner. But, if it be suggested that the section is intended to apply to cases where the demurrer is addressed, not to the sufficiency of the facts stated to disclose a public offense, but to the inartificiality of the pleading, as, for instance, that its averments are ambiguous or uncertain or unintelligible, the reply is that it so rarely happens that such an objection is made to a criminal pleading, except where an objection on those grounds in effect goes to the extent of challenging the sufficiency of the averments to state a public offense (in which case we are brought back to the original proposition that no offense is stated at all, and, therefore, according to the Attorney General, the section does not apply) that it is inconceivable that the Legislature intended to limit the application of the statute to such cases only. It may safely be declared that, where an information or indictment is not bad for want of facts or states a public offense, no demurrer would be interposed and much less allowed merely because such facts are not stated with the technical nicety which should, of course, characterize such a pleading. If the offense is stated in such manner as to inform the defendant of the precise crime with which he is charged, and the time and place of its commission, it is sufficient even if the statement of facts is not strictly in accord with a thoroughly scientific conception of criminal pleading.

There being, then, practically no cases to which the statute can apply except those in which the demurrer has been sustained on the ground that the pleading does not charge a public offense, and if it does not apply to the latter class, what is the meaning of sections 1008 and 1009 of the Penal Code? What did the Legislature intend to accomplish by their enactment? Of course, it must be conceded that they were placed upon our statute books for some purpose, for it cannot, of course, be assumed that the Legislature thus labored with no specific object in view or no particular purpose to subserve.

The vital requirement, or, if we may use the expression in this connection, the gravamen of the statute, is, in our opinion, that, in order to confer upon the district attorney the power to continue with the prosecution of a charge, which he has failed to state in the indictment or information, to which, for such reason, a demurrer has been sustained, he must, as an indispensable condition to his right to so proceed, first receive from the court the sole source of the power from which he may derive the right to proceed, express authority to do so; that, in other words, the district attorney's right to go on with the prosecution of the charge under the circumstances indicated solely depends upon and proceeds from the order of the court, as

much so as the right to do any other act which can be done only on an order of the court must depend upon such an order. If the court elects not to order the district attorney to proceed further, then the bar attaches by the very terms of the statute itself. The bar contemplated by section 1008 of the Penal Code, in other words, is what may appropriately be termed a statutory bar, somewhat analogous, in the principle upon which it operates, to the statute of limitations, or it may, with no impropriety, be called, in contradistinction to the common-law jeopardy, a "statutory jeopardy," resting, however, as is obvious, upon conditions or consisting of elements which are purely of statutory or legislative creation, different and distinct from and having no relation to those conditions which must be present in common-law jeopardy, as that doctrine is defined by and appropriated to others of our Code sections. It is, in brief, a bar merely and solely because the Legislature has said so. Of course, no one will dispute the power of the Legislature to provide that any conditions which may arise in a criminal case may operate as a bar to a second or further prosecution of the charge preferred against the accused, regardless of whether jeopardy, in the common-law sense of that term, arises and attaches or not.

[3] The theory upon which this legislation proceeds is, as declared in *Ex parte Williams*, supra, that the Legislature deemed it the wisest plan to vest in the court and not in the district attorney the discretion of deciding whether under the circumstances pointed out by the statute the district attorney shall proceed further against the accused for the same offense named in the pleading to which a demurrer has been sustained. The reason for this is, it seems to us, obvious. On the one hand, while the district attorney clothed with such discretion might allow his partisanship (for, like all lawyers, a partisan in litigation he is) to lead him to an unjust harassment of the accused, on the other hand, he might, having such discretion, refuse to proceed further in a case which ought to be prosecuted. The court to which this discretion is wisely committed is not a partisan. Its duty is to view both sides fairly and impartially. It may familiarize itself with the facts so as to fairly decide whether the prosecution of the charge should or that it should not be pressed after demurrer sustained to the first, or, it may be, the second indictment or information. Its order to the district attorney to proceed further is mandatory upon that official, and failure to obey the order thus made would involve a violation of duty on the part of the prosecuting official for which he could be removed from office or perhaps otherwise punished. *Ex parte Williams*, supra.

That the construction of section 1008 here given is the true one we think the language of the statute itself clearly bears out, for,

it will be noted, the language is, "if the demurrer is allowed, the judgment is final upon the indictment or information demurred to." The language, it will thus be seen, is not, "if the demurrer is allowed the judgment is final upon the offense stated." To all intents and purposes, undoubtedly, in contemplation of said section, the document or instrument upon which the accused is arraigned is no less than what it purports to be—i. e., either an indictment or an information—up to the very point at the least where the court sustains a demurrer thereto, and the judgment which follows and becomes final, unless the order to the district attorney which it is in the discretion of the court to make accompanies the order sustaining the demurrer, is intended to act and operate upon the information or indictment in the form in which it appeared before and at the very time of the making of the order sustaining the demurrer. But we are not altogether without authority for the views here declared concerning the meaning of section 1008 of the Penal Code.

In the case of the State v. Crook, 16 Utah, 212, 51 Pac. 1091, the defendant, having been informed against for the crime of abortion, demurred to the information "upon the ground that the facts shown therein did not constitute a public offense." The court sustained the demurrer, and thereupon ordered the discharge of the prisoner. A second information was, however, filed by the prosecuting attorney, and the defendant tried and convicted thereunder. But the accused had, upon his arraignment upon said new information, in addition to the plea of not guilty, interposed a plea of "former acquittal," alleging, "in specific terms, that he had previously been charged by information with the same identical felony and offense as is charged in this information; that his demurrer to said prior information for the same offense had been sustained by the court, and final judgment entered thereon; and that he had been acquitted and discharged by the court of and from said crime and charge." The defendant appealed to the Supreme Court from the judgment and order, and, reversing the cause, with directions to the trial court to discharge the accused, that court says: "The defendant's plea of former acquittal of the same offense charged in the information, by the judgment of the court sustaining the demurrer, and ordering the defendant discharged, without making an order directing another information to be filed, or that the cause be submitted to the grand jury, was, under the facts shown, a sufficient plea of former acquittal, and a bar to a prosecution under the third information filed. The information to which the demurrer was sustained and the information upon which the defendant was tried stated the same identical offense. The identity of the parties was admitted. We are of the opinion that the instruction of the court to the jury, to the effect that the judgment of the court in sustaining the demurrer to the second information and discharging

the defendant thereon, without an order directing another information to be filed, would not amount to an acquittal of the defendant on that information, and that the jury should so find, was error." It may here be remarked that the section of the Utah Code with respect to orders sustaining demurrers to informations and indictments and the duty of the court to direct the prosecuting attorney to proceed further as a prerequisite to that official's right to do so after demurrer sustained is in language precisely the same as that of our section, and it will be noted that that case, as to the facts, is strikingly similar in all essential respects to the case at bar. The effect of the ruling there, as is the result arrived at here, is that the statute *ex vi termini* operates as a bar where the court, regardless of whether the accusatory pleading states an offense or not, after demurrer sustained, has omitted to direct the district attorney to proceed further with the prosecution of the charge named in the information to which the demurrer was sustained. In that case, as here, no offense was stated, but the court held, from the crime named in the first information and the facts stated in connection therewith, such as the time and place of the commission of the designated crime and the names of the witnesses inserted on the back of the information, etc., it appeared that the new information charged the identical offense designated and attempted to be set forth in the original information and the condition so disclosed was sufficient to bring the case within the terms of the section of the Utah Code, identical, as we have seen, in language, to section 1008 of our Penal Code.

We have examined the question under review from every conceivable angle, with the result that we are unable to discover any ground upon which a different construction of our statute can be justly arrived at. Any other conclusion would not only leave the statute without any practical meaning whatsoever, but would necessitate the insertion therein, by judicial construction, of language that it does not contain.

[4] It has been suggested that the petitioner has an adequate remedy in the ordinary course of law, and that, therefore, he should not be permitted to pursue this summary and extraordinary method of securing his discharge from custody. We do not agree to the proposition thus suggested. The case of *Ex parte Williams*, supra, furnishes a precedent for the adoption of the writ of habeas corpus as a remedy for the release of a citizen restrained of his liberty under such circumstances as are present here.

The ultimate question submitted here is plainly one of jurisdiction. As we have seen, the further prosecution of the charge unsuccessfully sought to be alleged in the information is barred, under the terms of section 1008 of the Penal Code, by the failure of the court below to direct the district attorney to proceed further against the petitioner in any

of the several ways pointed out by said section. It follows, therefore, that the district attorney is absolutely without legal authority to file a new or an amended information or an indictment, charging the same offense, that would confer jurisdiction upon the court to try the accused for said offense. The prosecution is just as completely at an end as if the petitioner had been tried on the charge and acquitted or convicted thereof by a jury, and therefore a trial of the accused for the crime attempted to be stated in the information, which has become functus officio by the ruling on the demurrer, upon a new information charging the same offense would be in excess of the jurisdiction of the court, and while, of course, this question could be raised and adjudicated on appeal, where a plea in bar of the prosecution, based upon section 1008 of the Penal Code, had been interposed by a defendant, yet we have been shown no sound reason for remitting the petitioner to his remedy at law when it is obvious that a verdict of guilty would necessarily have to be set aside. To require him to resort to his remedy by appeal would likely only be to force him to suffer imprisonment until his trial is had, and, in case of conviction, until his appeal could be heard and determined, and all this as the result of a proceeding of which the court has no jurisdiction. Moreover, to require him to go to trial would necessitate the entailment of an unnecessary and no insignificant expense upon the taxpayers of the county of Merced, a consideration which should have some weight in the determination of a question which, in point of fact, involves, in its solution, so far as its importance as a legal proposition is concerned, in this case at least, merely a decision as between "tweedle-dum" and "tweedle-dee."

The remedy by appeal is neither speedy nor adequate in a case where a citizen is restrained of his liberty under an illegal process. Where one is unlawfully imprisoned and it may be made so to appear to a court in an appropriate legal proceeding, there can exist no conceivable reason why he should not be restored to his liberty by the shortest cut recognized by the law, and not be compelled to remain in a county prison, and thus be made to suffer the inconveniences of such restraint until some more dilatory remedy, which may ultimately be available to him, has been put in operation. See *Terrill v. Superior Court*, 60 Pac. 38.¹

We think the petitioner, for the reasons stated in this opinion, is being restrained of his liberty without legal right, and he is therefore discharged from custody.

We concur: CHIPMAN, P. J.; BURNETT, J.

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 127 Cal. xviii.

MIKLAUSCHUTZ v. SUPERIOR COURT
OF LOS ANGELES COUNTY et al.

(Civ. 1,005.)

(District Court of Appeal, Second District,
California. May 10, 1911.)

1. JUSTICES OF THE PEACE (§ 189*)—APPEAL—
STATEMENT OF CASE.

Where there has been no trial in fact before a justice of the peace, there is no evidence to be embodied in a statement of the case on appeal, and the appellate court may reverse for errors appearing in the copy of the justice's docket or in the papers and files.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 189.*]

2. JUSTICES OF THE PEACE (§ 122*)—ANSWER
—WAIVER—STIPULATION FOR TRIAL.

Where parties to an action before a justice treated the case as at issue without an answer and stipulated for a time for trial on the merits, an answer was waived, and it was error to enter judgment by default for want of an answer.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 122.*]

3. JUSTICES OF THE PEACE (§ 189*)—APPEAL
—JURISDICTION OF APPELLATE COURT.

The superior court on appeal from a justice's court having jurisdiction to determine whether error appeared from the record and files had jurisdiction to reverse the judgment because of error in entering judgment by default for want of an answer which was the effect of an order vacating the judgment and remanding the case for a new trial, though technically it was improper to direct a new trial when there had been no trial in fact.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 189.*]

Petition by M. Miklauschutz against the Superior Court of California in and for Los Angeles County and others, for a writ of review. Denied.

McKelvey & Sorenson, for petitioner.
George M. Harker, for respondents.

ALLEN, P. J. The record before us discloses that on August 8, 1910, petitioner, as plaintiff, commenced an action in the justice's court against certain defendants. On August 12th following a stipulation was signed by the attorneys for the respective parties setting the action for trial on the 12th of September, 1910. At the same time counsel for defendants directed the attorney for plaintiff, temporarily acting as justice's clerk, to enter a general denial. This the attorney neglected to do. Thereafter, on August 15th, defendants' default was entered, and also judgment entered against defendants. On September 3d defendants moved to set aside the default on the ground that the same was taken after issue made and before time fixed for trial. The court declined to pass and never did pass upon this motion. Thereafter defendants gave notice of an appeal on questions of law and fact, and the papers were certified to the superior court. No statement of the case, however, was filed. The superior court, when a mo-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tion was made by counsel for plaintiff for judgment upon the pleadings, denied the same, and upon the hearing vacated the judgment of the justice and remanded the cause for trial upon its merits. Petitioner seeks to have this judgment annulled upon the ground that the court had no jurisdiction in the premises.

[1] Where there has been no trial in fact, there is no evidence to be embodied in a statement of the case, and the court is authorized to reverse the judgment if errors appear in the copy of the justice's docket, or in the papers and files. The papers and files in this case did disclose the error of the justice in rendering the judgment by default, under the circumstances of the case.

[2] Assuming that no duty devolved upon the acting clerk to enter the general denial, nevertheless, the parties treated the case as at issue, and stipulated for a time of trial upon its merits. The necessity of an answer was waived by the stipulation for trial on the matters set forth in the complaint. *Bailey, Wood & Co. v. Landingham*, 52 Iowa, 415, 3 N. W. 461. More especially should this rule be applicable in a proceeding before a justice, where an oral answer is permissible.

[3] The superior court upon the appeal had jurisdiction to determine whether or not error was apparent from the record and files. Having jurisdiction, it had authority to reverse the judgment. This was the effect of the order made vacating the same, and, while ordinarily it may be that a case cannot be remanded for a new trial where there has been no trial, such rule would not apply whereas in this case, the justice rendered a judgment, without any trial, by default after issue tendered, his duty being to proceed to trial. This duty the superior court properly enjoined upon him by its order.

Writ denied.

We concur: JAMES, J.; SHAW, J.

16 Cal. App. 241

PORTER et al. v. COUNTS. (Civ. 819.)
(District Court of Appeal, Third District, California. May 11, 1911.)

1. BOUNDARIES (§ 37*)—DISPUTED BOUNDARY LINE—EVIDENCE—LOCATION.

Evidence held to establish the location of a disputed boundary line.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 184-194; Dec. Dig. § 37.*]

2. EJECTMENT (§ 112*)—BOUNDARIES—NEW TRIAL—GROUNDS.

In ejectment to establish a disputed boundary line, a second new trial will not be granted to enable defendants to employ a more experienced surveyor to ascertain the true line.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 346-351; Dec. Dig. § 112.*]

Appeal from Superior Court, Humboldt County; Clifton H. Connick, Judge.

Ejectment by Robert Porter and another against Andrew J. Counts. Judgment for plaintiffs, and defendant appeals. Affirmed.

E. M. Frost and L. M. Burnell, for appellant. J. H. G. Weaver, for respondents.

CHIPMAN, P. J. This is an action in ejectment; the real issue being to establish the boundary line between adjoining tracts of land claimed by the parties, respectively. The cause was here on appeal from the judgment in favor of plaintiffs at the first trial, and was reversed and sent back with directions to establish more definitely the west boundary of plaintiffs' land, which would also be the east boundary of defendant's land. 6 Cal. App. 550, 92 Pac. 655. At the second trial plaintiffs had judgment, from which and from the order denying his motion for a new trial defendant appeals.

[1] There is no conflict in the evidence, for the findings rest upon the testimony of Surveyor Elsemore, who was the only witness who undertook to make the survey necessary to the ascertainment of the desired line. The point of objection to the finding and judgment is that in making the survey Mr. Elsemore did not follow the rules and regulations prescribed by the United States Land Department. The same point was made on the former appeal, and it was held that, while the evidence was sufficient to show that defendant had encroached upon plaintiffs' land, it was not sufficient to determine to what extent the encroachment went, nor was it sufficient to meet the issue raised by defendant's cross-complaint. The findings and judgment at the first trial were supported by witness Elsemore's testimony, as they are now. But at the second trial his testimony showed that he had made some further surveys, and was able to definitely locate the line to establish which the cause had been remanded for a new trial.

Plaintiffs are the owners of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 19, and the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 30, township 3 N., range 4 E., Humboldt meridian. Defendant is the owner of lots 2, 3, and 4 of said section 19 and lot 1 of said section 30. It is not deemed necessary to give all the testimony of witness Elsemore showing in detail the method by which he reached his conclusion. He testified that he followed the rules and regulations laid down by the General Land Office in ascertaining the location of corners and boundary lines of sections and subdivisions of sections and we cannot discover, from anything brought out in his cross-examination, or otherwise, that his method was in violation or in disregard of these regulations and directions, nor was it, so far as we can see, likely to result in making an incorrect or unwarranted location of this disputed line.

By taking a township plat and following what we shall briefly show was done by the witness, it will be seen that the court was justified in its findings. All the section corners on the west township line are still in place from section 30 to the northwest corner of section 18. So, also, are the section corners on the south township line east to the southwest corner of section 33. From this latter section corner running north to the southwest corner of section 16 the section corners were found. On the section line north from the southwest corner of section 32, until he came to the quarter corner between sections 7 and 8, the witness found no corners and could find nothing corresponding with the field notes. He found where these missing corners ought to be and was able to locate them on the map, but did not establish them in place as he deemed it unnecessary. He had the section corners to sections 19 and 30 on the township line from which to work, and he had the distance from the known corners two miles east of these. He also had the line from the southwest corner of section 32 to the quarter corner between sections 7 and 8. He made many measurements and established the northeast corner of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 19. He also established the southeast corner of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 30. He found the distance from these corners west to the township line and also the distance from the southwest corner of section 19 along its south boundary to a point where plaintiffs' line crosses that boundary. He also located the northwest corner of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 19 and the southwest corner of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 30. He testified that he "tied up to the southwest corner of section 19," the corner last above referred to in that section, as was also the corner in section 30. He ascertained by measurements the strip of land in controversy, determining its width on the boundary line between sections 19 and 30, and also the width at its north and south boundaries, and he definitely located the situs of the dividing line between the land of plaintiffs and the land of defendant. This line is now definitely fixed and located in place and by such description in the findings and decree that any person competent to handle surveying instruments can trace it accurately. This, it seems to us, determines the whole controversy. The findings have support in the evidence and support the judgment.

[2] We are asked to grant a new trial in order that a more experienced surveyor can be called upon to ascertain the true line. The case has been tried twice. Witness Elsemore showed himself well qualified, so far as we can now judge. Defendant had full opportunity to call in the services of any sur-

veyor of his choice to do the work preparatory to his defense. The request for a new trial on the ground urged does not appeal to our sense of fairness or justice.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

16 Cal. App. 235

SAN JOAQUIN & K. R. CANAL & IRRIGATION CO., Inc., v. STEVENSON et al. (Civ. 857.)

(District Court of Appeal, Third District, California. May 10, 1911.)

1. APPEAL AND ERROR (§ 757*)—BRIEFS—INCORPORATION OF PORTIONS OF RECORD.

In the absence of a definite rule for the regulation of the new method of taking appeals prescribed by Code Civ. Proc. §§ 953a-953c, an appeal will not be dismissed for failure to comply with the requirements of section 953c, in that such portions of the record as the appellant desires to call to the attention of the court should be printed on the brief, where the brief specifies the pages on which the testimony which is deemed important may be found, and no great amount of trouble will be placed upon the court in reviewing the points involved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.*]

2. COURTS (§ 81*)—RULES—AUTHORITY TO MAKE.

It is not the duty of the District Court of Appeal to formulate a rule by which the new practice as to appeals prescribed by Code Civ. Proc. §§ 953a-953c, may be uniformly observed and followed; the authority to make rules governing the practice in the District Courts of Appeal and the Supreme Court being vested by the Constitution in the latter tribunal.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 81.*]

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by the San Joaquin & Kings River Canal & Irrigation Company, Incorporated, against James J. Stevenson (a corporation) and others. From a judgment for defendants, plaintiff appeals. Motion to dismiss appeal denied.

Frank H. Short, F. G. Ostrander, and Edward F. Treadwell, for appellant. James F. Peck, Joseph C. Campbell, W. B. Bunker, H. A. Van C. Torchiana, F. J. Solinsky, and Page, McCutchen, Knight & Olney, for respondents.

HART, J. [1] This is a motion to dismiss the appeal of plaintiff herein. The ground of the motion is that, having prepared its record on appeal in accordance with the provisions of sections 953a, 953b, and 953c of the Code of Civil Procedure, the appellant failed to file, within 30 days after the filing of the transcript, a brief wherein were printed "such portions of the record as the appellant desires to call to the attention of the court." Section 953c, Code Civ. Proc. The contention is that said section contemplates that the appellant must print in his

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

brief so much of the evidence or other portions of the record as may be necessary to make clear and present fairly and lucidly before the appellate court the legal points upon which he relies for a reversal, and, the appellant here having failed to do as thus required, this court should incontinently refuse to consider its appeal.

But, considering that the alternative system of taking appeals in civil cases as prescribed by the sections mentioned is comparatively a new innovation on the appellate practice and procedure as it existed for many years, and in view of the fact that there has been no definite rule established for the regulation of the new method of taking appeals, nor any decision of the appellate courts involving a definite exposition of what the precise practice should be in such cases, we think that a dismissal of the appeal for the reasons urged by the respondents, assuming that in the absence of any such authority expressly given by the statute or by any rule of court to adopt that course we have a right to make such an order, would involve too harsh a penalty to impose upon appellant, conceding that its brief does not comply with the mandates of section 953c of said Code. Where they deem an examination of the testimony important, counsel for appellant in their opening brief specify the pages on which it may be found. We do not say that this is a compliance with the requirements of the statute, but, in this case, if counsel correctly state in their brief the points relied upon, we do not apprehend that a great amount of extra trouble will be placed upon the court in reviewing said points.

The judgment appealed from here is founded on the order of the court granting a motion for a nonsuit on the conclusion of the introduction of evidence by plaintiff. The motion appears to have arisen and been decided upon the proposition contended for by respondents, according to appellant's brief, that the plaintiff (a corporation engaged in the business of supplying water for purposes of irrigation in the counties of Fresno, Merced and Stanislaus) is not entitled to acquire property for the purposes of its business as stated under the power of eminent domain, the contention of counsel for respondents and the theory upon which the motion was decided being that such a corporation can exercise no such rights "unless," as counsel for appellant put it, "its system is so constructed that it can actually, physically and practically supply water for the irrigation of all the lands in the county, no matter where they are situated, whether in the same watershed or on a higher level than the source of supply of the company." The contention of appellant, as to this proposition, is that all that is required of such corporations is that they shall so conduct said business of supplying water for the purposes stated as that all the inhabitants of

the county, as a matter of legal right, may be entitled to and actually enjoy, if they desire to avail themselves of the same, the use of the water so supplied.

The vital questions involved in the proposition as thus stated seem to be whether plaintiff is a public service corporation, and, if so, whether, in order to be entitled to exercise the right to the acquisition of property by proceedings initiated under the power of eminent domain, it must show that its water system is so situated as to be capable of supplying all the land in the county in which its system or continuations thereof are situated with water for irrigation. There is addressed to the first of these questions some evidence, as we judge from the brief of appellant, and it appears to be stated and referred to in said brief by the pages on which it may be found in the reporter's transcript. As stated, we have no fear that the examination of this evidence will entail upon the court a very great amount of extra labor.

[2] The second question is one purely of law, requiring, in its solution, the examination of no evidence other than that which may be found in the record addressed to the proof of the public character of the plaintiff corporation. The same may be said of some other points discussed in appellant's brief. In any event, we are not, as already intimated, prepared to say that we have any authority to dismiss the appeal for the reasons suggested by respondents, and, as stated, if we felt assured that we could exercise that power, we think it would not be proper or just to do so under the circumstances. We may, however, without impropriety, add that we do not conceive it to be the duty of this court, as counsel suggest, to formulate and promulgate a rule by which the new practice as to appeals may be uniformly observed and followed. The authority to make rules governing the practice in this and the Supreme Courts is vested, by the Constitution, in the latter tribunal. We agree with counsel, however, that, since the meaning of the language of section 953c of the Code of Civil Procedure does not seem to be so self-evident as that its true scope is generally understood, there should be some rule of court regulating the administration of the new procedure for taking appeals or at least an authoritative construction of said section that will make clear to the profession generally its true meaning.

It is very clear, as is aptly said in the case of *Roussin v. Kirkpatrick*, 8 Cal. App. 7, 95 Pac. 1123, "the Legislature did not intend to require the reviewing court to grope through the unprinted transcription of the phonographic report of the trial to find the testimony and documents relied upon by the parties, or that it would be sufficient compliance with the statute for the parties to indicate in their briefs the portions of the record relied on by simply citing the page of this transcription where such portions

may be found." See, also, *Estate of McPhee*, 156 Cal. 335, 342, 104 Pac. 455. It has been said that it would be difficult to lay down a "hard and fast" rule as to the practice under the new sections or one that would meet the exigencies of all cases that are brought to the appellate courts by the alternative method of taking appeals. This would be true, perhaps, if the language of section 953c is to be given a narrow or an unreasonably restricted interpretation.

I feel no reluctance in saying, from the experience thus far had with the "alternative" method, as it has hitherto been followed, that in the place of facilitating the decision of cases on appeal its tendency has been to produce delay in that respect, and that such will always be its effect, unless section 953c is definitely construed to mean (as I think it was intended to mean) that, if necessary to the elucidation of the points relied upon, something in the nature, substantially, of a statement or a bill of exceptions be required, in addition to the filing of the phonographic report of the trial, to be printed in a supplement appended to the brief. The language of the section seems to be mandatory, and I think was intended to be. As we have seen, it reads: "In filing briefs on said appeal, the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." As stated, it is not within the province of this court to make a rule or to explain the meaning of the statute; still I think that it may safely be laid down as a rule of practice clearly intended by the Legislature to be observed in the preparation of appeals under the alternative system that whatever may be necessary—whether the evidence or the pleadings, the findings, conclusions of law, and judgment or such interlocutory motions and orders as may have been made during the pendency of the litigation and during the trial—to a clear explanation of the points relied upon or to a lucid exposure of the relevancy, pertinency, force, or importance of such points in their bearing upon the ultimate issue submitted for decision should be inserted, in printed form, in a supplement appended to the brief. The "brief" referred to in the section, if prepared as the section prescribes, is much more than the ordinary brief to which we are accustomed under the old practice, because, when prepared as the statute commands, it becomes a part of the record on appeal.

My opinion is that the Legislature, while not intending under the new method so elaborate a printed record as is required under the older system of taking appeals, contemplated that there should be a sufficient record in printed form to enable the appellate courts to review it without the necessity of wading through a mass of irrelevant and re-

dundant matter, and that the stenographer's report of the trial was intended more as an aid to the court in fully satisfying itself upon points as to which, as is often the case with bills and statements, a paucity of information only is furnished by the printed record. In other words, I think it is clear, if the section referred to means anything at all, that the Legislature thus intended a pretty full printed record, and that the transcription of all that has occurred at the trial shall be filed with such record for no other purpose than to assist the court, if necessary, in obtaining a more complete understanding of points as to which the printed record may not be as full and clear as it should be.

These are the individual views of the writer.

However, as declared, we are, under the circumstances as indicated, constrained to deny the motion here made, and such is the order.

We concur: CHIPMAN, P. J.; BURNETT, J.

16 Cal. App. 244

MCDONALD v. KINGSBURY et al.
(Civ. 974.)

(District Court of Appeal, Second District, California. May 11, 1911.)

1. PRINCIPAL AND AGENT (§ 123*)—AUTHORITY OF AGENT—EVIDENCE.

Evidence held to sustain a finding that B., to whom payments on a land contract were made, was the vendor's general agent, not only to make the sale, but also to collect and arrange with reference to payment of unpaid installments, so that payments received by the agent long after they were due and made pursuant to and on the faith of promises that the contract should not be canceled were binding on the vendor.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 429; Dec. Dig. § 123.*]

2. PRINCIPAL AND AGENT (§ 111*)—AUTHORITY.

Where a vendee made payments under a contract after they became due pursuant to representations by the vendor's general agent that they might be so made, and that the vendee would not incur a forfeiture, the vendor was bound by the agent's promises, and could not claim that defendant was guilty of a grossly willful breach of duty within Civ. Code, § 3275, providing that whenever by the terms of an obligation a party incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom on making full compensation, except in case of a grossly negligent, willful, or fraudulent breach of duty.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 331; Dec. Dig. § 111.*]

3. QUIETING TITLE (§ 52*)—JUDGMENT.

Where, in a suit by a vendor to quiet title and enforce a forfeiture before the time for completion of the contract had arrived, the court relieved defendant from the forfeiture on payment of the amount due, the legal title subject to the contract remaining in plaintiff, it was improper for the clerk to enter judgment

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that plaintiff take nothing by the action, under the rule that in such suit the respective parties are entitled to have their rights, claims, and interests finally determined.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 52.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Martha A. McDonald against Rae W. Kingsbury and others. From a judgment in favor of defendants, and from an order denying a new trial, plaintiff appeals. Modified and affirmed.

Davis & Rush and Byron C. Hanna, for appellants. Clement L. Shinn and Elizabeth L. Kenney, for respondents.

ALLEN, P. J. The action was one to quiet title. The facts as found by the trial court are these: Plaintiff and defendants' assignor entered into a written contract on January 24, 1905, for the sale and purchase of real property at the agreed price of \$900, of which \$50 was paid in cash and the residue to be paid in monthly payments of \$10 each, with interest at 7 per cent. payable semiannually, upon deferred payments, time being made of the essence. Plaintiff, by contract in writing, extended the time for the payment of the first four installments until May 20, 1905; that on said last-named date defendant paid \$40, and subsequent and deferred payments were made, including interest, until September 26th; that no payments were thereafter made until December 5th, when the payments then in default were made and accepted by plaintiff. Thereafter, on February 24, 1906, the deferred payments with interest were again paid and accepted. No further payments were made. The first extension of time was given by one Broder-son, the selling agent of plaintiff, which was ratified by plaintiff. Thereafter Broder-son, still a general selling agent of plaintiff, represented to defendant that, if necessary, she would carry defendant on account of future payments, and assured her that plaintiff would take no advantage of any failure to pay promptly; that plaintiff did receive payments, one of which was made by the agent, long after the same were due and never refused to receive such past-due payments until November 6, 1906, at which date defendant tendered to plaintiff the amount, with interest, due upon such purchase, which plaintiff refused to accept, and thereafter brought this action. Defendant by answer set up the matters so found by the court in its findings with relation to extension of time and representations of the agent, and the trial court upon the hearing made an order that, if defendant would pay into court for plaintiff all the sums due, judgment would be entered in favor of defendant. Defendant made such payment, and the court found that such pay-

ment was a full, just, and equitable compensation to plaintiff for all loss or injury suffered on account of default in payments; that no damage had resulted to plaintiff on account of such default; that defendant had been guilty of no grossly negligent, willful, or fraudulent breach of duty; that defendant had a valid and subsisting right to complete such purchase, and to be relieved from forfeiture. Judgment was entered accordingly, from which, and an order denying a new trial, plaintiff appeals.

[1, 2] It is contended by appellant that the finding that Broder-son was the general agent of plaintiff when she made the representations and assurances to defendant, upon the faith of which she acted has no support. That Broder-son was plaintiff's selling agent is not questioned; that, assuming to act for plaintiff, she extended the time for payment of the first four installments and executed a supplemental contract, signed by herself, and plaintiff with full knowledge ratified such act. Plaintiff intrusted to Broder-son the duty of looking after defendant's deferred payments, which is clearly shown by her repeated calls upon Broder-son to inquire why defendant was lax in payment. That plaintiff had knowledge of Broder-son's representations that no advantage would be taken on account of defaulted payments is shown by Broder-son's testimony where she says, with reference to such assurances, that "plaintiff made no objection to it when I told her"—a rather indirect statement with reference to such communications, yet it is susceptible of no construction other than that she (Broder-son) told plaintiff of such assurances and that she acquiesced therein. We think there is, therefore, sufficient in the record to warrant the trial court in finding that Broder-son was a general agent of plaintiff, not only in the sale, but in the matter of collection and arrangement with reference to time of payment; and having knowledge of the representations and assurances of her agent, making no objection thereto, receiving payments long after due, made pursuant thereto and upon the faith of such promises, plaintiff is bound by the action of Broder-son in making such agreement and is not in a position to say that defendant is guilty of a grossly willful breach of duty.

The question remains as to the right of the court to relieve defendant from the forfeiture occasioned by a breach of the strict terms of the contract. Section 3275 of the Civil Code provides: "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty." The assurances and representations

of Broderson, of which plaintiff had knowledge, could only have the effect to lull defendant into a sense of security and induce the belief that payments made after strict default would be received as though made in time. Plaintiff relies upon the doctrine of *Glock v. Howard, etc., Co.*, 123 Cal. 15, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17, and cases therein cited and discussed as establishing plaintiff's right to claim a demand and forfeiture. We do not regard such cases as undertaking to construe the section of the Code above quoted, nor to determine rights thereunder. *Glock v. Howard* is a learned and exhaustive discussion and determination of the rights of the parties who stand upon and whose rights are dependent alone upon the terms of a written contract. Here the rights are dependent upon the contract and modifications thereof and the effect which should be given the acts of plaintiff as to waiver of terms and conditions expressed, as well as matters involving an estoppel to claim under the strict letter of the agreement. We are of opinion that this case clearly comes within the class contemplated by the section above referred to, and that under such section the court possessed the right from the facts found to relieve from the forfeiture.

[3] When, however, defendant was so relieved, the plaintiff still held the legal title subject to the contract and agreement of purchase. This the court determined. The action being one to determine adverse claims to real property, the respective parties were entitled to have their rights, claims, and interests finally determined. The findings of fact and conclusions of law, which constitute the judgment, when considered in connection with the admissions of the pleadings, may be said to comply with section 738 of the Code of Civil Procedure, and therefore sufficient in form to preserve the rights of all parties. The entry of such judgment, however, which is a requisite to its effective character, contains the recital "that plaintiff take nothing by the action." While such entry is a ministerial act upon the part of the clerk, it nevertheless must be performed before an appeal will lie, and it may not be improper to say that upon it as entered the appeal rests. This entry of judgment should be modified by striking therefrom that part which recites "that plaintiff take nothing." Such recital is not consistent with the judgment as pronounced.

It is therefore ordered that the entry of judgment be modified by striking therefrom the words "that the plaintiff take nothing against the defendants or either of them by this action"; and, as so modified, the judgment and order are affirmed, without costs.

We concur: JAMES, J.; SHAW, J.

16 Cal. App. 351

HOOVER v. LESTER. (Civ. 952.)

(District Court of Appeal, Second District, California. May 4, 1911.)

1. JUDGMENT (§ 279*)—ENTRY—JUDGMENT ROLL—MATTERS INCLUDED.

Under Code Civ. Proc. § 632, which provides that, upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within 30 days after the cause is submitted, and under section 633, which declares that the facts found and the conclusions of law must be separately stated, and judgment entered accordingly, the findings of fact and conclusions of law are the only papers in connection with the judgment that the trial judge is required to sign and file to make the judgment effectual.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 279.*]

2. JUDGMENT (§ 271*)—ENTRY OF JUDGMENT—NECESSITY.

Under Code Civ. Proc. § 664, the making of an entry of the substance of a judgment in the judgment book is an act purely ministerial in its nature, the performance of which devolves on the clerk.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 504-509; Dec. Dig. § 271.*]

3. JUDGMENT (§ 284*)—ENTRY—JUDGMENT ROLL—REQUISITES.

It makes no difference where the clerk procures the form for his entry in the judgment book, or that the signature of the judge appears on the entry; and, where the court has rendered its judgment by signing and filing findings of fact and conclusions of law, the clerk's entry in the judgment book setting forth the names of the parties reciting that the court had theretofore made its findings and conclusions, and stating the amount recovered, sufficiently sets forth the substance of the judgment.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 284.*]

4. APPEAL AND ERROR (§ 931*)—REVIEW—PRESUMPTIONS—FINDINGS OF COURT.

On appeal on the judgment roll there being a finding that there was a delivery of goods alleged to have been sold, it will be assumed in support of the finding that evidence on that question was introduced.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3762-3771; Dec. Dig. § 931.*]

5. APPEAL AND ERROR (§ 193*)—OBJECTIONS—PLEADING.

Where defendant, by his answer, treated the complaint as tendering an issue as to delivery of goods sold, and denied that plaintiff had delivered the same, and the court found that the goods had been delivered, defendant cannot object for the first time on appeal that the complaint failed to state a cause of action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226-1240; Dec. Dig. § 193.*]

6. TRIAL (§ 396*)—SUFFICIENCY OF FINDINGS—DEFINITENESS AND CERTAINTY.

Where plaintiff averred that he "sold to said defendant his crop of lemons," and the court found "that * * * said plaintiff herein sold to said defendant a certain crop of lemons," the finding is sufficient to identify the lemons as being the same as those described in the complaint.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 935-938; Dec. Dig. § 396.*]

Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Action by L. V. Hoover against A. Lester. Judgment for plaintiff, and defendant appeals. Affirmed.

Luce, Sloane & Luce, for appellant. Walker & Sparks, for respondent.

JAMES, J. The appeal in this case is taken by defendant from the judgment, and is presented on the judgment roll alone. Plaintiff sued to recover a balance of \$317.01 alleged to be due and unpaid on account of the purchase price of a crop of lemons. The judgment was for the amount prayed for. After trial, the court made and filed its findings of fact and conclusions of law. Thereafter the clerk entered judgment in the following form: "Now on this 25th day of August, 1910, upon and in accordance with the findings of facts and conclusions of law heretofore made and filed by the court in the above entitled and numbered action, it was considered, ordered, and adjudged by the court that the plaintiff, L. V. Hoover, do have and recover of and from said defendant, A. Lester, the sum of \$317.00, with interest amounting to \$24.00, together with his cost herein taxed at \$16.00. W. R. Guy, Judge of Superior Court."

[1] One of the contentions made by appellant is that this entry of judgment is insufficient, and that it amounts only to a certificate of the clerk that the court did prior to the entry thereof make its findings. With this contention we do not agree. Section 632, Code of Civil Procedure, provides that, "upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision." By section 633, immediately following, it is provided: "In giving the decision, the facts found and the conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly." The findings of fact and conclusions of law are the only papers in connection with a judgment that the trial judge is required to sign and file; the signing and filing of these documents constituting the rendering of judgment. There is no other judicial act required to be performed by the court to make the judgment effectual.

[2] The making of the entry in the judgment book of the substance of the judgment is an act purely ministerial in its nature, the performance of which devolves upon the clerk. "If the trial has been had by the court, judgment must be entered by the clerk, in conformity to the decision of the court, immediately upon the filing of such decision. In no case is a judgment effectual for any purpose until so entered." Code Civ. Proc. § 664; *Marshall v. Taylor*, 97 Cal. 422, 32 Pac. 515; *Painter v. Painter*, 113 Cal. 375, 45 Pac. 689; *First Nat. Bank of Fresno v. Dusy*, 110 Cal. 69, 42 Pac. 476; *City and County of S. F. v. Brown*, 153 Cal. 644, 96

Pac. 281; *Crim v. Kessing*, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491. The question then to be determined is whether the clerk, in performing the ministerial duty of entering the judgment of the court on the judgment book, made a sufficient statement of what had been decided by the court.

[3] It makes no difference at all from what source that official procured the form which he used in his entry in the judgment book; nor does the fact that the signature of the judge appeared on the entry add anything to the record, and neither would the want of such signature detract from its sufficiency. "With reference to the form of judgments, Mr. Black in his work on the subject (section 115) states the rule as follows: 'It may therefore be stated as the modern rule that the form of the judgment is not very material provided that in substance it shows distinctly and not inferentially that the matter had been determined in favor of one of the litigants, or that the rights of the parties in litigation had been adjudicated.' In discussing the same subject, another law-writer says: 'That whatever appears upon its face to be intended as the entry of a judgment will be regarded as sufficiently formal, if it show (1) the relief granted, and (2) that the grant was made by the court in whose records the entry is written.' Freeman on Judgments, § 50." *Hentig v. Johnson*, 8 Cal. App. 221, 96 Pac. 390. Here the court had rendered its judgment by signing and filing findings of fact and conclusions of law. The clerk's entry in the judgment book sufficiently set forth the substance of that judgment. It gave the name of the plaintiff and the defendant, recited that the court had theretofore made its findings of fact and conclusions of law, and stated the amount of money ordered to be recovered by the plaintiff from the defendant.

[4, 5] Plaintiff in his complaint failed to aver a delivery of the lemon crop sold to defendant. That such an averment was essential to the statement of a cause of action seems to be admitted by respondent. However, defendant in his answer denied "that said plaintiff has at any time carried out said contract or delivered to said defendant said crop of lemons so contracted for." The court found that the lemons had been delivered. By his answer the defendant treated the complaint as tendering to him an issue as to the delivery of the fruit. On this appeal with only the judgment roll to look to, where the finding is that there was a delivery, it must be assumed in support of this finding that evidence was introduced on that question. Defendant cannot now be heard to object that the complaint was deficient in failing to allege a delivery of the lemons. His answer treated the issue as having been properly made. Evidence was heard on the subject, and the court made its finding in determination of that issue. It is too late, under such conditions, to object for the first time that

the complaint fails to state a cause of action in the particular referred to. *Merrill v. Pacific Transfer Co.*, 131 Cal. 582, 63 Pac. 915; *Horn v. Hamilton*, 89 Cal. 278, 26 Pac. 833; *Riverside Water Co. v. Gage*, 108 Cal. 245, 41 Pac. 299.

[6] One more point is urged by appellant. He insists that the finding of fact is insufficient where the court finds "that on the 14th day of July, 1909, said plaintiff herein sold to said defendant a certain crop of lemons." The allegation of the complaint upon which this finding was made was in part as follows: "Plaintiff sold to said defendant his crop of lemons." It is the contention of appellant that, as the identity of the lemons sold with those which were delivered was the main issue in the case, the finding of the court that the plaintiff sold a certain crop of lemons is not a finding that plaintiff sold "his" crop of lemons to defendant. The finding seems to be sufficient to identify the lemons as being the same as those described in the complaint. The mere use of the words "a certain crop of lemons," instead of the words employed in the complaint, to wit: "his crop of lemons," is not such a difference in descriptive terms as to warrant an inference being drawn that the crop sold might have been other than that delivered. In their closing brief counsel for appellant suggest on this point that the pleadings call for "his crop of lemons from his lemon orchard near Lakeside." This is hardly a correct statement of the issue. Plaintiff alleged merely that he sold "his crop of lemons." Defendant answered that allegation in the following form: "Admits that on or about the 14th day of July, 1909, said plaintiff sold to said defendant a certain crop of lemons from plaintiff's lemon orchard near Lakeside in the county of San Diego." The phrase, "from plaintiff's lemon orchard near Lakeside," included in the admission found in that paragraph of defendant's answer just referred to, was not an admission of anything that plaintiff had alleged, nor was it an affirmative allegation of any fact. It was a mere recital which should be disregarded.

The judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

16 Cal. App. 249

KORANDER v. PENN BRIDGE CO.
(Civ. 976.)

(District Court of Appeal, Second District, California. May 11, 1911.)

MASTER AND SERVANT (§ 185*)—INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANT—"MACHINE."

Civ. Code, § 1970, provides that an employer shall be liable for injuries to a servant sustained through the employer's negligence or the default of a co-employé, employed on a machine or other appliance than that on which the employé injured, was employed. *Held*, that the

word "machine" as so used meant an instrument composed of one or more of the mechanical powers, and capable when set in motion of producing by its own operation certain predetermined physical effects, being distinguished from all other mechanical instruments in that its rule of action resides within itself, and hence, where a servant employed to steady piles in front of a pile driver was injured by the negligence of the engineer operating the engine by which the hammer was lifted, the pile driver and the engine being connected only by a rope by which the power was transmitted to the hammer, plaintiff and the engineer were not working on the same machine within such section.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 185.*

For other definitions, see Words and Phrases, vol. 5, pp. 4265-4267; vol. 8, pp. 7711, 7712.]

Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Action by Gus Korander against the Penn Bridge Company. From a judgment for defendant on an order granting its application for a nonsuit, plaintiff appeals. Reversed.

J. E. O'Keefe, E. L. Thomas, and C. N. Andrews, for appellant. Eugene Daney, for respondent.

SHAW, J. Action to recover damages for personal injuries alleged to have been sustained as a result of defendant's negligence.

At the close of plaintiff's evidence, defendant moved for a nonsuit, which motion the court granted. Judgment went accordingly, from which plaintiff prosecutes this appeal.

The complaint contains two counts, the cause of action in one of which (and the only one necessary to here consider) is based upon the alleged negligence of an engineer engaged in operating a steam hoisting engine supplying motive power in operating a pile driver upon which plaintiff was employed. The evidence disclosed by the record clearly tends to show negligence on the part of the engineer; indeed, such fact is not controverted by respondent. The question, then, presented is whether or not this negligence of the engineer can be imputed to the defendant, his employer. By section 1970, Civil Code, it is provided that an employer shall be required to indemnify his employé for losses suffered by the latter through injuries resulting "from the wrongful act, neglect or default of a co-employé * * * employed upon a machine, * * * or other appliance than that upon which the employé is injured is employed." In granting defendant's motion for nonsuit the learned trial judge held that both plaintiff and the engineer whose negligence caused the injury to plaintiff were fellow servants employed upon the same machine or appliance, and hence under said provision of the statute plaintiff was not entitled to recover. In thus ruling we think the court erred.

Briefly stated, the facts are as follows: Plaintiff was an employé of defendant, who was engaged in operating a pile driver

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & REP.'S INDEXES

mounted upon the end of a lighter, anchored or moored in the bay of San Diego next to and adjoining a wharf where the piles were being driven. This pile driver consisted of a mass of iron, termed the "hammer," weighing upwards of a ton, and was drawn upwards between two timbers, termed "guides," the purpose of which, in addition to supporting the hammer, was to control or guide it in its downward course when permitted to fall upon the pile as it was driven into the ground underneath the surface of the water. For the purpose of raising this hammer, a rope was fastened thereto, and, passing over a pulley at the top of the guides or scaffold, was attached to a drum connected with a portable steam engine, placed upon the lighter some thirty feet distant from the pile driver, and which by causing the drum to revolve raised the hammer to the desired distance above the pile, when, by the action of the engineer in removing the friction, the hammer was permitted to drop upon the timber constituting the pile. Plaintiff was employed as a loftman, his duty, among other things, requiring him to occupy a position on the scaffold near the top of the pile, see that it was kept in position while being driven, and at the proper time "ring" it; that is, place an iron ring somewhat smaller in circumference than the head of the pile, which upon being driven down by a drop of the hammer, encircled the head and prevented the force and weight of the hammer in falling from splitting and otherwise injuring the timber. While thus employed in "ringing" a pile, and using his left hand in holding the ring on top of the pile, he stooped down to get a board used as a lever with which to force the leaning pile into a perpendicular position, and while so engaged the engineer dropped the hammer, causing the injuries for which he asks damages. It was the duty of the engineer to release the hammer only when signaled so to do by the foreman in charge of the work, and this signal the foreman gave when plaintiff indicated to him his readiness to have the hammer drop. The accident was due to the fact that, in the absence of any signal from the foreman or plaintiff and without warning, the engineer released the hammer. "A machine is an instrument composed of one or more of the mechanical powers, and capable, when set in motion, of producing, by its own operation, certain predetermined physical effects. It differs from all other mechanical instruments in that its rule of action resides within itself." *Stearns & Co. v. Russell*, 85 Fed. 225, 29 C. C. A. 121. The steam engine constituted a complete machine whose only function was to develop power. It was in charge and under the control of the engineer, whose duty it was, by means of operating the engine, to develop and apply the power as needed in raising the ham-

mer, and upon signal only to withdraw the power so applied, thus permitting the hammer to drop. While for the time being it was used in developing the required power, the engine was no part of the pile driver upon which plaintiff was employed, and plaintiff had no control over its operations. This necessary power might be supplied in many ways other than by a steam engine; such, for instance, as electricity, horse power, the explosion of gunpowder, or gasoline. The fact that the power was transmitted by means of a rope connecting the engine and hammer did not constitute the pile driver and engine one machine any more than would an electric plant and saw mill (distant miles apart) constitute one machine because the two were connected by a wire over which the current was transmitted from the one to operate the other. They were distinct and separate machines or appliances, neither one dependent upon the other for performing the work for which each was intended. The cases of *Livingston v. Kodiak Packing Co.*, 103 Cal. 258, 37 Pac. 149, *Mann v. O'Sullivan*, 126 Cal. 61, 58 Pac. 375, 77 Am. St. Rep. 149, and *Bridges v. Los Angeles Pac. Ry.*, 156 Cal. 492, 105 Pac. 586, 25 L. R. A. (N. S.) 914, were all decisions rendered prior to the amendment of section 1970, and no doubt the Legislature by said amendment intended to change the rule declared in those cases. It may be, as contended by respondent, that, notwithstanding the amendment, plaintiff, and the engineer must, under the law, still be deemed fellow servants. However this may be, we are of the opinion that the evidence tends to prove that the injury to plaintiff was due to the negligence of the engineer, who was employed upon a machine other than the appliance or machine upon which plaintiff was employed when injured, and hence, under the provisions of section 1970, Civil Code, as amended, such negligence is imputable to the employer.

The judgment is reversed.

We concur: ALLEN, P. J.; JAMES, J.

16 Cal. App. 85

MORGAN et al. v. MUTUAL BENEFIT LIFE INS. CO. (Civ. 863.)

(District Court of Appeal, First District, California. April 25, 1911. Rehearing Denied by Supreme Court June 24, 1911.)

1. PROCESS (§ 86*)—PUBLICATION—SERVICE—SUBJECT OF ACTION — "PERSONAL PROPERTY."

Where a foreign insurance company, doing business in the state of New York, issued a policy to a resident, who with the company's consent assigned it to another resident as collateral security for a loan, and the assignee died a resident of the state of New York, and his trustees held the policy as an asset of his estate, the subject-matter of an action by the trustees against the company and the beneficiary to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 116 P.—25

recover the amount advanced, in view of Statutory Construction Law N. Y. § 4 (Consol. Laws 1909, c. 22, § 39), is "personal property" within Code Civ. Proc. N. Y. § 438, subd. 5, authorizing the service of summons on a non-resident defendant by publication, where the complaint demands judgment that the defendant be excluded from an interest in personal property within the state, and the nonresident beneficiaries may be served by publication.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 100; Dec. Dig. § 86.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5346-5358; vol. 8, p. 7753.]

2. INSURANCE (§ 590*)—RIGHTS TO PROCEED—CHARGE FOR PAYMENT OF PREMIUM.

Where a third person, at the request of insured and the beneficiary, pays the premiums on life insurance, such payments are a lien on the policy and the proceeds thereof, even though the assignment of policy is not effective.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1482; Dec. Dig. § 590.*]

3. JUDGMENT (§ 821*)—FOREIGN JUDGMENT—BAR—RIGHT TO INTERPOSE.

Where a judgment was recovered in another state against an insurance company and the beneficiaries of a life policy, in favor of one who had paid the premiums at the request of the insured and beneficiary, the pleading of such judgment by the company, in an action upon the same policy by those named as beneficiaries, is not setting up in its own favor equities existing in favor of others.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1492-1495; Dec. Dig. § 821.*]

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Clara E. Morgan and others against the Mutual Benefit Life Insurance Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Transfer of cause for rehearing in the Supreme Court denied 116 Pac. 389.

E. C. Chapman and W. C. Sharpstein, for appellants. M. J. Kuhl, for respondents.

KERRIGAN, J. This is an appeal taken by defendant from a judgment rendered by the superior court of the city and county of San Francisco in favor of the plaintiffs and against the defendant, upon a policy of life insurance issued by defendant to Elizabeth A. Morgan upon the life of her husband, Orson A. Morgan.

To properly discuss the questions of law involved in this case, a somewhat extended statement of the facts will be necessary. They are as follows:

On March 26, 1866, the appellant insurance company, in the state of New York, issued to Elizabeth A. Morgan, mother of respondents, a policy of insurance on the life of her husband, Orson A. Morgan, father of respondents. By the terms of said policy appellant agreed to pay \$5,000 to Elizabeth A. Morgan, or assigns, or, in case she should die before Orson A. Morgan, then to the children of said Orson A. Morgan. Being unable to pay the premium due on March 26, 1871, Mr. and Mrs. Morgan, on or about

that date, requested one Dayton S. Morgan, since deceased, to pay the same, in order to keep and preserve said policy in force. The said insurance policy was thereupon assigned by said Elizabeth A. Morgan and her husband to Dayton S. Morgan to secure the repayment of that particular premium and also such other premiums as he might thereafter pay, together with interest thereon, until such advances should be repaid. Appellant insurance company assented to this assignment. Thereafter Dayton S. Morgan, each and every year until his death on April 9, 1890, paid the premium on said policy, and after his death the executors and trustees of his estate continued to pay the same until the death of Orson A. Morgan, the assured, which occurred in the year 1905. His wife predeceased him, having died in the year 1904. At the time of the death of Orson A. Morgan the sums advanced by Dayton S. Morgan and his personal representatives in payment of said premiums, together with interest thereon, largely exceeded the face of said policy.

When the policy of insurance was executed and delivered, and at the time of the assignment thereof, Elizabeth A. Morgan and Orson A. Morgan were residents of the state of New York. Dayton S. Morgan at all the times mentioned herein resided in the said state of New York, and the policy of insurance since its delivery has always been in that state, in the possession of Dayton S. Morgan and his personal representatives. At the time of the death of the assured, all his children before mentioned were and ever since have been nonresidents of said state.

The appellant insurance company, as to the state of New York, is a foreign corporation, having its principal office and place of business in the state of New Jersey, but since the year 1866 and prior thereto it has been doing business within the state of New York, having met the statutory requirements of that state.

On October 6, 1905, proofs of the death of the assured having been furnished to the company, the personal representatives of Dayton S. Morgan commenced an action in the Supreme Court of New York against the insurance company and the heirs at law of said Orson A. Morgan, for the purpose of ascertaining the interest of the parties in said policy of insurance, and to establish an equitable lien in favor of the plaintiffs in that action upon said policy and the moneys due thereunder to the extent of the moneys paid by them and their testator upon said policy, and for the recovery of the amount of the policy from the company. The insurance company duly appeared. Thereafter, upon application of the plaintiffs therein (executors of Dayton S. Morgan), an order was granted directing the service of summons upon said heirs at law

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

by publication, and service was made upon them pursuant to that order, but they did not appear in the action. Defendant insurance company answered the complaint, and admitted that it had issued said policy, and that the amount stated in said complaint was owing by it; but it alleged that in the month of November, 1905, the said heirs at law had commenced an action against it in the superior court of San Francisco, Cal., demanding judgment against it for the amount of said policy and interest. The insurance company, after some further references in its answer to the action pending in California, submitted its rights to the judgment of said New York court.

Thereafter said insurance company moved, upon the papers upon which the order of publication was granted, that said order of publication be set aside and canceled upon the ground that the court had no jurisdiction to direct publication of summons against the defendants, said nonresident heirs at law. The motion was denied, and an appeal was taken from such order to the Appellate Division of the Supreme Court, where, on May 1, 1907, the order was affirmed (*Morgan v. Mut., etc., Ins. Co.*, 119 App. Div. 645, 104 N. Y. Supp. 185), but leave was granted by that court to appeal to the Court of Appeals of New York. Accordingly the latter court was called upon to decide whether or not jurisdiction of the said heirs at law could be acquired by the New York courts by publication of summons. The New York Court of Appeals, on November 1, 1907, answered the question certified to it by the Appellate Division of the Supreme Court in the affirmative. *Morgan v. Mut., etc., Ins. Co.*, 189 N. Y. 451, 82 N. E. 438.

Subsequent to this decision the case was tried in the Supreme Court upon its merits. The respondents, the said heirs at law, did not appear, and after trial judgment was, on September 16, 1908, duly given that the personal representatives of Dayton S. Morgan were entitled to all the money due under the policy, and that the said heirs at law were barred and foreclosed of all interest in said policy and its proceeds, and that plaintiffs in that action recover of the insurance company the sum of \$5,228.88, and costs. Thereafter, to wit, on May 5th, 1909, the Appellate Division of the Supreme Court, to which court the insurance company appealed, affirmed this judgment. *Morgan v. Mut., etc., Ins. Co.*, 132 App. Div. 455, 116 N. Y. Supp. 989. The company then appealed to the New York Court of Appeals, which, on February 8, 1910, without an opinion, affirmed the judgment of said Appellate Division. *Morgan v. Mut., etc., Ins. Co.*, 197 N. Y. 607, 91 N. E. 1117.

In November, 1905, as before noticed, the said heirs at law commenced this action. The defendant, in defense thereto, pleaded the judgment of the New York courts, and also set up the facts upon which said judg-

ment was based. After a hearing said superior court rendered judgment against the defendant insurance company, and in favor of the said heirs at law. In due time the insurance company appealed to the Supreme Court, which court, by an order regularly made transferred the cause to this court for hearing and decision. The appellant contends that the New York judgment is conclusive on the respondents here; and, secondly, that even if that be not so, it is entitled to judgment on the facts of the case.

[1] The respondents, on the other hand, in support of the judgment of the superior court of the city and county of San Francisco, argue here (as was contended by the insurance company in the New York courts) that the courts of that state acquired no jurisdiction over them by the publication of summons, so that they are not concluded by the judgment rendered by such courts; and furthermore that the assignment of the policy of insurance was void as to them; they being expressly named as beneficiaries of the policy and not having joined in the assignment. The question of whether the courts of New York acquired jurisdiction over the respondents by the publication of summons was considered by the Court of Appeals of that state (*Morgan v. Mut., etc., Ins. Co.*, 189 N. Y. 451, 82 N. E. 438), and in adopting the conclusion there reached we quote quite extensively from the opinion. It is there said:

"The interest of the plaintiff's assignor, Elizabeth A. Morgan, in the policy of insurance was contingent upon her surviving her husband. *Bradshaw v. Mut. Life Ins. Co.*, 187 N. Y. 347 [80 N. E. 203]. As she did not survive her husband, the plaintiffs seek in this action to charge the policy and the proceeds thereof with the amount paid by them, and their intestate for premiums thereon. *Pomeroy's Eq. Jur.* vol. 3, § 1243; 25 *Cyc.* 774, 775; *Am. & Eng. Ency. of Law*, vol. 19, p. 90; *Mandeville v. Kent*, 88 Hun, 132 [34 N. Y. Supp. 622]; *Brick v. Campbell*, 122 N. Y. 337 [25 N. E. 493, 10 L. R. A. 259]; *Conn. Mut. Life Ins. Co. v. Burroughs*, 34 Conn. 305 [91 Am. Dec. 725]; *Lane v. N. Y. Life Ins. Co.*, 56 Hun, 92 [9 N. Y. Supp. 52].

"The defendants other than the insurance company are proper and necessary parties to this action (citing cases). The defendant insurance company therefore had a standing in court to move to vacate the order of publication. *Brandow v. Vroman*, 29 App. Div. 597 [51 N. Y. Supp. 943]. This is not disputed by the plaintiffs.

"Service of a summons upon nonresidents of the state of New York may be made as provided by section 438 of the Code of Civil Procedure. It is therein provided as follows: 'An order directing the service of a summons upon a defendant, without the state, or by publication, may be made in either of the following cases: * * * 5.

Where the complaint demands judgment, that the defendant be excluded from a vested or contingent interest in or lien upon, specific real or personal property within the state; or that such an interest or lien in favor of either party be enforced, regulated, defined, or limited; or otherwise affecting the title to such property. * * *

"The term 'personal property' is defined by statute. Section 4 of the statutory construction law (chapter 677, Laws 1892 [Consol. Laws 1909, c. 22, § 39]) provides as follows: 'The term "personal property" includes chattels, money, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien or incumbrance in, to or upon property, or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated, wholly or in part, and everything, except real property, which may be the subject of ownership. The term "chattels," includes goods and chattels.' Revised Stats. pt. 4, tit. 7, c. 1, § 33; Code Proc. § 463; Code Civ. Proc. (1880) § 3343, subd. 7.

"It is not necessary to consider to what extent, if any, the Legislature, simply by statutory definition or provision, can treat intangible personal property as within this state, and subject it to the jurisdiction of our courts as against persons not served with process within our territorial limits, because in this case not only are the plaintiffs as claimants residents of this state, but the debtor and the debt, as well as the written instrument by which the debt was created, acknowledged, and evidenced, are in contemplation of law within this state.

"A foreign insurance company is not allowed to do business in this state until it submits itself fully to the jurisdiction of our courts. It must obtain from our Superintendent of Insurance a certificate authorizing it to do business in this state. It is subject to examination by the insurance department of this state, and it is required to deposit with the Superintendent of Insurance of this state, or with the Auditor, Comptroller, or general fiscal officer of the state by whose laws it is incorporated, stocks and bonds as provided by our statutes to the same amount as required by domestic insurance corporations, which stocks and bonds are held in trust for the benefit of all the policy holders of the corporation. A foreign insurance corporation is also required to appoint our Superintendent of Insurance its attorney in this state upon whom all lawful process in any action or proceeding against the corporation can be served. The authority of such foreign insurance corporation must be revoked in case it applies to remove into the United States court any action brought against it in the court of this state. Our statutes expressly provide that an action against a foreign corporation

may be maintained by a resident of the state or by a domestic corporation for any cause of action. Such an action may be maintained in this state by another foreign corporation or by a nonresident, when the action is brought to recover damages for the breach of a contract made within this state.

"The presence of the insurance company in this state is not temporary, but continuous. It is legally and actually here, not only because process has been served upon it and it has appeared in the action, but it is here pursuant to the provisions of our statutes, by authority of which it is doing business and maintaining offices in this state. The contract of insurance was made by it with a resident of this state through its agents so located and doing business here. Every transaction relating to the contract, its assignment, and the payment of premiums thereon has occurred here. The policy of insurance and the claim against the insurance company for the money payable on the policy of insurance are in the control of our court, and any judgment that may be rendered in the action can be enforced and made effectual in this state. As to such a claim, the insurance company should be treated as a domestic insurance corporation and as domiciled in this state. The situs of the debt would consequently be here, and the action is one to define and enforce an interest in specific personal property within the state within the meaning of the Code provision quoted. Whenever a question as to the situs of a similar claim against an insurance company doing business in a state pursuant to the statutes thereof has been directly involved in this court or in the federal courts, and it has been sought to uphold the situs of the claim in the state where the contract was made, it has been sustained.

"In *Martine v. International Life Insurance Society*, 53 N. Y. 339 [13 Am. Rep. 529], an action was brought upon a policy of life insurance. The defendant was a foreign corporation. The court say: 'The defendant sought and obtained the privilege of establishing and carrying on its business here under the regulations fixed by the statutes of this state. It established a permanent general agency, and conducted its business here as a distinct organization, and was permitted by law to do this in the same manner as domestic institutions. * * * As to the business transacted here, the company must be regarded as domiciled by the residence of its general agent and its local organization. * * *'

The court then reviews the cases of *New England Mut. Life Ins. Co. v. Woodworth*, 111 U. S. 138, 4 Sup. Ct. 364, 28 L. Ed. 379, *Sulz v. Mut. R. F. L. Ass'n*, 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379, and *Matter of Gordon*, 186 N. Y. 471, 79 N. E. 722, 10 L. R. A. (N. S.) 1089, and cites them in support of its conclusion. Other cases that may be cited in support of the jurisdiction of the

New York court are the following: *Loaiza v. Sup. Ct.*, 85 Cal. 11, 24 Pac. 707, 9 L. R. A. 376, 20 Am. St. Rep. 197; *Murray v. Murray*, 115 Cal. 266, 47 Pac. 37, 37 L. R. A. 626, 56 Am. St. Rep. 97; *Chicago, etc., Co. v. Strum*, 174 U. S. 710, 19 Sup. Ct. 797, 41 L. Ed. 1144; *Jellenik v. Huron, etc., Co.*, 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647.

[2] 2. It is next argued by respondents in support of the judgment that the assignment of the policy of insurance was as to them void; they being expressly named as beneficiaries under the policy and not having joined in the assignment. The answer of the appellant to this contention is that the assignee of such a policy, who advances the premiums to keep the policy in force, is entitled to a lien on such policy and its proceeds for such advances, even though the assignment is void.

This is the question that was considered by the Appellate Division of the Supreme Court of New York (*Morgan v. Mut. Benefit Life Ins. Co.*, 132 App. Div. 455, 116 N. Y. Supp. 989) and determined adversely to the contention of respondents. That court cites with approval and follows the rule laid down in *Pomeroy's Equity Jurisprudence* (volume 3, § 1243) as follows: "Where a person, not being the owner of a policy of life insurance, nor bound to pay the premium, but having some claim or color of interest in it, voluntarily pays the premiums thereon, and thus keeps it alive for the benefit of a third party, he may thereby acquire an equitable lien on the proceeds of the policy as security for the repayment of his advances." This equitable rule was applied by our own Supreme Court in the case of *Stockwell v. Mut. Life Ins. Co.*, 140 Cal. 198, 73 Pac. 833, 98 Am. St. Rep. 25, where, even in the absence of an assignment of the policy, one of the beneficiaries, who had advanced premiums for the purpose of keeping the policy alive, was allowed an equitable lien upon the proceeds of the policy for the reimbursement of those advances, as against the claim of one of the other beneficiaries to receive her share of the policy free and without deduction from it of a pro rata of such advances. See, also, *Unity, etc., Ass'n v. Dugan*, 118 Mass. 219; *Harley v. Heist*, 86 Ind. 196, 45 Am. Rep. 285; *Matlack v. Seventh Ave. Bank*, 180 Pa. 360, 36 Atl. 1082; *Stevens v. Germania Life Ins. Co.*, 26 Tex. Civ. App. 156, 62 S. W. 824.

[3] Respondent finally makes the point in support of the judgment that the defendant insurance company cannot set up in its own defense equities alleged to exist in favor of other parties. But we think in the present case the matter set up by the defendant is much more than an equity in favor of other persons. It is a judgment against it, in an action in which the respondents were made parties, and which it is bound to pay.

The judgment is reversed, and, inasmuch

as this case was tried upon an agreed statement of facts and a stipulation that judgment should be entered without findings, the court below is directed to enter judgment in favor of the defendant.

We concur: HALL, J.; LENNON, P. J.

16 Cal. App. 85

MORGAN et al. v. MUTUAL BENEFIT LIFE INS. CO. (S. F. 5,529.)

(Supreme Court of California. June 24, 1911.)

APPEAL AND ERROR (§ 1089*)—AFFIRMANCE ON REHEARING — DECISION OF INTERMEDIATE COURT.

Where a decision by the appellate court was correct, being based upon one valid reason, the error of another reason given in support of the decision will not justify the Supreme Court in transferring the cause.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4293-4301; Dec. Dig. § 1089.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Clara E. Morgan and others against the Mutual Benefit Life Insurance Company. From a judgment for plaintiffs, defendant appeals. Petition for transfer to the Supreme Court denied.

For opinion in Court of Appeal, see 116 Pac. 385.

E. C. Chapman and W. C. Sharpstein, for appellant. M. J. Kuhl, for respondents.

PER CURIAM. In their petition for a rehearing of this cause, the respondents confine themselves to a criticism of the doctrine asserted by the Court of Appeals of New York, in the case of *Morgan v. Mutual, etc., Ins. Co.*, 189 N. Y. 451, 82 N. E. 438, wherein it was held that they were brought within the jurisdiction of the courts of that state by constructive service of summons. If it be conceded that their argument on this point is destructive of the doctrine assailed, it does not follow that the judgment of the District Court of Appeal is erroneous, for it does not rest alone upon the estoppel pleaded in the supplemental answer; it is fully sustained by the allegations (stipulated to be true) of the third defense set up in the original answer. It was upon these identical facts that the courts of New York correctly held that the appellant must pay the amount due on the policy to the representatives of those who, as assignees, had kept it alive by payment of the premiums, amounting with interest to more than the sum insured. Whether the New York decisions sustaining their jurisdiction were correct or not, it is clear that as to the merits of the controversy the final decision there was correct, and for the same reasons that appellant was compelled to pay there it must be exonerated here.

Without determining the question of jurisdiction, the petition for a transfer of the cause to this court for further consideration is denied.

160 Cal. 18

Ex parte WINSTON. (Cr. 1,682.)
(Supreme Court of California. May 27, 1911.)

1. CRIMINAL LAW (§ 211*)—PROCEEDINGS BEFORE JUSTICE—COMPLAINT—MISDEMEANORS.

A complaint charging a misdemeanor before a justice of the peace must conform to Pen. Code, § 1426, requiring that such proceeding shall be commenced by a complaint under oath setting forth the offense charged with such particulars of time, place, person, and property as to enable defendant to understand distinctly the character of the offense complained of and to answer the complaint, and need not conform to section 950, providing that an indictment or information shall contain the title of the action, specifying the name of the court in which it is presented, the names of the parties, and a statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 420-430; Dec. Dig. § 211.*]

2. CRIMINAL LAW (§ 252*)—SUMMARY COMPLAINT—SUFFICIENCY.

Under Pen. Code, § 1425, giving justice courts jurisdiction of batteries not charged to have been committed on a public officer in discharge of his duties, or to have been committed with such intent as to render the offense a felony, a complaint, alleging that defendant on or about the 10th day of July, A. D. 1910, unlawfully and willfully did use force and violence on the person of the affiant, all of which was contrary to the form, force, and effect of the statute, etc., alleged every element of a simple battery, defined by Pen. Code, § 242, to consist of any willful and unlawful use of force and violence upon another, and was therefore sufficient to confer jurisdiction on the justice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 526-536; Dec. Dig. § 252.*]

3. CRIMINAL LAW (§ 252*)—SUMMARY COMPLAINT—SUFFICIENCY.

It is not essential to the jurisdiction of a justice of the peace to hear and determine a charge of misdemeanor that the complaint be of sufficient definiteness and certainty that the record of the conviction will establish the identity of the offense in case of a subsequent prosecution on the plea of former conviction unaided by evidence aliunde.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 526-536; Dec. Dig. § 252.*]

In Bank. Application for writ of habeas corpus by H. B. Winston. Denied.

Black & Clark, for petitioner.

BEATTY, C. J. This is a petition for the writ of habeas corpus. The prisoner is held by the sheriff of Alameda county by virtue of a commitment issued by a justices' court after a judgment of conviction, which has been affirmed on appeal by the superior court. The imprisonment is alleged to be unlawful for the sole reason that the complaint upon which the prosecution was founded was insufficient to confer jurisdiction on the justices' court. So much of the

complaint as is material here reads as follows: "Roland Webb, being duly sworn, deposes and says that H. B. Winston did, in the city of Berkeley, county of Alameda, state of California, on or about the 10th day of July, A. D. 1910, unlawfully and willfully use force and violence upon the person of the affiant, all of which is contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California." The objections to this charge are that it does not allege the particular acts of force and violence; that it does not conform to the requirements of section 950, or section 1426, of the Penal Code; that it does not state any offense and does not inform the defendant of the nature of the charge against him so that he could plead the judgment thereon as a bar to a subsequent prosecution for the same offense.

[1] In charging a misdemeanor of which justices' courts have jurisdiction it is not necessary that the complaint should conform to the requirements of section 950 of the Penal Code. It is only necessary in such cases to conform to the requirements of section 1426.

[2] Justices' courts have jurisdiction of "batteries not charged to have been committed upon a public officer in discharge of his duties, or to have been committed with such intent as to render the offense a felony." Pen. Code, § 1425. This complaint alleges every element of a simple battery. "Battery is any willful and unlawful use of force or violence upon another." Pen. Code, § 242. A complaint charging a misdemeanor cognizable in justices' courts is sufficient not only to confer jurisdiction, but for every purpose if it is made under oath, and sets forth "the offense charged with such particulars of time, place, person, and property as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint." Pen. Code, § 1426.

[3] This complaint charged, in the language of the statute, every element of the offense of battery, with the particulars of time, place, and person (no property is involved), and the conviction under it can undoubtedly be pleaded as a bar to any prosecution that may hereafter be instituted for the same offense. The record of the conviction, it is true, might not be sufficient, unaided by evidence aliunde, to establish the identity of this offense with one hereafter charged in different or even in the same words, but that is not a jurisdictional requirement. The cases cited by counsel from the reports of this state in which it is held that a defendant is entitled to have the charge against him set forth with reasonable particularity in order to enable him to plead a conviction or acquittal in bar of a subsequent prosecution

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tion for the same offense are all appeal cases where the question arose upon special demurrer to the indictment, and the reversals were for error in procedure, not for excess of jurisdiction. *People v. Perales*, 141 Cal. 581, 75 Pac. 170; *People v. Ward*, 110 Cal. 369, 42 Pac. 894; *People v. Webber*, 138 Cal. 145, 70 Pac. 1089. No case involving merely the question of jurisdiction is cited in which the prisoner has been discharged upon the ground here considered.

It must be remembered that in justices' courts nicety of pleading is not exacted in either civil or criminal cases. The rule which confines inferior courts strictly to matters within their jurisdiction does not apply to their proceedings where they are acting within their jurisdiction. Here the complaint clearly charges a simple battery—a case within the jurisdiction of the justices' court, and it charges it with the particulars of time and place and person. It certainly discloses the character of the offense charged, and there was nothing to prevent the prisoner from making any defense he could possibly have proved under a plea of not guilty, or either of the pleas of former jeopardy.

Writ denied.

160 Cal. 80

PEOPLE v. FIGUEROA. (Cr. 1,642.)

(Supreme Court of California. June 2, 1911.

Rehearing Denied July 1, 1911.)

1. CRIMINAL LAW (§ 1130*)—APPEAL—BRIEFS—REVIEW.

The court on appeal in a capital case will review the rulings and proceedings of the trial court, though the case is submitted without argument or briefs on behalf of accused or the people.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2965-2970; Dec. Dig. § 1130.*]

2. HOMICIDE (§ 339*)—APPEAL—HARMLESS ERROR.

Where the proof that accused had a pistol and shot his wife with it was not contradicted, the error in sustaining an objection to a question, on cross-examination of a witness testifying that on the evening before the killing he saw that accused had a pistol similar to the one found near to decedent's body after the shooting, as to whether the witness was intoxicated that evening, was not prejudicial; the circumstances of the examination indicating that the witness would have denied any intoxication, and counsel for accused not suggesting the contrary.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 714; Dec. Dig. § 339.*]

In Bank. Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

George F. Figueroa was convicted of murder of the first degree, and he appeals. Affirmed.

Rehearing denied in bank; Beatty, C. J., dissenting.

Jos. F. Seymour, Jr., and Fred W. Morrison, for appellant. U. S. Webb, Atty. Gen., and Beebe, Deputy Atty. Gen., for the People.

SHAW, J. The defendant was convicted of the crime of murder of the first degree and sentenced to death. He appeals from the judgment and from the denial of his motion for a new trial.

[1] The defendant was accused of the murder of his wife, Sarah M. Figueroa, on the night of May 22, 1910. The case was submitted on appeal without oral argument on behalf of the defendant or the people, and no briefs have been filed by either party. Notwithstanding this failure of counsel to present the case upon appeal, we have, as is our usual practice in capital cases, carefully read the record and considered the rulings and proceedings upon the trial. The defendant was given a fair trial. The evidence of his guilt was clear and satisfactory.

[2] We find but one ruling worthy of notice. It was shown by direct and satisfactory evidence that the defendant shot and killed his wife with a pistol. A witness testified that on the evening before the 22d he saw the defendant and his wife, at their residence, and observed that the defendant had a pistol in his hip pocket, the handle of which was similar to a pistol found near the body of the wife soon after the shooting on the subsequent night. The homicide took place in the residence of the defendant and his wife. On cross-examination this witness stated that he had taken a glass of beer during that evening. He was then asked how many he had taken, and whether or not he had been drinking to excess on that night. An objection that this was immaterial and not proper cross-examination was sustained. We think the questions should have been allowed. If the witness had been intoxicated at the time, it would have been for the jury to consider whether his faculties were as clear as if he had been sober, and whether or not his recollection was correct. But these questions occurred during the course of a long, apparently aimless, and wholly fruitless cross-examination occupying 23 pages of the record on appeal. It was obvious from the entire course of the procedure by counsel that he had no knowledge or information that the witness was intoxicated on that occasion. He did not inform the court that he had expected to elicit an admission to that effect, or that he believed or suspected it to be the fact. The witness had been asked minutely as to his doings during that evening prior to his interview with the defendant, and there was nothing to indicate that he had been drinking intoxicants or that he was under the influence thereof. The question was obvious-

ly merely one of a large number of questions asked without any object, other than a hope of discovering something concerning which counsel had neither information nor knowledge and which it was hoped might discredit or confuse the witness. The fact of the possession of a pistol by Figueroa on the evening before the homicide was not an important part of the case of the prosecution. The proof that he had the pistol and shot his wife with it was not contradicted or impeached in any particular. The circumstances of the cross-examination indicate almost with certainty that the witness would have denied any intoxication. Since counsel did not then suggest the contrary and has not seen fit to pursue the appeal further, we are satisfied that the ruling did not prejudice the defendant in any substantial right.

The judgment and order are affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

160 Cal. 131

VAN NESS v. ROONEY et al. (Sac. 1,766.)
(Supreme Court of California. June 6, 1911.)

Rehearing Denied July 6, 1911.)

1. MINES AND MINERALS (§ 29*) — MINING CLAIMS—"PROPERTY."

Independent mining claims on the public domain constitute "property" in the fullest sense of the word, so that a valid location of mineral lands, made and kept up in accordance with Act Cong. July 26, 1866, c. 262, 14 Stat. 251, providing for the location of such claims, is in effect a grant by the United States of the right of present and exclusive possession of the land located.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 66-72; Dec. Dig. § 29.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770.]

2. MINES AND MINERALS (§ 9*) — MINERAL LANDS—LOCATION—RAILROAD GRANTS.

Mineral lands located on the public domain situated within the limits of railroad grants are subject to location, at least up to the time of the issuance of the patent to the railroad company.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 9-13; Dec. Dig. § 9.*]

3. MINES AND MINERALS (§ 38*)—RAILROAD GRANT—MINERAL LANDS—LOCATION—ACTION TO QUIET TITLE—"SUIT TO INVALIDATE PATENT."

Where a patent for land granted to a railroad company excluded and excepted all mineral lands, should any such be found in the tracts described, exclusive of coal and iron lands, and plaintiff prior to patent had located a quartz mine within the grant, a suit to quiet title against one holding under the railroad grant involved only a construction of the patent to the railroad company, and was not a suit to invalidate the same, within Act Cong. March 2, 1896, c. 39, 29 Stat. 42 (U. S. Comp. St. 1901, p. 1603), prohibiting actions to annul patents erroneously issued under railroad grants after five years from the passage of the act.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 89; Dec. Dig. § 38.*]

4. PUBLIC LANDS (§ 73*)—AID OF RAILROADS—LANDS SUBJECT TO GRANT.

Under Act Cong. July 26, 1866, c. 262, 14 Stat. 251, providing for the location of mineral lands on the public domain, when a locator has discovered a valuable mineral deposit on such land and perfected location in accordance with the law, the United States has no subsequent power to deprive him of the exclusive right to possession and enjoyment of the located claim, and the lands having thereby become mineral lands cannot be granted in aid of railroad construction.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 236, 237; Dec. Dig. § 73.*]

5. PUBLIC LANDS (§ 78*)—PATENT—RAILROAD GRANT—EXCEPTIONS.

Where a patent to land granted to a railroad company, after describing the land, contained a clause, "yet excluding and excepting all mineral lands should any such be found in the tracts aforesaid * * * but not to include coal and iron land," the patent did not pass title to the railroad company to land within the description of the patent on which, prior to its issuance, was a valid quartz gold location.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 243; Dec. Dig. § 78.*]

6. PUBLIC LANDS (§ 116*)—PATENT—EFFECT—KNOWN MINERAL LOCATION.

The rule that a patent of government land to a railroad company is conclusive of the fact that the land was of such a character as was patentable under the grant, while applicable to vest in the patentee of agricultural land title to all mineral deposits not known to exist when the patent is issued, does not apply so as to vest the patentee with title to known mineral deposits existing in the land at the time of patent, and reserved by an express exception therein.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 323, 325-328; Dec. Dig. § 116.*]

7. MINES AND MINERALS (§ 38*)—QUIETING TITLE—RIGHT TO RELIEF.

Where claimant's predecessor had made a valid location of a mining claim on land within the limits of a railroad grant, prior to the issuance of a patent to the railroad company, and plaintiff had performed all assessment work required to continue his right to such location, he was the equitable owner of the mining claim, the title being held by the government in trust for him; and hence he was entitled to maintain a suit to quiet his title thereto against defendants, illegally asserting title under the patent to the railroad.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 87½; Dec. Dig. § 38.*]

Department 2. Appeal from Superior Court, Trinity County; James W. Bartlett, Judge.

Action by H. J. Van Ness against John Rooney and others. Judgment for plaintiff, and defendants appeal. Affirmed.

D. J. Hall and Taylor & Tebbe, for appellants. Braynard & Kimball, for respondent.

LORIGAN, J. This action was brought by plaintiff against defendants to quiet his title to a quartz mining claim, known as the "Five Pines Mine," located in Trinity county, and for an injunction restraining defendants from trespassing on or extracting ore therefrom. Plaintiff proved a valid location of the mine by one Edwin Baker, on August 26, 1895, and a conveyance by said locator to plaintiff;

that the claim consisted of a piece of land 1,500 feet long by 600 feet wide located partly in section 20 and partly in section 29, township 35 north, range 1 west, M. D. M., about half the surface ground of said claim lying in each of said sections; that the annual work and labor required by law to be done had been performed on said claim each year after its location, and that the claim embraced valuable gold-bearing ore, and contained no deposits of coal or iron.

The defendants asserted title to that portion of the mining claim located in section 29 as successors in interest, under a patent issued by the United States, to the Central Pacific Railroad Company, dated February 14, 1896. This patent purported to convey to said railroad company some 200,000 acres of land in various sections, townships, and ranges in California, including all of said section 29. The descriptive calls in the patent are followed by the granting clause, whereby the United States grants to the Central Pacific Railroad Company "all the tracts of land described in the foregoing, yet excluding and excepting all mineral lands should any such be found in the tracts aforesaid, but this exclusion and exception according to the terms of the statute shall not be construed to include coal and iron lands."

Judgment was entered in favor of plaintiff, declaring him to be the owner and entitled to the possession of the mining ground in question against every one, except the government of the United States; that defendants had no right or title to any part thereof, and enjoined them from trespassing upon the property. Defendants moved for a new trial, which being denied, this appeal is taken solely from the denial of said order.

The judge of the superior court of Trinity county, Hon. J. W. Bartlett, before whom this cause was tried, in ordering judgment for plaintiff filed a written opinion in which he set forth so clearly the questions involved in the suit, with accurate declarations of law bearing on them, that we quote from it extensively.

After referring to the facts, as we have recited them above, including the terms of the patent to the railroad company and the exceptions contained therein, the opinion of said superior judge proceeds:

"What, if any, is the effect of the exception and reservation above set forth in said patent is determinative of the issues involved in this case. Plaintiff's claim is that by virtue of this exception and reservation no title passed by the patent to that portion of the 'Five Pines mine' which lies within that portion of said section 29 of township 35 north, range 7 west, M. D. M., to which defendants allege title. Defendants claim that plaintiff is debarred from making this claim by reason of the provisions of the act of Congress of March 2, 1896 [chapter 39, 29 Stat. 42 (U. S. Comp. St. 1901, p. 1603)], which prohibits the bringing of actions by the United

States to annul patents theretofore erroneously issued under railroad or wagon road grants, after five years from the time of the passage of said act of Congress; that this action is an unauthorized attack upon a United States patent, and that if plaintiff was ever in a position to question the validity of the passing under said patent of the title to said section 29 he has lost his rights by not bringing his action within five years from the time the patent was issued. Defendants also claim that the excepting clause is inserted in the patent without any authority of law, and is void and of no effect.

"These questions are of momentous importance, for on their proper solution depends the validity of titles of locators on much of the mineral lands in the mining districts of Trinity county and in other of the mining counties of the state of California. While a great number of authorities on questions relating to the scope and effect of patents issued by authorized officers of the government of the United States were cited in the argument of counsel at the trial of this action, none have been presented, and after much research this court has not as yet found any decision of United States Supreme Court, federal court, or state Supreme Court, clearly or directly determining the questions urged by defendants, and in this action it is compelled to solve those matters largely through a construction and application of the United States statutes governing the transfers of public lands and those governing the locating and holding of mining claims situate on the public domain.

"From its inception it has been the policy of the United States government to retain the mineral lands of the United States for mining purposes, and not to allow title to them to pass to pre-emptors, homesteaders, timber applicants, grantees under wagon road or railroad grants, or in any case, save where patents were secured in pursuance of the provisions permitting the purchase directly of mineral lands. This is evidenced by all the statutes of the United States relating in any way to the disposal of public lands, by the requirements in final proofs when made by claimants for any variety of land, and by various resolutions of the Congress of the United States, declaring that mineral lands were not intended to be granted under the guise of grants in aid of the construction of wagon roads and railways. In the recitals of the patent involved in the case at bar, it is specified that the act under which the patent is issued does not pass mineral lands, and the exception and reservation in question indicate that the officers authorized to make disposition of the lands by patent were desirous of preserving for the people of the United States any mineral lands that might be found in the large portion of the public domain which was being given for all time into the hands of a private corporation.

"By the mining statutes of the United

States passed in 1866 [Act July 26, 1866, c. 262, 14 Stat. 251], the right of entering upon and locating and appropriating lands valuable for their mineral deposits was conferred upon every citizen of the United States, and those who might declare their intention to become such citizens. By the discovery of mineral and marking of boundaries and compliance with such rules as local mining districts or state Legislatures might enact, not to conflict with the United States laws, the locator of a quartz mining claim was given the exclusive right to the possession of the lands and the mineral therein contained within the boundaries of his claim. Only one condition was imposed upon him, and that was in every calendar year he must perform in work and labor and improvements upon his mine at least \$100 in value. If he did not do this, he was liable to lose his mine, in the event some other qualified locator made a location of the claim before the original locator had resumed work. His claim did not become forfeited to the government because of failure to do the work, as he could resume operations and rely upon his original title by location at any time before another had located. Under these mere locations, much of the valuable mining lands of the United States have been held and worked, and are still held and worked, and the title kept alive by the required work in each year has always been regarded as a perfectly safe and secure title. No provision has ever been enacted compelling any miner to patent his claim, and time and again these locations have been held to have all the effect and incidents of a grant from the government. As said by the Supreme Court of the United States in *Forbes v. Gracey*, 94 U. S. 767 [24 L. Ed. 313]:

[1] "Mining claims on public land are property in the fullest sense of the word." In the case of *Gwillim v. Donnellan*, 115 U. S. 49 [5 Sup. Ct. 1112 (29 L. Ed. 348)], the same court holds: 'A valid location of mineral lands, made and kept up in accordance with statute, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located.'

[2] "Mineral lands situated within the limits of railroad grants are subject to location up to the time of the issuance of the patent, clearly determined in the great case of *Barden v. N. P. R. R. Company*, 154 U. S. 288 [14 Sup. Ct. 1030, 38 L. Ed. 992] by the Supreme Court of the United States, and this court is the final arbiter of all the questions arising in cases like the one before this court, and this decision alone precludes this court from finding that plaintiff's grantor, was not entitled to this land when the patent under discussion was executed to the Central Pacific Railroad Company.

[3] "The argument of defendants that plaintiff is debarred from the relief he seeks because of the provisions of the act of Congress of March 2, 1896, is wholly without

merit. Plaintiff is not seeking in this action to annul or avoid a patent issued by the government of the United States. The effect of granting the relief he asks does not in any way invalidate the patent in question. It is an interpretation of the instrument that will be brought about by the judgment in this action, which will determine what, if any, lands in section 29 of township 35 north of range 7 west, M. D. M., are included in the reserving clause of the patent. It is safe to presume that when the President of the United States was about to sign the patent, if it had been called to his attention that there was on said section 29 a quartz claim which has been duly located, which was being worked, which had defined bounds, or could be identified and defined, that he would have refused to sign the patent until these lands had been expressly excepted. But to except such lands it was not necessary for him to know that an actual location had been made. That could be an actual fact, as in this instance it was, without the knowledge reaching the land department or the President prior to the issuance of the patent. By virtue of such location, and because of the mining statutes, and by reason of the interpretation made by the Supreme Court of the United States as to the effect of such location, the lands embraced in the location had passed into the possession and control of the locator; his location had as effectually given him a right to the possession of the located claim, as if it had been granted to him by the government of the United States.

[4] "The moment the locator discovered a valuable mineral deposit on the lands and perfected his location in accordance with law, the power of the United States government to deprive him of the exclusive right to the possession and enjoyment of the located claim was gone; the lands had become known mineral lands, and they were exempted from lands that could be granted to any railroad company. On August 25, 1895, a lode had been found to exist on the section in controversy in this action, mineral lands had been found in one of the tracts mentioned in the patent, and by force of the reserving clause therein these lands never passed from the government by reason of the patent.

"The case of *Noyes v. Mantle*, 127 U. S. 348, 8 Sup. Ct. 1132, 32 L. Ed. 168, is most convincing that such is the construction that should be placed on the reservation in the patent. In this case the Supreme Court of the United States says: 'Where a location of a vein or lode has been made under the law, and its boundaries have been specifically marked on the surface so as to be readily traced, and notice of the location is recorded in the usual books of record within the district, we think it may safely be said that the vein or lode is known to exist, although personal knowledge of the fact may not be possessed by the applicant for a

patent of a placer claim. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein or lode. A copy of the patent is not in the record, so we cannot speak positively as to its contents; but it will be presumed to contain reservations of all veins or lodes known to exist pursuant to the statute. At any rate, as already stated, it could not convey property which had already passed to others. A patent of the United States cannot, any more than a deed of an individual, transfer what the grantor does not possess.

[5] "Plaintiff's predecessor in interest having duly located the Five Pines mine, before the issuance of the patent here in question, that portion of said mine which lies within the west half of the northwest quarter of section 29 of township 35 north of range 7 west, M. D. M., must be held to be not included in the lands conveyed by the patent to the Central Pacific Railroad Company because of the reservation contained in the granting clause of the patent, and judgment in this action should be in favor of the plaintiff, as prayed for in his complaint."

The affirmance of this appeal might be rested upon the legal principles announced in this opinion of the trial judge and further consideration of the matter made unnecessary, if it were not that some points and authorities cited by appellant here are to be noticed, as well as some decisions, other than those referred to by the trial judge, to be cited.

The principal claim of the appellants is that the patent of the government to the railroad company was conclusive of the fact that the land was such as was patentable under the grant; that, as land which was mineral in character (save coal and iron lands) could not be granted, the issuance of the patent, accompanied by the presumption that the land department had done its duty, conclusively established that the lands as described in the patent were nonmineral in character, and the exception and reservation of mineral land contained therein amounted to nothing.

As a general proposition, and as applied to the disposition of its public lands by the government of the United States, the rule contended for by appellants is undoubtedly true. The land department is vested with special power to determine the claims of different persons to public lands it is authorized to dispose of. The duty is cast upon it to determine the character of the public lands, as to whether it is mineral land reserved under the provisions of the general law from sale, or agricultural or other land of which it may make disposition. The determination of this question of the character of the land being given to the land department, the general rule is that the issuance of a patent is a conclusive determination that the land is agricultural, or such other character as

might be disposed of under the general law providing for the disposition of public lands, and not mineral land reserved from sale, and the effect of the issuance of a patent to the land as agricultural land is to transfer to the patentee all mineral deposits which may be subsequently discovered within its boundaries, but which were not known to exist at the time the patent was issued. While this is the general rule as to vesting in the patentee of agricultural land the title to all mineral deposits, the existence of which were unknown when the patent was issued, the rule is equally established that mineral deposits known to exist in the land at the time the patent was issued do not pass under it. In this state this was held to be the rule in cases involving patents issued to railroad companies under the same general act of Congress making such grants, and which explicitly excluded and excepted from the operation thereof grants of mineral lands, and with similar express exclusion and exception in a patent as to mineral land, should any be found in the premises granted.

The first case (*McLaughlin v. Powell*, 50 Cal. 64) was ejection; plaintiff derailing title under a patent of the United States to the Western Pacific Railroad Company of California, issued in 1870. This patent, as does the one here, excluded and excepted mineral land, should any be found to exist on the tracts described in the patent. Defendant offered to prove that a portion of the land described in the patent and of which plaintiff sought to recover possession was mineral land, and that he had held it as a mining claim since 1866. The trial court refused to permit him to do so, and the court, reversing the cause for this refusal, said: "The exception contained in the patent introduced by the plaintiff is part of the description, and is equivalent to an exception of all the subdivisions of the land mentioned which were 'mineral' lands. In other words, the patent grants all of the tracts named in it which are not mineral lands. If all are mineral lands, it may be that the exception is void; but the fact cannot be assumed, as by its terms the exception is limited to such as are mineral land, and does not necessarily extend to all the tracts granted. We think the defendant should have been allowed to prove that the demanded premises were mineral lands."

In *Chicago Quartz M. Co. v. Oliver*, 75 Cal. 194, 16 Pac. 780, 7 Am. St. Rep. 143, the action was brought by plaintiff to quiet its title to a quartz mining claim to which the defendant asserted title as successor in interest under a patent issued to the Central Pacific Railroad Company in 1870, and which patent contained a provision, as in the patent involved here, excepting and excluding all mineral land, should any be found in the patented premises. The trial court found that the Chicago Quartz Mining Company's quartz mine was valuable gold-bearing

ing mineral land, and had been notoriously known and frequently worked as such ever since 1861, and thereupon made a decree in favor of plaintiff, quieting its title. On appeal here, the same point was made as is urged now that the patent was conclusive, and not subject to collateral attack. In affirming the judgment, this court discussed the acts of Congress under which these grants to the railroad company were made, and the duty of the land department relative to issuing patents thereunder. In connection therewith, it said: "In the original act (granting lands to railroads in aid of the construction of their roads) all mineral lands are expressly excepted from its operation, and in the amendatory act it is enacted that the grant shall not include mineral lands, or any lands returned and denominated as mineral lands. 'Whatever is included in the exception is excluded from the grant; and it therefore often becomes important to ascertain what is excepted, in order to determine what is granted.' *Leavenworth, etc., R. R. Co. v. U. S.*, 92 U. S. 733 [23 L. Ed. 634]. It is not claimed that the officers on whom was devolved the duty of issuing the patents to the lands granted could add anything to the grant. But it is claimed that the patent is conclusive evidence that the grant included all the land covered by the patent. The Supreme Court of the United States has said: 'A patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that it had no jurisdiction to dispose of the lands; that is, the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had previously been transferred to others.' *Smelting Co. v. Kemp*, 104 U. S. 636 [26 L. Ed. 875]. This is quoted approvingly in the opinion of the court, delivered by Field, J., in *Wright v. Roseberry*, 121 U. S. 488 [7 Sup. Ct. 985, 30 L. Ed. 1039]." And following the rule announced in *McLaughlin v. Powell*, supra, it was held that such a patent only grants lands which are nonmineral in character; that the exception of mineral lands in the patent is part of the description and equivalent to an exception therefrom of all lands that were mineral, and that the Chicago Quartz Mining Company had a right to show that the land that it claimed was known mineral land at the time of and long prior to the issuance of the patent to the railroad company, and was land within the exception in the patent.

Aside from the cases in our court dealing particularly with patents under grants of Congress to railroad companies, the rule appears to be general that mineral deposits do not pass under a patent issued for land subject to disposal or sale where, at the time of the issuance of the patent, such mineral deposits are known to exist. *Reynolds v. Iron Silver Min. Co.*, 115 U. S. 687, 6 Sup. Ct. 601, 29 L. Ed. 774; *Davis' Adm'r v. Weib-*

bold, 139 U. S. 507, 11 Sup. Ct. 628, 35 L. Ed. 238; *Kansas Min. & Mill. Co. v. Clay*, 3 Ariz. 326, 29 Pac. 9; *Loney v. Scott (Or.)* 112 Pac. 173.

In *Reynolds v. Iron Silver Min. Co.*, supra, a patent was granted for a placer mine within the boundaries of which, when the patent was issued, a quartz mine was known to exist. Speaking of the effect of the grant to the placer claim patentee under this circumstance, the court said: "He (the placer claim patentee) takes his surface land and his placer mine, and such lodes or veins of mineral matter within it as were unknown, but as to such as were known to exist he gets by that patent no right whatever. The title remaining in his grantor, the United States, to this vein, the existence of which was known, he has no interest in it as authorizes him to disturb any one else in the peaceable possession and mining of that vein. When it is once shown that the vein was known to exist at the time he acquired title to the placer, it is shown that he acquired no title or interest in that vein by his patent. Whether the defendant has title or is a mere trespasser, it is certain that he is in possession, and that it is a sufficient defense against one who has no title at all, nor ever had one." It was therefore held that no title to the quartz ledge passed to the placer claim patentee, but the title thereto remained in the United States government. In the case of *Davis' Adm'r v. Weibbold*, supra, it was likewise held that as to known mineral land no title passed to the patentee. And to the same effect are the other authorities referred to by us.

Certain California cases are cited by appellant under which they claim that the patent to the railroad company is conclusive against the attack of respondent. These are particularly: *Gale v. Best*, 78 Cal. 235, 20 Pac. 550, 12 Am. St. Rep. 44; *Saunders v. La Purisima, etc., Co.*, 125 Cal. 159, 57 Pac. 656; *Paterson v. Ogden*, 141 Cal. 43, 74 Pac. 443, 99 Am. St. Rep. 31; and *Jameson v. James*, 155 Cal. 275, 100 Pac. 700. But an examination of these cases shows that the attack on the patent was made by junior claimants. As to such claimants, it is clear, as pointed out in those authorities, that the patent to the land as agricultural land is conclusive.

But the plaintiff here is not a junior claimant. He had made a valid mining location and initiated his title to his mining claim in the quarter section in question nearly six months before the issuance of the patent to the railroad company, and, as the law is that mineral deposits whose existence are known when the patent is issued do not pass under it, the patent was ineffectual to transfer any title to the appellants as to the mining claim of the respondent.

[6, 7] As to the right of the respondent to have his title quieted as against defendants, we have no doubt. Respondent was in pos-

session of his mining claim under a valid location made prior to the issuance of the patent under which appellants claim, and was, therefore in privity with the United States. He is the equitable owner of the mining claim, and while the government holds the legal title it holds it in trust for him, to issue a patent therefor, if he should elect to obtain one upon his complying with the provisions of the law entitling him to such issuance. Under such circumstances, while respondent's title to the mining claim is only an equitable one, and though the legal title is in the government, he is entitled to have such equitable title quieted against appellants who, though they acquired no title whatever to the mining claim of respondent under the patent to the railroad, are nevertheless asserting title to it against respondent.

The order appealed from is affirmed.

We concur: HENSHAW, J.; MELVIN, J.

160 Cal. 72

BRENNER v. CITY OF LOS ANGELES.

(L. A. 2,519.)

(Supreme Court of California. June 2, 1911.)

1. TAXATION (§ 542*)—PAYMENT UNDER PROTEST—STATUTES.

Pol. Code, § 3819, provides that at any time after the assessment book has been received by the tax collector one who claims that the assessment is void, in whole or in part, may pay the same under protest, and payment shall not be regarded as voluntary, but such owner, within six months after payment, may bring an action against the county to recover the taxes, etc. *Held*, that such section was not limited to cases in which the taxpayer had vainly applied for relief before the assessor had closed his books, and before the board of equalization had adjourned, but authorized the recovery of taxes paid under protest on nontaxable property, without prior application to such officer or board.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1003-1005; Dec. Dig. § 542.*]

2. TAXATION (§ 542*)—PAYMENT UNDER PROTEST—RECOVERY—STATUTES.

Pol. Code, § 3819, providing for the recovery of taxes paid under protest, does not furnish an exclusive remedy; section 3804 providing for the refunding of taxes illegally collected, authorizing the recovery of taxes assessed on property not subject to taxation, though paid without protest.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1003-1005; Dec. Dig. § 542.*]

3. TAXATION (§ 535*)—TAXES ILLEGALLY COLLECTED—REFUNDMENT—STATUTES—"MAY."

Pol. Code, § 3804, provides that any taxes, penalties, and costs paid more than once, or erroneously or illegally collected, may, by order of the supervisors, be refunded. *Held*, that the duty to refund was mandatory; the word "may" being construed to mean "must," under the rule that, where persons or the public have an interest in having an act done by a public body, the word "may" is to be so construed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 991-995; Dec. Dig. § 535.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4418-4447; vol. 8, p. 7719.]

4. TAXATION (§ 542*)—TAXES ILLEGALLY ASSESSED—PROPERTY NOT SUBJECT TO TAXATION—UNIVERSITY MORTGAGE.

Plaintiff owned property on which there was a large mortgage to the regents of the state university. The assessor in valuing the property for assessment did not deduct the amount of the mortgage, though it was not subject to assessment, and made no application to plaintiff for a statement of the value of such property. Plaintiff had no knowledge that the mortgage indebtedness was not deducted until after time to apply to the assessor and to the board of equalization had expired, when he sought relief without success, by petition to the city council, and then paid the taxes under protest and sued to recover the same. *Held* that, since the taxes, in so far as they were collected on the mortgage, were in effect a tax on the state's own property, which was exempt from taxation, plaintiff was entitled to recover such part of the amount paid as taxes under a double assessment due to mistake, authorized by Pol. Code, § 3804.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1003-1005; Dec. Dig. § 542.*]

In Bank. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by Gustave Brenner against the City of Los Angeles. Judgment for plaintiff and defendant appeals. Affirmed.

Leslie R. Hewitt, City Atty., Emmet H. Wilson, Chief Deputy, for appellant. Denis & Loewenthal, for respondent.

MELVIN, J. Plaintiff sued to recover certain taxes paid under protest to the city of Los Angeles. A general demurrer to his complaint was overruled, and defendant declining to answer, judgment by default was rendered in favor of the plaintiff. From said judgment, the city of Los Angeles prosecutes this appeal.

The complaint is drafted in two counts, both based on sections of an ordinance of the city of Los Angeles providing for the assessment and collection of city taxes, and the said ordinance is fully set forth in the complaint. The essential facts disclosed by the complaint are that on the 1st of March, 1906, plaintiff was the owner of certain real property in the city of Los Angeles upon which a recorded mortgage for \$60,000 was held by the regents of the University of California. No part of this mortgage had been paid. The assessor in making his assessment for the year 1906 placed the valuation of the property of plaintiff at \$82,000 and failed to deduct \$60,000 for the mortgage, although he had done so in his assessment of the year before. The ordinance provided that the city might exact from each taxpayer a statement, under oath, setting forth under appropriate headings his various kinds of property, and the complaint contained an averment that no demand had been made upon plaintiff at any time by the city assessor of the city of Los Angeles for such declaration of his taxable possessions. There is also an allegation that not until May 28, 1907,

did the plaintiff know that the assessor had failed to deduct \$60,000 from the total assessable value of his land. Then follow averments that the taxes were paid under protest on June 28, 1907; that on the same day plaintiff filed with the city council of Los Angeles a petition asking for a return of the portion of the said taxes improperly assessed against him; that on December 27, 1907, he filed with said city council a duly verified claim for the return to him of said taxes so erroneously charged against him; and that the city council refused such repayment. The second count contains all matters set forth in the first one, and the additional allegation that the tax collector of the city of Los Angeles had erroneously and illegally collected from plaintiff the amount of taxes and penalties properly chargeable against the mortgage held by the regents of the University of California.

Appellant's attorneys rely upon the authority of *Henne v. County of Los Angeles*, 129 Cal. 297, 61 Pac. 1081, in which it was held that certain taxes paid under protest upon an assessment similar to the one here considered could not be recovered, because steps for their repayment had not been taken by the taxpayer within the time provided by law. In that case, as here, the mortgage was held by the regents of the University of California as mortgagees, and no part of it had been paid, yet the county assessor had placed a valuation upon the realty covered by the mortgage without reference to the security which, under the Constitution (article 13, § 4), was to be assessed to the owner thereof. The assessment was made March 1, 1898. On July 23, 1898, plaintiff, Henne, demanded that the assessor correct the assessment by deducting the amount of the mortgage. The assessor refused to comply with this demand. On November 23, 1898, plaintiff filed a verified petition, asking the board of supervisors to refund the portion of the taxes which had been levied on the mortgage, and, this petition having been subsequently denied, the plaintiff paid the full amount of the taxes under protest. The reasoning of the court in that case in upholding the action of the assessor and the board of supervisors was based upon the fact that the taxpayer made application to the former for relief after the assessor's books had been closed and a statement of his year's work had been transmitted to the state board of equalization, and that the board of supervisors had fully performed their duty of equalization according to the statute and had sent the completed assessment to the auditor before they were asked to refund the excessive amount paid for taxes. Assuming that the taxpayer had full notice of the assessor's alleged mistake (and there was nothing in the pleadings to the contrary), the court held that he had failed to avail himself seasonably of the remedies provided by law. The last sentence of the opinion indi-

cates the rationale of the decision. It is as follows: "It was the fault of the plaintiff himself in this case that he did not obtain relief by one or the other of the modes indicated, inasmuch as his application was too late in both cases."

Respondent's counsel point out several differences between the case of *Henne v. County of Los Angeles*, supra, and the case at bar. In the former case, as the opinion indicated, there was insufficient allegation with reference to the overvaluation of plaintiff's interest by the assessor. The court said: "The value of the property, aside from the assessment, is not stated in the complaint, and for aught that appears the assessment may have been for the value of such property over the amount of the mortgage." In the case before us, there was not only the averment in the complaint that the assessor failed to deduct the amount of the mortgage, but there was the statement, also, that \$82,000 was the full value of the property at the date of the assessment. Another difference between this and the *Henne* Case is that in the latter it did not appear whether or not the assessor demanded a statement from the taxpayer; while in the case at bar there was an allegation that no statement had ever been required of plaintiff. In the *Henne* Case the court said: "There is no averment in the complaint that the assessor failed to make a demand on the plaintiff as a taxpayer for a statement of his property as required by law, nor is there any averment that the plaintiff as a taxpayer made and delivered to the said assessor a statement under oath." In the *Henne* Case it affirmatively appears that the plaintiff therein, after his demand on the assessor on July 23, 1898, waited until November 3d before seeking aid from the supervisors, and that therefore there was probably time, after the discovery of the assessment of the property to himself without deduction for the mortgage, in which he might have brought his grievance before the board of supervisors sitting as a board of equalization. Here it appears that Brenner had no notice of the assessor's error until long after the possibility of seeking relief from the board of equalization had passed. In the absence of any request for a statement of his taxable property, he had the right to assume that the assessor had properly performed official duty and had deducted the value of the recorded mortgage from the assessed valuation of plaintiff's property. Another marked difference between the two cases is that in *Henne v. County of Los Angeles* the court treated the application as one made under the provisions of section 3819 of the Political Code, and, even if we should regard that case as authority against the plaintiff's claim as set forth in his first count in the case now before us, we would still have to examine the second count, which is based upon section 63 of the ordinance attached to the complaint.

But we are of the opinion that, in so far as *Henne v. County of Los Angeles* places in the same category the mere overvaluation of property in an assessment thereof, and the inclusion in such an assessment of property not taxable at all, that case should be overruled. The case was properly decided, because the record failed to show that the property was not assessed for its value "over the amount of the mortgage"; but we think it is time to renounce the doctrine that money paid under protest for taxes on property not liable to assessment cannot be recovered, unless application is made for correction of the assessor's error before the period of equalization fixed by law has passed.

We think that perhaps the court in the *Henne* Case adopted some language from the opinion of the Supreme Court of Massachusetts without a sufficient examination of the law of that state. The case was *Osborn v. Inhabitants of Danvers*, 6 Pick. (Mass.) 98. Plaintiff had properly submitted to the assessors a list of his possessions, but before acting, the assessors added items of property situated in another state. The court declined to decide the question as to the validity of the taxes, but decided against the plaintiff strictly in accordance with the peculiar statute of Massachusetts. This language is used in the opinion: "The remedy, and the only remedy, for an overvaluation and assessment is under the statute of 1785, c. 50, § 10, by which it is provided that, whenever any person shall be aggrieved by being overrated in the assessment of any tax, he may apply to the assessors to make a reasonable abatement; and, if they refuse so to do, complaint is to be made, in nature of an appeal, to the court of general sessions of the peace, who are authorized to relieve him. This is an adequate and convenient remedy; but great mischiefs would follow, if we were to hold that an excess of valuation would render an assessment illegal and void. And it is immaterial whether the excess is caused by including in the valuation property of which the person taxed is not the owner, or that for which he is not liable to be taxed. In both cases the remedy is the same. As the plaintiff was liable to taxation for his personal property, the assessment was valid, although he was assessed for more than his due proportion. His only remedy is by application for an abatement; for when a new right is created by statute, which at the same time provides a remedy for any infringement of it, that remedy must be pursued."

[1] The latter part of the quotation, beginning with the words "but great mischiefs," was adopted in the *Henne* Case, but the language preceding it shows that the real basis of the decision was the exclusive remedy furnished by the statute there considered. *Osborn* failed to invoke the only remedy given him by law within the time strictly limited in that enactment; while in

the case at bar, and in the *Henne* Case, suit was brought in the tribunal having jurisdiction, and under the very terms of the statute (section 3819, Pol. Code). That section is not limited, in its application, either by its language or by other statutes, to cases in which the taxpayer wishing to avail himself of it has vainly applied for relief before the assessor has closed his books, and before the board of equalization has adjourned. That part of the opinion in *Henne v. County of Los Angeles*, supra, which seeks to limit a taxpayer in a case like this to the remedies open to him before the assessment has become final by the closing of the assessor's books and by the termination of the period of equalization is overruled.

[2] Returning now to a consideration of section 63 of the ordinance of Los Angeles, we find that this section, which is analogous to section 3804 of the Political Code, provides for the return of taxes "erroneously or illegally collected" upon a verified claim filed within six months after the payment of said taxes. In *Stewart Law & Collection Co. v. County of Alameda*, 142 Cal. 660, 76 Pac. 481, it was held that section 3819 of the Political Code did not furnish an exclusive remedy, and that section 3804 might be invoked, even when the taxes were paid without protest. See, also, *Lauman v. County of Des Moines*, 29 Iowa, 310. The proper application of section 3804 of the Political Code was discussed in *Pacific Coast Company v. Wells*, 134 Cal. 471, 66 Pac. 657. In that case the problem under consideration was the attempted repayment by the city and county of San Francisco of taxes upon \$100,000 erroneously levied by reason of a clerical error of plaintiff's bookkeeper, which was followed by the assessor. Although the taxes had been voluntarily paid, the board of supervisors, upon presentation of the facts, ordered the restoration of the sum charged against the taxpayer by reason of the erroneous assessment. The auditor refusing to allow the claim thus authorized by the supervisors, this court held that a writ of mandate should issue to compel his obedience to the resolution of the board directing such repayment. This language, which is very pertinent to the problem presented by the case at bar, is used in the opinion: "Petitioner has paid all its just taxes, and this sum in addition. No doubt, if the assessor had called the attention of petitioner to the statement it had given in, the footings would never have been changed. It was a clerical error that could easily have been explained. When the attention of the assessor was called to it, he recommended that the mistake be corrected. The board of supervisors, representing the county, after investigation, made an order to correct it. Shall the city and county keep the \$1,625, regardless of all this? It surely would be in violation of honesty and fair dealing for

them to do so. Is it in violation of law for them to refund it? We think not. The board were authorized to order the money refunded, under section 3804 of the Political Code, which provides: 'Any taxes, penalties, and costs paid more than once, or erroneously or illegally collected, may, by the order of the board of supervisors, be refunded by the county treasurer.' This being a remedial statute, it should be liberally construed, so as to carry out its intent and object." It is worthy of note that the opinion in *Pacific Coast Company v. Wells* is signed by Mr. Justice Van Dyke, the author of the opinion in *Henne v. Los Angeles County*, and by Mr. Justice Harrison, who concurred in that opinion.

In *Hayes v. County of Los Angeles*, 99 Cal. 74, 33 Pac. 766, the plaintiff was seeking to recover the amount of money paid upon a delinquent sale of property which had been doubly assessed, the taxes having been paid by the real owner, and the delinquent sale having followed the supposed default of the person to whom the property had been mistakenly assessed. In that case section 3804 of the Political Code is thus expounded: "Section 3804 was enacted to do justice in a class of cases where, but for its provisions, the application of the doctrine of caveat emptor would work a hardship to citizens who had paid money which it was inequitable for the county to retain. I am of the opinion that the doctrine of caveat emptor has no proper application to that class of cases in which the attempted sale of real property for taxes is absolutely void by reason of the tax having been previously paid. This view is sustained by a large number of the late authorities, but for present purposes the question is not of moment; the inquiry being directed to plaintiff's right of recovery under the statute.

[3] "It is urged by respondent that the Code, by providing that the board of supervisors may by order provide for refunding taxes, etc., paid more than once, made it optional with that body whether to do so or not, and that the board in this instance, having refused to refund, its action is conclusive upon the plaintiff. Where the public interest or private right requires that the thing should be done, then the word 'may' is generally construed to mean the same as 'shall.' *People v. Supervisors*, 68 N. Y. 119. Where the statute directs the doing of a thing for the sake of justice or the public good, the word 'may' is the same as the word 'shall.' *Rex v. Barlow*, 2 Salk. 609. Where a statute directs a thing to be done for justice's sake, 'may' means 'shall.' *Silvey v. United States*, 7 Ct. Cl. 334. Where persons or the public have an interest in having the act done by a public body, 'may' in such a statute means 'must.' *Phelps v. Hawley*, 52 N. Y. 27; *People v. Supervisors*,

51 N. Y. 401. See *Estate of Ballentine*, 45 Cal. 696." See, also, *Palomares Land Co. v. County of Los Angeles*, 146 Cal. 537, 80 Pac. 931.

[4] It seems to us that taxes erroneously collected upon the state's own property which is exempt from taxation fall very properly and logically into the category of those paid because of a double assessment, due to the mistake of a public servant. Ever since 1888, when the case of *People ex rel. Attorney General v. Board of Supervisors of City and County of San Francisco*, 77 Cal. 136, 19 Pac. 257, was decided, it has been the settled law that a mortgagor is entitled, upon proper application, to a return of taxes paid, in cases where the assessor has failed to notice a mortgage held by the state. In that case the court said: "But the state should not expect to collect taxes on her own property; much less should she expect somebody else to pay them."

By the judgment of the superior court herein, the city of Los Angeles lost not a cent of taxes rightfully due upon plaintiff's property, while upon the opposite conclusion plaintiff would be mulcted, not for taxes due from some one else which, through error or carelessness, he had paid, but for a charge upon property free from any legitimate assessment by the city at all. In our opinion the plaintiff was entitled to recover the amount found by the court to be due.

The judgment is therefore affirmed.

We concur: SLOSS, J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

160 Cal. 48

PETERS v. SOUTHERN PAC. CO.
(Sac. 1,802.)

(Supreme Court of California. June 1, 1911.
Rehearing Denied July 1, 1911.)

1. APPEAL AND ERROR (§ 1061*)—HARMLESS ERROR—REFUSAL OF NONSUIT.

Refusal of a nonsuit is harmless error, if upon conclusion of the whole case the evidence warrants submission to the jury.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4210; Dec. Dig. § 1061.*]

2. MASTER AND SERVANT (§ 198*)—FELLOW SERVANTS—RAILROAD EMPLOYÉS.

The engineer of a passenger train and the brakeman of a construction train were fellow servants, as affecting the liability of their employer for death of the engineer, whose engine ran into a switch left open by the brakeman and collided with the construction train.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 493-514; Dec. Dig. § 198.*]

3. MASTER AND SERVANT (§ 170*)—RAILROADS—EMPLOYÉS—SELECTION.

The ordinary care which railroad companies must use in selecting their employés, as affecting liability for death caused by negligence of a coemployé, is measured by the perils to be encountered by employés and the consequences reasonably to be expected to follow en-

gagement of an incompetent or unskillful servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 336; Dec. Dig. § 170.*]

4. MASTER AND SERVANT (§§ 276, 279*)—RAILROADS—DEATH OF LOCOMOTIVE ENGINEER—NEGLIGENCE—EVIDENCE.

In an action for the death of a locomotive engineer whose engine ran into an open switch, evidence held to sustain findings that the accident was proximately caused by incompetency of the brakeman of a construction train, who left the switch open, and that the company was negligent in ascertaining his qualifications and in failing to instruct him concerning his duties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 970, 973; Dec. Dig. §§ 276, 279.*]

5. MASTER AND SERVANT (§ 164*)—RAILROADS—BRAKEMEN—EMPLOYMENT—COMPANY'S DUTY.

A railroad company is not only bound to devise a proper method under which its student brakemen may be properly instructed, and whereby their competency can be determined, but must see that those who are charged with duty in the matter perform it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 331; Dec. Dig. § 164.*]

6. MASTER AND SERVANT (§ 271*)—RAILROADS—COMPETENCY OF EMPLOYÉES.

That a railroad employé is ignorant of important rules governing discharge of hazardous duties assigned to him is evidence of his incompetency.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 928; Dec. Dig. § 271.*]

7. MASTER AND SERVANT (§ 287*)—RAILROADS—COMPETENCY OF EMPLOYÉ.

Whether an employer has taken reasonable precautions to instruct a prospective employé in the proper discharge of the duties of a position he desires to fill, or whether reasonable investigation into his qualifications has been made before assigning him to duty, are peculiarly matters to be determined by the jury from all the circumstances disclosed by the evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1051-1067; Dec. Dig. § 287.*]

8. EVIDENCE (§ 514*)—EXPERT TESTIMONY—SUBJECTS—RAILROADS—BRAKEMEN—COMPETENCY OF BRAKEMAN.

On an issue of competency of a brakeman through whose act in leaving a switch open plaintiff's decedent was killed, old and experienced brakemen and switchmen were properly permitted to testify as to what experience is required to qualify them for their occupations.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2319-2323; Dec. Dig. § 514.*]

9. MASTER AND SERVANT (§ 271*)—RAILROADS—BRAKEMEN—COMPETENCY—EVIDENCE.

On an issue of the competency of a brakeman through whose negligence plaintiff's decedent was killed, testimony showing that the place where the accident occurred was a particularly difficult place to switch in was properly admitted; the issue not being determined by considering the average place or the whole road.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 928-931; Dec. Dig. § 271.*]

10. DEATH (§ 57*)—DAMAGES—ISSUES—EVIDENCE.

In an action for negligent death, evidence of decedent's average rate of wages at the

time of his death was properly admitted under an allegation of general damages.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 74; Dec. Dig. § 57.*]

11. DEATH (§§ 57, 86*)—DAMAGES—MEASURE—ISSUES—EVIDENCE.

The pecuniary loss which the wife and children suffered by being deprived of the benefit of what the husband would have probably earned and accumulated during the residue of his life, had he not been killed, is damage sustained as a natural and ordinary effect of his death, and is one of the elements of damage which may be proven under a general allegation of damages.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 74, 112; Dec. Dig. §§ 57, 86.*]

12. DEATH (§ 86*)—DAMAGES—RIGHTS OF SURVIVING CHILDREN.

In an action for negligent death, brought for the benefit of the widow and children, it was proper to instruct that the pecuniary interest of children in the lives of their parents does not necessarily end at majority.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 112; Dec. Dig. § 86.*]

13. TRIAL (§ 295*)—INSTRUCTIONS—CONSIDERING AS A WHOLE.

In determining whether error appears in instructions, they must be considered as a whole.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

14. DEATH (§§ 85, 95*)—DAMAGES—ELEMENTS.

A successful plaintiff in an action for wrongful death is entitled to recover for the pecuniary loss sustained, and in determining the amount thereof the jury are entitled to consider the loss which the wife and children have sustained through loss of decedent's society, support, comfort, and protection.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 111, 112, 116; Dec. Dig. §§ 85, 95.*]

15. DEATH (§ 104*)—INSTRUCTIONS—DAMAGES.

In an action for negligent death, an instruction that the children might recover for probable loss of any benefit of a pecuniary value they would probably have received after reaching their majority; that damages were not limited to the actual pecuniary damage sustained by the widow through loss of decedent's services; that damages must be confined to the pecuniary loss suffered, including the comfort, society, support, and protection of decedent; and that grief, mental suffering, and sorrow could not be compensated—was not erroneous, as giving the jury unrestrained latitude.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 142-148; Dec. Dig. § 104.*]

16. DEATH (§ 99*)—DAMAGES—EXCESSIVENESS.

Thirty thousand dollars is not excessive recovery for negligent death of a locomotive engineer, in a suit for the benefit of his widow and two minor children.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125-130; Dec. Dig. § 99.*]

In Bank. Appeal from Superior Court, Solano County; L. G. Harrier, Judge.

Action by Julia L. Peters, Herman L. Peters' administratrix, against the Southern Pacific Company. From an order denying a new trial on judgment for plaintiff, defendant appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Frank McGowan and McGowan, Squires & Westlake (William F. Herrin and P. F. Dunne, of counsel), for appellant. William J. Herrin and C. H. Garoutte, for respondent.

LORIGAN, J. Plaintiff, the surviving widow of Herman L. Peters, deceased, brought this action under the statute, as administratrix of his estate, to recover damages sustained by her and the two minor children of deceased through the death of the latter, alleged to have been occasioned through the negligence of defendant.

Herman L. Peters was the engineer on a passenger train of defendant known as the Oregon Express which, on its route, passed through the town of Suisun, in Solano county. On December 31, 1904, this train being late, and having the right of way in passing through said town, ran into an open switch on the main line of defendant, colliding with a construction train on a side track, with the result that the engine and a portion of the passenger train were demolished and said engineer, Peters, instantly killed.

The complaint alleged that the accident resulting in the death of Peters was occasioned through the main line switch being left open by one Leo J. Sheridan, head brakeman on the construction train with which the passenger train collided, and as a basis of her right to recover it was alleged that at the time of the accident the said Sheridan was inexperienced as a brakeman, unfamiliar with switching, and incompetent to discharge the duties thereof assigned him; that before employing said Sheridan the defendant did not exercise ordinary care in instructing him how to perform the work of brakeman and switchman, and did not use ordinary care and prudence in selecting him to perform that work to which he was assigned.

The jury returned a general verdict in favor of plaintiff for \$30,000.

Interrogatories, in the nature of a special verdict, were propounded to the jury, and in answer thereto they found that Sheridan left the main switch open after the construction train had backed into the side track; that when employed by defendant Sheridan was a man of ordinary intelligence, but that he had not received the usual course of instruction by defendant as to his duties as brakeman before being employed by it as such; that he was not then a competent or experienced switchman or brakeman; that he had not sufficient training and experience to properly perform the duties of head brakeman in a place like Suisun; that he was not sufficiently conversant with the rules of the defendant to properly perform the duties of head brakeman at that place; and that defendant had not exercised ordinary care and prudence at the time it employed Sheridan to perform the duties of brakeman.

Judgment having been entered in favor of plaintiff upon the verdict, defendant moved for a new trial, which being denied, it takes

this appeal from the denial of that order alone.

As grounds for reversal, it is insisted that the court erred in denying the motion of defendant for a nonsuit, and that, aside from this, the evidence on the whole case is insufficient to sustain the verdict. It is further claimed that the court erred in its rulings on the admission of evidence and in its instructions to the jury, and that the damages awarded were excessive.

[1] We shall not examine into the correctness of the ruling of the court in denying the motion for a nonsuit. After the order made, the defendant introduced evidence on its defense. It is well settled that an order denying a motion for a nonsuit will not be disturbed, although the evidence at the close of plaintiff's case was so weak that it might properly have been granted, if, upon the trial, the defect is overcome by evidence subsequently introduced. If, upon the conclusion of the whole case, there is evidence upon the material issues warranting the submission of the cause to the jury, the question of whether the court erred in denying a nonsuit becomes of no consequence. *Lowe v. San Francisco Ry. Co.*, 154 Cal. 573-576, 98 Pac. 678, and cases therein cited. In fact, while the point is made here that the court erred in the ruling on the nonsuit, it is not particularly pressed, because the broader position is taken that the evidence, even treated as a whole, does not sustain the verdict in several essential respects.

The rule of law under which it was claimed that the defendant was liable for the death of Peters is found in section 1970 of our Civil Code, as it stood when the accident occurred, and which declared that: "An employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employé, or unless the employer has neglected to use ordinary care in the selection of the culpable employé."

[2] It must, of course, be conceded that Sheridan and the deceased were fellow servants, employed in the same general business of defendant in operating its railroad, and that, if the death of deceased was the result of simple negligence on the part of Sheridan in leaving the main switch open, being otherwise entirely competent to discharge the duties of a brakeman with reference to switching, no recovery could be had against the defendant. This being true, necessarily the plaintiff, in order to recover, was required to make out a case bringing it within the provision of the statute just quoted from, making defendant liable where "the employer has neglected to use ordinary care in the

selection of the culpable employé" by whose act, in the discharge of the duties assigned him, the death of plaintiff's intestate resulted.

[3] It is so well settled as to need no particular discussion nor citation of authority that, while railroad companies are only bound to the exercise of ordinary care in the selection of their employés, this ordinary care to be exercised is to be measured by the perils to be encountered in the discharge of the duties of the employment, and the consequences which might reasonably be expected to follow where an incompetent or unskillful employé is engaged. The general rule in this respect is clearly stated in *Still v. San Francisco, etc., Ry. Co.*, 154 Cal. 559, 567, 98 Pac. 672, 20 L. R. A. (N. S.) 322, 129 Am. St. Rep. 177, which involved, as here, the question as to the ordinary care to be exercised by a railroad in the selection of its employés. It is there said: "Under all the authorities, the term 'ordinary care,' as used in this connection, means that degree of care that a man of ordinary prudence would use in view of the nature of the employment and the consequences of the employment of an incompetent person—a degree of care commensurate with the nature and danger of the business and the grade of service for which the servant is intended, and the hazards to which other servants are to be exposed from the employment of a careless or incompetent person. *Wood on Law of Master and Servant*, §§ 417, 418. In accord with this rule, it is generally declared that, where the service in which the servant is employed is such as to endanger the lives and persons of co-employés if the servant is not competent, an employer is bound, in the exercise of ordinary care, upon the plainest principles of justice and good faith, to make a reasonable investigation into his character, skill, qualifications, and habits of life. See 1 *Labatt on Master and Servant*, § 194; *Bailey's Personal Injuries*, § 1407; *Western Stone Co. v. Whalen*, 151 Ill. 472, 38 N. E. 241, 42 Am. St. Rep. 244; *Mann v. Delaware, etc., Co.*, 91 N. Y. 495. The question whether he has made such investigation as is reasonable under all the circumstances is peculiarly one for the jury."

[4] Under the allegations of her complaint, and to bring her right to recover within the rule of liability announced, the plaintiff undertook to prove that Sheridan, when employed by defendant, was in fact incompetent to act as a brakeman; that the accident causing the death of Peters was proximately caused by such incompetency; and that defendant, before assigning him to the discharge of the duties of brakeman and switchman, had failed to use proper diligence or care in instructing him as to his duties in such position, or to exercise ordinary care and diligence to ascertain his qualifications to discharge the duties of that position before assigning him to it. The jury found by

its special and general verdict in favor of the claim of plaintiff in all these respects, and in every particular the claim of appellant is that such findings of fact are not supported by the evidence. On the contrary, appellant claims that the evidence affirmatively shows that the main line switch was not left open by Sheridan, nor was, in fact, open at the time the Oregon Express passed through it; that the evidence shows Sheridan to have been a competent and experienced brakeman; that the defendant took all reasonable care and precaution, not only to instruct Sheridan as to his duties as brakeman and switchman, but before accepting him as an employé had made special examination into his qualifications as such, with satisfactory results. The claims of appellant being thus stated, brings us to an examination of the evidence.

Sheridan, who was 20 years of age at the time of the accident, and known among his fellow employés as "Kid Sheridan," had never had any experience in railroading when he made application to the defendant as a student brakeman, which, as the term imports, was to learn the duties of the position which he desired to assume with the company. This application was made October 3, 1904, and he went into the employ of the defendant as such a student on November 21, 1904. The accident resulting in the death of Peters occurred on December 31, 1904. Sheridan was not then an accepted employé of the defendant, nor had he any regular employment with it, except as a student, until about a week before the accident. He was, however, put upon the pay roll of the company December 1, 1904, although he then did not work every day, being only employed as an extra man and when occasion required. About a week before the accident, he was put on as an extra man, as head brakeman on a construction train under the control of Conductor Brown, the crew of which, in railroad parlance, was known as the "Chain Gang." The term "head brakeman" does not indicate superiority in rank over any other brakeman, but was merely used to designate the one whose position was at the front of the train, as distinguished from the rear brakeman. On the morning of the accident, Sheridan was engaged in making up the construction train, consisting of some 32 cars loaded with dirt, and which were situated on various side tracks of the defendant at its depot in Suisun. To make up this train and hold it on one of the side lines known as the "fruit line," to await the passage of the Oregon Express, which was known to be due, and had the right of way, Sheridan, as was his duty, attended to the switching, which necessitated the opening of the main line switch and side line switches, in order to get the train on the fruit line. In order to get upon the side line track and make up the construction train in readiness to pass out after the Oregon Express had gone through,

Sheridan opened the main line switch, so as to allow the engine of the construction train to pass from the main track to the side lines. As the engine passed in from the main line, Sheridan jumped on it and proceeded through the side lines, opening up the necessary inside switches. The evidence warranted the jury in finding that he never returned to the main line switch after he had opened it and the engine had passed through it. After he had coupled up the various cars on the side lines and had made up the train and got it in readiness to proceed after the Oregon Express had passed, he left the train and went down to the depot, where he remained, with no particular object in view, for a short while and returned to the construction train, on the engine of which he, with the other employés, was seated, when the Oregon Express came down the line and passed through the open switch, with the resulting collision and death of Peters.

There was evidence showing that the railroad premises at Suisun were considered among railroad men as a very difficult place to switch in on account of the many main line trains coming in and going out, trains being due in the morning and afternoon, and branch tracks running in and out of the place; that the situation there was complicated, and there was not much time in going in and out on the main line; that on account of these conditions it required skillful, experienced, and alert men to meet them, and that, considering the training Sheridan was shown to have had as head brakeman up to the time of the accident, he was not sufficiently experienced to discharge the duties of head brakeman at a place like Suisun.

It was shown in evidence that one of the rules promulgated by the defendant pertaining to the duties of a brakeman in switching, and numbered 336, provided that: "At points where trains meet or pass, an employé attending the switch will, after locking it to the main track, take position on the opposite side of the track from the switch, stand and remain there until the expected train has passed." While the application of Sheridan to be permitted to go into the probationary employment of the defendant recited that he had received a copy of the rules, the fact is that defendant never furnished him with them. Nor does it appear that any one instructed him as to these rules or his duty under them in switching, or that he had ever possessed a copy of the book of rules, or had read them, or knew anything about this one relative to his duties in main line switching.

As to how far Sheridan had been instructed in his duties as brakeman, the experience he had, and the precautions which had been taken by defendant to determine his qualifications to act as such before assigning him to that position, various experienced conductors of the defendant, who had served as head brakemen before their advancement

as conductors, together with one of the brakemen who worked on a train with Sheridan, and the examining agent of the defendant, were produced as witnesses. The student brakemen are placed in the charge and under the direction of conductors. Sheridan was originally placed with Conductor Brown, and served under him for 30 days prior to November 12, 1904, on a run between Oakland and Port Costa. This was his main, continuous student service. On November 14, 1904, he made one trip with Conductor Rumsey between Tracy and Oakland. On November 15, 1904, he made another trip with Conductor Miller of some eight or ten hours between Lathrop and Fresno. On November 16, 1904, he made a run with Conductor Phillips between Sacramento and Oakland. All of these conductors—Brown at the end of 30 days, and the others at the end of the respective runs on which Sheridan accompanied them—gave him certificates to the superintendent of the division of the defendant, setting forth the fact that Sheridan had been with them for the periods above indicated, and that either his work was very satisfactory, or seemed to be. Scott, a rear brakeman under Conductor Hughes, and the only brakeman called who had been upon any train on which Sheridan was a student, testified that during the 30 days of Sheridan's studentship he performed the duties which were assigned to him "very nicely." The testimony of this particular witness may be dismissed, however, with the statement that under his testimony it does not appear that he knew of any duty which was assigned to Sheridan, or that he ever saw him do anything. The duties of this witness were those of a rear brakeman; Sheridan was not under his supervision and did not work with him, but was with the other brakemen on the train, of whom there were several.

[5] As to the conductors. Under the system of the defendant, these conductors were required to take care and supervision of the student brakemen and to see that they were properly instructed in their duties; to observe their work and determine whether they displayed sufficient intelligence and became sufficiently skillful and proficient in the discharge of their duties to warrant a satisfactory report to the superintendent. Having devised this system for determining the capability and competency of men seeking employment in situations where the safety of employés in the operation of its road and of passengers upon its trains was imperiled, the responsibility for neglect upon the part of its conductors to take reasonable precautions and care to determine the qualifications of such prospective employés must be borne by the defendant. It was not only the duty of the railroad company to devise a proper method under which its student brakemen might be properly instructed in the duties of their position, and whereby,

after such probationary period, it could be determined whether they were sufficiently competent to be intrusted with those duties, but the duty further devolved upon the railroad company to see that those who were charged with this duty performed it. When we examine the testimony of the conductors whose duty it was to supervise the work of Sheridan and to instruct him and observe how far he became proficient in their discharge before reporting to the superintendent in his favor, we find that, aside from their testifying that Sheridan appeared to be an intelligent young man, it does not appear that they ever saw Sheridan perform any of the duties of a brakeman.

Take the testimony of Conductor Hughes, under whose supervision Sheridan is supposed to have mainly acquired whatever knowledge of his duties he possessed at the time of the accident. This conductor testified that Sheridan appeared to be an intelligent young man, and as far as his testimony discloses, or that of any of the other conductors with whom he afterwards made short trips, this, aside from the fact that he was with them at the time and on the trips above referred to, is apparently all they knew about him. None of them appeared to have taken any interest in him or any supervision over him, except such as followed from his presence on their train with the other brakemen, and as far as any instructions in his duties are concerned, if any were given him (and even Sheridan himself does not say he was given any), they were received from the other brakemen on the train, none of whom, with the exception of Scott, testified in the case. None of these conductors appear to have ever given Sheridan any instructions or to have observed his work; none of them claim to have seen him perform any of the duties of a brakeman—head or rear—nor that they ever saw him at a switch, either opening or closing it, or assisting others in doing so, or that any switch work was done while Sheridan was under their supervision. Hughes gave Sheridan his certificate of competency, not on any knowledge that he himself had acquired of the capacity of Sheridan from an examination of him or observation of his work, but solely at the request of Scott, the rear brakeman above referred to, and simply on the assurance of the latter that he thought Sheridan was entitled to it.

As far as the testimony of Sheridan is concerned, it was only of a general character, to the effect that, while in the service of the defendant prior to being employed on the construction train, he assisted the brakemen in performing their duties. What the duties of a brakeman are does not appear from the evidence. They doubtless involve switching, but, for all the evidence discloses, may have required other duties in the operation of trains. However, it does not appear that prior to the day of the accident Sheridan

ever turned or assisted in turning a switch. As far as the evidence shows, the morning of the accident was the only time he had done so. Conductor Brown, in whose charge the construction train was, and who had control over Sheridan, gave him no instruction whatever when he assigned him to the duty of head brakeman that morning, and in testifying to the capability of Sheridan while in his employ during the week preceding the day of the accident, testified that "in reference to his duties as brakeman he acted as an ordinary man with that amount—with what we would term a green man would act; nothing unusual in his actions."

The only other evidence in the case introduced for the purpose of supporting the claim of appellant that proper care had been exercised to determine the competency of Sheridan before his employment was that of J. H. Burnham, who, on November 21, 1904, was the examiner for the defendant, and who certified that on that date he had examined Sheridan, and that the latter "fully understood all of the rules required in his position of brakeman."

Having set forth the evidence brings us to a consideration of the particulars above set forth, in which it is contended by appellant that it is insufficient to sustain the verdict.

On the point that the evidence did not show that Sheridan left the main switch open, in addition to what we have set forth on that subject, Brown, who was conductor of the construction train on the morning of the accident and a witness for defendant, stated that some 15 minutes before the accident he looked up the track from the depot, a point some 800 or 1,000 feet from the main switch, and knew that the switch was closed from the fact that the red target or disc located at the switch, and which by its position would indicate whether the switch was open or closed, showed him it was closed. This was the basis for his statement, as he did not pretend to be able to state whether in fact the switch was open or closed, as when it is open its width is but about a quarter of an inch, and its actual condition unobservable by a witness at the distance he was from it. Littlejohn, the engineer of the construction train, also a witness for defendant, did not know who opened the main line or side line switches to make up the construction train on the side line; whether it was Sheridan or some other employé on the construction train. He testified, however, that Sheridan closed the main switch after they had gotten through with the switching on the side track. According to the testimony of this witness, while Sheridan closed the switch, there is no doubt that at the time the Oregon Express came along it was in fact open. This witness, with other employés was seated on the engine of the construction train waiting for the Express to arrive, and as it came along he looked ahead and saw that the main switch

was open; that the Express was coming through, and called on the others who were with him, including Sheridan, to jump and save themselves from the collision, which was inevitable. On the other hand, Sheridan, the man charged with leaving the switch open, is not so certain after opening it whether he closed it or not. He testified in response to the inquiry, "Who opened those switches (referring to the main switches and side switches)?" "I think I did. I think I closed them. I am not sure about that. I don't know whether I closed them or the other brakeman closed them." Again, after stating that he knew it was his duty to line the switches up on the main track after the engine had passed through it, and that as far as he knew he did so, he testified that there was a possibility that he might have left the main switch open, and, on inquiry as to whether there was not a probability that he had failed to close it, answered: "Well, I don't know as to that, I don't know. It might have been, and it might not have been." In addition to this there was produced a written report, made to the defendant immediately after the accident, which stated that Sheridan had caused it.

Now the fact is that the main switch was open when the Oregon Express came along; that the only one who handled this switch was Sheridan; that after he opened it, and the construction engine was backed down upon the track, he left it open and never went back to it. It is not pretended that any one else, except Sheridan, was seen in the vicinity of the switch at any time after the construction engine passed through it, or that any one else had anything to do with opening or closing it. Under these circumstances, notwithstanding the testimony of other witnesses that they observed the switch closed, the jury were not bound to believe them. The express train could not have gotten through, except the switch was open. It would be idle to discuss the suggestion of appellant that the Oregon Express may have run into the switch, because the "locomotive may have jumped the track, or (on account of) many other contingencies which might be suggested." What these other contingencies might be is not suggested. One would be at a loss to conjecture what they might be, and the suggestion that the locomotive of the Express may have jumped the track is disposed of by the uncontradicted evidence that certainly at the time the Express entered the siding through the main switch that main switch was open. How it happened to get open, if Sheridan closed it, might be a question, but in view of the fact that it was undoubtedly open when the Express approached, that Sheridan was the only person who operated it, that he had opened it and was doubtful as to whether he had closed it or not, the jury were warranted in finding that he had in fact not

closed it, and the accident was due to negligence on his part in that respect.

The jury being warranted in finding that Sheridan had failed to close the main line switch brings us to the next proposition advanced by appellant, namely, that, assuming the finding of the jury that Sheridan left the main switch open is supported by the evidence, still the evidence shows that Sheridan in fact knew what his duties were relative to the main line switching, and that his negligence respecting it was an act of mere personal negligence on his part, for which the defendant was not responsible.

It is no doubt true that where an employé has been for years engaged in the performance of duties and has theretofore performed them properly—in other words, where full knowledge of his duties is to be presumed from years of employment in their discharge—a single act of negligence on his part may be attributable to remissness in discharging known duties, rather than attributable to ignorance and incompetency respecting their proper performance. But no such situation was presented here. Sheridan had but recently gone into the employment of defendant, and the very question under consideration by the jury on this branch of the case was whether when accepted as an employé of defendant he had sufficient knowledge of the duties of a brakeman, derived from either instruction, experience, or familiarity with the rules of the company. It bore on the fact of incompetency, independent of any question whether the defendant had exercised ordinary care and prudence in ascertaining the qualifications of Sheridan. And the finding of the jury that Sheridan was in fact incompetent to properly discharge the duties of head brakeman and switchman at the time of the accident was fully warranted from the evidence alone, showing that he was entirely ignorant of the requirements of rule 336 of the defendant relative to his duties in main line switching, and which ignorance directly contributed to the accident. That rule expressly required, as we have quoted it above, that "at points where trains meet or pass, the employé attending the switch will, after locking it to the main track, take position on the opposite side of the track from the switch, stand and remain there until the expected train has passed."

The situation on the morning of the accident was exactly that which called for the knowledge by Sheridan of his duties as brakeman respecting it, so that such duty might be performed as the rule prescribed. The switching from the main track had been done for the purpose of making up the construction train, and, as made up, it was waiting under orders the arrival and passage of the Oregon Express, to allow it to pull out and proceed on its way on the main track. It is hardly open to discussion that this rule is one of the most important

governing the conduct of employes respecting switching. The extreme peril to the lives of coemployes and to passengers upon trains occasioned through main track switching called for the greatest precaution upon the part of the railroad company, in order to prevent accidents through the negligent operation of such switches. The defendant recognized that danger and attempted, as far as possible, to prescribe a rule for switchmen which would prevent accident from open switches. Sheridan was entirely ignorant of this rule, in as far as it required him, even after he had locked the switch to the main track (which, of course, the jury found, and was warranted in finding, he did not do), to take a position on the opposite side of the track from the switch and remain there until the Oregon Express had passed. It may be conceded, as Sheridan testified, that he knew it was his duty to close the switch and lock it after the construction train had passed through, and it may be further conceded that a failure to do this alone would have been but an act of personal negligence—negligence committed by the employe with knowledge of how he should have properly discharged his duty. But the duty cast upon Sheridan under the rule required more than to close and lock the switch; it required him to take his post at the switch, even if he had in fact locked it. This was the explicit requirement of the rule, and its purpose is obvious. The company recognized that employes will be careless, and the rule was to provide as great precaution against such negligence as possible. Had Sheridan known of this rule and taken his position at the other side of the switch, as the rule required, it is hardly conceivable that the accident would have happened. If he had assumed the position which a knowledge of his duty would have required, he would undoubtedly have discovered that the switch was open long before the express approached, and the accident would have been averted.

[6] It goes without saying that an employe of a railroad company who is ignorant of important rules governing the discharge of hazardous duties assigned to him is an incompetent employe, and the jury upon this evidence alone, to which we have called immediate attention, was warranted in finding that Sheridan was so incompetent.

The jury being warranted under the evidence in finding that Sheridan was in fact incompetent to act as a head brakeman in switching, by reason of his ignorance of the essential rules prescribed by the defendant for the proper discharge of his duties as such, leaves little to be discussed upon the claim of appellant that the evidence shows that it had taken reasonable care and precaution to either instruct Sheridan as to his duties or to ascertain his skill and qualifications before assigning him to a performance of them.

[7] Whether an employer has taken reasonable precautions to instruct a prospective employe in the proper discharge of the duties of a position he desires to fill, or whether reasonable investigation into his qualifications has been preliminarily made before assigning him to duty, are peculiarly matters to be determined by a jury from all the circumstances disclosed by the evidence. We have already set forth all that was done by the defendant during the period when Sheridan was under the control of its conductors, serving out his probationary period as a student brakeman. We make no question about the soundness of the system devised by the defendant for making its contemplated employes practically familiar with the duties of the positions they desire to fill. It provides for actual work by the student brakemen in the operation of the road, under competent employes, who are capable of instructing them in the proper discharge of their duties, at the same time that it provides for a final examination, after the probationary period, by an examining officer of the defendant, whose duty it is to inquire into the qualifications of the applicant for acceptance into the service of defendant. When followed, this system of instruction and examination doubtless affords as efficient a method as might be devised for insuring the employment of those who are skillful and competent. Under the evidence here, however, the jury were warranted in finding that there was a theoretical, instead of a practical, application of the system, at least in the case of Sheridan. While he made some trips, which were supposed to give him practical instruction, by assisting in the work of brakeman, it does not appear definitely that he ever did anything, except to make the runs. It does not appear that he ever opened any switch, or assisted in doing so, on any trip he took, and none of the conductors issuing him certificates of competency ever saw him perform any of the duties of a brakeman. They issued the certificates in his favor, not because they were satisfied from any work they saw him do that he understood how to do it, but because they were told by some of their brakemen that he appeared to be all right. It does not appear that he was given any instruction by any one. He was not furnished with a book of rules; was never instructed as to any of the rules; never read them; and as to the important rule 336, defining his duties as switchman with reference to the main switch, under the situation of the trains presented on the morning of the accident, he had never been instructed as to it, or knew anything about it.

It is true that the jury in response to one of the special interrogatories submitted to them, found that Sheridan had passed "a satisfactory examination as to qualifications for the position as brakeman." This had reference to the examination which Sheri-

dan took before the examining officer of the defendant, J. H. Burnham, on November 21, 1904. As to the extent of this examination, the only evidence offered respecting it was the certificate of Burnham, which recited that "I have examined J. L. Sheridan on the rules and regulations which took effect June 15, 1903, and I find that he understands all of the rules required in his position as brakeman."

In view of the general verdict of the jury and its special findings that Sheridan was not sufficiently conversant with the rules of the defendant to discharge the duties of switching brakeman, and that defendant had not exercised ordinary care and prudence at the time that it employed him to perform the duties as such brakeman, the finding as to a satisfactory examination cannot be taken as meaning anything more than that the examination that Burnham made was satisfactory to himself. But this is not the test to be applied. The examination or investigation on the part of the employer must be of such a reasonable affirmative character as will disclose, as a fact, whether the employé has such knowledge of his duties that he may safely be intrusted with employment.

Now, while the jury found that the examination by Burnham satisfied him that Sheridan possessed the necessary qualifications for the position of brakeman, the evidence warranted them, as the general verdict and the other special findings determined, that this examination did not measure up to that reasonable investigation and examination that the law requires. Burnham was trainmaster of the defendant. He did not remember Sheridan, or that he had examined him. He had never served in the capacity of a brakeman and his examination was made solely from the rules of the company—a theoretical examination. As the fact is that Sheridan never read the rules and knew nothing about the requirements of rule 336, the jury were well warranted in ignoring Burnham's certificate that Sheridan "understood all the rules required in his position as brakeman," and in concluding that any examination Burnham put Sheridan through was such an extremely limited and perfunctory one that it could not be characterized at all as a reasonable investigation, under which the capability of Sheridan could be or was determined, because, as he did not know rule 336, Burnham, if he had examined him respecting it, would have discovered his ignorance. This disposes of all of the points made by appellant on the ground of insufficiency of the evidence, and, as we find none of them well taken, we proceed to consider other points made for reversal.

[8] Complaint is made by appellant that the court erred in admitting testimony. Certain railroad men—old and experienced brakemen and switchmen—were permitted

to testify as to what experience was required to fit a person as brakeman and switchman. We perceive no error in admitting this testimony. The management and operation of trains is a matter outside the experience and knowledge of ordinary jurors, and it is therefore a proper subject for expert testimony. Our Code (Code Civ. Proc. § 1870, subd. 9) provides for receiving the opinion of witnesses on questions of science, art, or trade, where the witness is skilled therein. The occupation of a railroad brakeman is a trade, and the preparation and experience necessary to make a person competent to discharge its duties is peculiarly within the knowledge of experienced railroad men, particularly those who have followed that occupation. While it is true that the jury was to pass upon the question whether Sheridan was competent to discharge the duties of a brakeman when employed by defendant, it could ordinarily have no knowledge of what preparation and experience was necessary to render a brakeman competent. Only experts—men skilled and experienced in the trade of brakeman—could clearly inform the jury as to the preparation and experience necessary to make one competent in the trade, and their opinion in that respect was admissible.

[9] Appellant likewise complains of the admission of testimony showing that Suisun was a particularly difficult place to switch in. We have set out the testimony in this matter above. The position of appellant is that in determining the competency of Sheridan the average place or the whole road could alone be taken into consideration. But we think not. While the defendant was required to engage only men of average competency, that competency was to be measured by the condition and character of the duties they were to perform, wherever they might be assigned on the road to do it, and, if the conditions at Suisun presented difficulties and complications in switching different from these occurring in other parts of the defendant's road, plaintiff had a right to show it, as the duty of defendant was to assign an employé to discharge the duties of switchman at Suisun who was competent to meet the conditions existing there.

[10, 11] Nor is there any merit in the claim that the court erred in admitting evidence to prove the average rate of wages which the deceased was receiving at the time of his death. There was, it is true, as appellant asserts, no allegation in the complaint as to the earning capacity of the deceased. The allegation was that by reason of the death of deceased plaintiff had suffered damages in the sum of \$50,000. It was not necessary to specially aver the particular loss sustained to the wife and minor children of the deceased by being deprived of the benefit of his future wages through his death. This was not a matter for special pleading. Loss of the benefit of earn-

ings which the deceased might have secured by his trade, and which would have gone to the benefit of his heirs or personal representatives—his wife and children here, for whose benefit this action was prosecuted under the statute—is one of the elements of damage which, with loss of comfort, society, and protection of which the family were deprived by his death, go to make up the whole damage proximately caused by his death, and for which recovery may be had. Civ. Code, § 3333. The pecuniary loss which the wife and children suffered by being deprived of the benefit of what the husband would have probably earned and accumulated during the residue of his life, had he not been killed, is damage sustained as a natural and ordinary effect of his death, and is one of the elements of damage which may be proven under a general allegation of damages. *Bond v. Electric Railway Co.*, 113 Pac. 366. We are not cited to any authority by appellant sustaining its contention to the contrary, and have found none.

[12] Appellant questions the correctness of some of the instructions of the court, but we deem it necessary to examine in that respect but one claim. This is an attack on an instruction of the court as to the rule to be applied by the jury in assessing damages, should they find for plaintiff, and in this respect instruction 17 is particularly criticised. That instruction, as far as pertinent, reads as follows: "Pecuniary interest of children in the loss of their parents does not necessarily end with their arrival at the age of majority, but the jury may allow for the probable loss of any benefit, if any, of a pecuniary value, which a child would probably receive from its parent after arrival at majority. Such damages are not limited to the actual pecuniary damage sustained by the plaintiff by reason of loss of services of deceased. Damages must be confined to pecuniary loss suffered, including comfort, society, support, and protection of the deceased. * * * Grief, mental suffering, and sorrow cannot be awarded for."

The first point made is against that portion of the instruction just quoted contained in the sentence which declares that "the pecuniary interest of children in the lives of their parents does not necessarily end with their arrival at the age of majority," etc. Counsel concedes that this portion of the instruction, as far as it bears on the subject of pecuniary damage, is similar to one considered and sustained in *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 288, 42 Pac. 822, 1063, but questions the correctness of the rule as laid down in that decision. The accuracy of this rule has, however, come up for consideration several times since the *Redfield* Case was decided, and has been sustained. *Valenti v. Sierra Ry. Co.*, 111 Pac. 97; *Simoneau v. Pac. E. R. Co.*, 115 Pac. 320; *Bond v. United Railroads*, supra. So

that it must now be considered as the settled law in this state on the subject.

[13] Particular exception is taken, however, by appellant to that portion of the instruction which reads: "Such damages are not limited to the actual pecuniary damage sustained by the plaintiff by reason of loss of services of deceased." It is claimed by appellant that under this instruction the jury are not limited to a consideration of pecuniary damage alone, but it permitted them, while considering one element constituting it, namely, loss of service, to determine for themselves what other elements might be taken into consideration, and thereby permitted an unrestrained latitude for the play of emotional influences on the part of the jury, even to the extent of assessing punitive damages against the defendant. Whatever criticism this particular sentence of the instruction may be subject to standing alone, it is the established rule in this state that it is not the fair test in considering whether the jury has been properly instructed in a given case to take into consideration excerpts from a particular instruction, or a single instruction, given in a cause. On the contrary, the rule is firmly established here that the correctness of instructions to a jury is not to be determined by taking particular portions of one instruction or another and considering it alone. All of the instructions which are given must be considered, taken as a whole, and if, when so examined, they lay down a correct rule for the ascertainment of damages, that is all that is required. When such consideration is given to the instructions here, in their entirety, it is quite apparent that the jury were properly instructed.

[14] It is too well settled in this state to be now open to question that in actions of this character the plaintiff is entitled to recover for all pecuniary loss sustained, and as elements in determining that pecuniary loss the jury are to take into consideration the loss which the wife and children have sustained through being deprived of the comfort, society, support, and protection of the deceased by the wrongful act of the defendant. *Beeson v. Green M. G. M. Co.*, 57 Cal. 35; *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 277, 42 Pac. 822, 1063; *Dyas v. Southern Pac. Co.*, 140 Cal. 296, 73 Pac. 972; *Valenti v. Sierra Ry. Co.*, supra; *Bond v. United Railroads*, supra.

[15] That the jury were told that they should take these elements into consideration alone in determining the pecuniary loss, and should take no other matters into consideration, is quite clear from instruction 17, taken in its entirety. But if there might be any doubt upon that subject, it is dissipated when all the instructions given as to the rule for measuring damage are considered.

After instructing the jury that the ac-

tion which they were trying was a statutory one, enacted for the purpose of allowing the heirs to recover for pecuniary damages suffered by the loss of a relative, the court then proceeded in instruction 17 to instruct them that pecuniary damage was not limited to that sustained by them by loss of the services of the deceased, but that they were entitled to damage for pecuniary loss suffered, including comfort, society, support, and protection of the deceased, and that grief, mental suffering, and sorrow could not be awarded for. By instruction 19 they were told that as an element in determining such pecuniary loss they could take into consideration "what the deceased would probably have earned and accumulated by his labor in his business or calling during the residue of his life, and which would have gone to the benefit of his heirs and personal representatives, taking into consideration his age, health, habits of industry, ability, and disposition to labor, and the probabilities of his length of life." By instruction 20 they were told that the measure of damages is not alone this pecuniary loss sustained, as just explained in instruction 19, but in addition they could take into consideration the pecuniary loss, if any, sustained by them by being deprived of the comfort, society, support, and protection of the deceased.

Now, taking these instructions as a whole, it appears that the jury was instructed that damages for pecuniary loss were all that could be awarded. This was the standard by which the damages were to be measured, and the elements which were properly to be taken into consideration in determining those damages, they were told, was the pecuniary loss sustained through being deprived of the support of the deceased, because the instruction regarding pecuniary loss through being deprived of the earnings of the deceased which would have inured to the benefit of the family had reference to support, together with the pecuniary loss of being deprived of the comfort, society, and protection of the deceased. But one standard for measurement of the damages was given to the jury—the standard of pecuniary loss—with a proper statement of the several elements going to make up the standard, namely, loss of support, as one element; the other element, loss of comfort, society, and protection. They were expressly instructed that grief, mental suffering, and sorrow could not be considered. Hence, taking the instructions as an entirety, the jury were properly confined by them to a consideration of the proper elements under which to determine pecuniary loss, and pecuniary loss alone, which the plaintiff might have sustained, and they were cautioned as to those matters which might not be taken by them into consideration at all. In this view there

is no merit in the criticism of appellant directed against the instructions.

[16] The claim that the verdict is excessive is not based on any suggestion that if plaintiff was entitled to recover the amount of the award was improper. The peculiar claim in this respect is that the verdict must have been excessive because, as asserted by appellant, there was no evidence upon which a verdict could under any circumstances be awarded, which claim, if it required any answer from us at all, is answered by our discussion of the evidence and the conclusion which we have reached respecting its sufficiency to sustain the verdict. There are no other points made requiring consideration.

The order appealed from is affirmed.

We concur: SHAW, J.; MELVIN, J.; SLOSS, J.; ANGELLOTTI, J.; HENSHAW, J.

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ZIBBELL v. SOUTHERN PAC. CO. et al.
(S. F. 5.075.)(Supreme Court of California. June 20,
1911. Rehearing Denied July
20, 1911.)**1. NEGLIGENCE (§ 136*)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**

Whether one suing for a personal injury is guilty of contributory negligence is generally a question of fact, and is a question of law only when the evidence supports no other legitimate inferences than that of contributory negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-306; Dec. Dig. § 136.*]

2. NEGLIGENCE (§ 122*)—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

Contributory negligence is an affirmative defense, and defendant has the burden of proving it.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 221-234; Dec. Dig. § 122.*]

3. TRIAL (§ 143*)—QUESTION FOR JURY—"CONFLICTING EVIDENCE."

A conflict in the evidence, within the rule that, where the evidence is conflicting, the question is for the jury, must be real; and, where the testimony of a witness is contradicted by all the other evidence and the physical facts, there is no conflict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

4. EVIDENCE (§ 588*)—WEIGHT—CREDIBILITY OF WITNESS—QUESTION FOR JURY.

The jury is not bound by a mere declaration of a witness, irrespective of how improbable or impossible it may be, but the weight of the evidence is for the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. § 588.*]

5. APPEAL AND ERROR (§ 996*)—QUESTIONS REVIEWABLE—FINDINGS.

The court in reviewing a finding of the jury exonerating one suing for a personal injury from the charge of contributory negligence must bear in mind that of the reasonable inferences from the evidence those which supported freedom from contributory negligence were adopted by the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3908-3911; Dec. Dig. § 996.*]

6. RAILROADS (§ 350*)—INJURIES AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether a person struck by a train at a crossing was guilty of contributory negligence *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

7. RAILROADS (§ 267*)—INJURIES AT CROSSINGS—LIABILITY.

An engineer of a train who approaches a crossing without ringing the bell or sounding the whistle, and runs his train at an undue speed while unable to see the conditions in front of the train, is guilty of actionable negligence and liable for injuries received by one struck by the train at the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 859, 860; Dec. Dig. § 267.*]

8. RAILROADS (§ 267*)—INJURIES AT CROSSINGS—LIABILITY.

A brakeman of a switching crew who has no control over the acts of his associates, and who does not fail in any duty which the law exacts from him, is not responsible for the

acts of his fellow employes, and is not responsible for their negligence resulting in injury to a person struck by a train at a crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 859, 860; Dec. Dig. § 267.*]

9. APPEAL AND ERROR (§ 1173*)—REVERSAL—ONE OR MORE PARTIES.

Code Civ. Proc. §§ 578, 579, providing that judgment may be given for or against one or more of several defendants, etc., modify the common-law rule that, where an entire judgment against several joint tort-feasors must be reversed as to one, it must be reversed as to all, so that a judgment against a railroad company and its servants may be sustained as against the company and some of the servants, though it is erroneous as to one of the servants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4562-4572; Dec. Dig. § 1173.*]

10. DAMAGES (§ 173*)—PERSONAL INJURIES—EVIDENCE—ADMISSIBILITY.

Where one suing for a personal injury showed his experience in the breeding and training of standard bred horses, evidence of salaries paid to trainers of horses possessing his skill and experience was admissible as bearing on the general damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 490-501; Dec. Dig. § 173.*]

11. DAMAGES (§ 173*)—PERSONAL INJURIES—EVIDENCE—ADMISSIBILITY.

Under a plea of general damages and to prove a loss of earning capacity, it is permissible to show what wages would be open to one suing for personal injuries in a business or profession which he understands, and which he might follow were it not for his injuries.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 490-501; Dec. Dig. § 173.*]

12. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where the court erroneously permitted plaintiff to ask a witness whether a third person had made a statement and the witness answered in the negative, and no attempt was made to follow the question and prove the statement, the error was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4166; Dec. Dig. § 1050.*]

13. EVIDENCE (§ 155*)—DECLARATION OF WITNESS—ADMISSIBILITY.

Under Code Civ. Proc. § 1854, providing that, when a part of a declaration is given in evidence by one party, the whole on the same subject may be inquired into by the adverse party, defendant was entitled to all of the testimony in a former deposition of a witness at the trial bearing on a question concerning which he was examined by the plaintiff, but not to the introduction in evidence of other extraneous matter which the deposition contains.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 445-458; Dec. Dig. § 155.*]

14. DAMAGES (§ 216*)—PERSONAL INJURIES—INSTRUCTIONS.

Where, in an action for personal injuries, the court charged that the measure of damages was the amount which would compensate plaintiff for all the detriment proximately caused by the accident, and charged that, if plaintiff sustained the injuries complained of through the negligence of defendant and without negligence on his part, the jury should find for plaintiff, and assess the damages "in such sum as you (jury) believe, under all the circumstances of this case in evidence," he ought to re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cover, was not objectionable, as authorizing the assessment of damages in such sum as the jury believed plaintiff should recover, instead of such damages as would compensate him under the evidence, as required by Civ. Code, §§ 3281, 3333.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

15. DAMAGES (§ 216*)—PERSONAL INJURIES—INSTRUCTIONS.

A charge in a personal injury action that the jury should not consider profits of any business in which plaintiff might have engaged in estimating the amount of his damages, and a charge that, in estimating his damages, the loss of the earnings which he would have earned, if any, by reason of the injuries, were not conflicting, for the first charge directed the jury not to give damages for loss of profits, while the second charge authorized a recovery for loss of earnings as a direct loss resulting from the injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

16. NEW TRIAL (§ 143*)—MISCONDUCT OF JURY—EVIDENCE.

The declaration of a juror that a majority of the jury had visited the scene of the accident in issue, but that they did not go there in a body, but separately, is hearsay, and amounts to merely a statement that he himself had visited the scene.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 290-296; Dec. Dig. § 143.*]

17. TRIAL (§ 317*)—MISCONDUCT OF JURY—WAIVER.

Where the defeated party knew during the progress of the trial that a juror had been guilty of misconduct in visiting the scene of the accident in issue, but he did not complain, and both parties were apparently desirous that the jurors should visit the premises, the misconduct was not ground for reversal under the rule that the failure to object to the misconduct of jurors as soon as knowledge thereof has been obtained, and opportunity to object is presented, is a waiver of the right to object.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 751, 752; Dec. Dig. § 317.*]

18. APPEAL AND ERROR (§ 1004*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

The court, in deciding whether passion and prejudice of the jury governed the award of damages in a personal injury case, must compare the amount of the verdict with the evidence of the personal injuries, and the mere fact that a verdict is largely in excess of the largest verdict ever rendered in the state in a similar case does not show passion or prejudice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

19. DAMAGES (§ 95*)—PERSONAL INJURIES—AMOUNT OF RECOVERY.

The jury in awarding damages for a personal injury must award compensation for the physical and mental suffering caused, and to be caused, by the injury, and the partial or total impairment of earning capacity and the duration thereof, and, while loss of earning capacity may be approximated with reasonable exactness, no fixed amount can enter into an award for physical and mental suffering, but the jury cannot estimate such damages by determining what they would take to endure such suffering.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 222-229; Dec. Dig. § 95.*]

20. APPEAL AND ERROR (§ 1004*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

It is only where the verdict in a personal injury action is so grossly disproportionate to any reasonable compensation warranted by the facts as to shock a sense of justice and raise a strong presumption that it is based on passion that the court may interpose its judgment against that of the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

21. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

A person 27 years old, in perfect health, of robust constitution, skilled in the breeding and training of horses, earning about \$2,500 a year in that vocation, and with reasonable expectation of continued earning capacity in that vocation, sustained a personal injury resulting in the loss of both arms and one leg. *Held*, that a verdict of \$100,000, reduced to \$70,000, by a conditional order of the trial court, was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-396; Dec. Dig. § 132.*]

In Bank. Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by Willard R. Zibbell against the Southern Pacific Company and others. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Judgment and order reversed as to defendant F. M. Pope, and affirmed as to the other defendants.

L. L. Cory (Peter F. Dunne, of counsel), for appellants. Sullivan & Sullivan, J. Roche, and Everts & Ewing, for respondent.

HENSHAW, J. This is an action to recover damages for personal injuries. The defendants are the Southern Pacific Company and certain of its employes in the charge and operation of a switch engine with the cars thereto attached, by which the injuries were inflicted. The verdict of the jury was in favor of the plaintiff against all of the defendants. The appeal from the judgment and from the order denying their motion for a new trial is taken by all of the defendants.

The question most earnestly and elaborately argued by all the parties to this appeal is whether or not the evidence establishes the contributory negligence of plaintiff. The determination of this question necessarily involves consideration of the facts in evidence. Before entering upon this consideration, however, the rules of law governing the doctrine of contributory negligence require brief—though very brief—statement. We say very brief, for, while the zeal, industry, and research of counsel have been tireless in the collocation and presentation of the cases bearing upon the question, in a jurisdiction such as this, where the subject has by this court received frequent and elaborate exposition, little can be gained by going afield for authorities. And this is so because of the very nature of the question involved.

[1] Whether or not a plaintiff has been

guilty of contributory negligence is similar to the question whether or not the evidence in a criminal case is sufficient to sustain a verdict of guilty. It is usually a question of fact. It is a question of law only when the evidence is of such a character that it will support no other legitimate inference than that in the one case the plaintiff was guilty of contributory negligence, in the other case that there was not sufficient evidence to sustain the verdict. But even in such cases, while the question is said, and properly said, to be one of law, it is never a question of pure law. The real decision of the question by the court is a decision of fact. When the evidence is such that the court is impelled to say that it is not in conflict on the facts, and that from them reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury, then, and only then, does the law step in and forbid plaintiff a recovery. It must follow, therefore, that cases from other jurisdictions can be of value to such a consideration only when one may be found which parallels in all its essential features the case under consideration. This, in the nature of things, can never, or rarely, happen. And, even if such a case be found, it cannot in any true sense be said to settle the law. Its value will come from its persuasive force and reasoning—not upon the law—but upon the facts to which the law forbidding the recovery has been applied.

[2] The law of this state is so well settled that it may be briefly summarized. Contributory negligence is a defense the burden of proving which rests upon defendant. *Schneider v. Market St. Ry. Co.*, 134 Cal. 482, 66 Pac. 734; *Hutson v. Southern California Ry. Co.*, 150 Cal. 701, 89 Pac. 1093. Therefore in this state it is not incumbent upon the plaintiff—as it is in certain other jurisdictions—to establish affirmatively that he was free from negligence. It is incumbent upon the defendant to establish the existence of his contributing negligence. Again, the question of whether or not a plaintiff has been guilty of contributory negligence is usually one of fact for the jury's verdict. "It is only where no fact is left in doubt, and no deduction or inference other than negligence can be drawn by the jury from the evidence, that the court can say as a matter of law that contributory negligence is established. Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury." *Johnson v. S. P. R. R. Co.*, 154 Cal. 285, 97 Pac. 520; *Seller v. Market St. Ry. Co.*, 139 Cal. 268, 72 Pac. 1006; *Herbert v. S. P. Co.*, 121 Cal. 227, 53 Pac. 651.

[3] Finally, it is to be pointed out that, while in every case of a true conflict in evidence the determination and decision is for the jury, the conflict must, in fact, be real.

This has application to that class of cases where the plaintiff, struck by an approaching train, testifies that he did look, and did listen, and did not see, and did not hear, the approaching train; yet all the other evidence, including the physical facts and conditions is such as necessarily forces the conclusion, either that he did not look and did not listen (or he must have seen or heard the train), or that, if he did look and did listen, he looked with unseeing eyes and listened with unbearing ears.

[4] This is in accord with the general rule touching the weight of evidence that neither court nor jury is bound by the mere declaration of a witness—no matter how improbable, incredible, or impossible, that declaration may be. It is a principle recognized in all cases. *County of Sonoma v. Stofen*, 125 Cal. 35, 57 Pac. 681; *Quock Ting v. United States*, 140 U. S. 417, 11 Sup. Ct. 733, 851, 35 L. Ed. 501; *The William Gray*, Fed. Cas. No. 17,694, 1 Paine, 116; *Nelson v. Betts*, L. R. 5 Eng. Ir. App. Cas. 1, 20. The matter is briefly and vigorously summed up by Lord Stowell, in *The Odin*, 1 A. Rob. 248, when he says: "It is a wild conceit that any court of justice is bound by the mere swearing. It is swearing credibly that is to conclude its judgment." In railroad damage cases, as in all other classes and kinds of cases, this rule has been applied when and as in the judgment of the judges it should be applied. And it is sufficient to refer to such cases as *Hook v. Missouri Pac. R. Co.*, 162 Mo. 569, 63 S. W. 360; *Artz v. Chicago, etc., R. Co.*, 34 Iowa, 154; *Browne v. New York Central R. Co.*, 87 App. Div. 206, 83 N. Y. Supp. 1028; *Fox v. Pennsylvania R. Co.*, 195 Pa. 538, 46 Atl. 106; *Chicago, etc., Ry. Co. v. Kirby*, 86 Ill. App. 57; *Peters v. Southern R. Co.*, 135 Ala. 533, 33 South. 332; *Wardner v. Great Northern Ry. Co.*, 96 Minn. 382, 104 N. W. 1084; *Chicago, etc., Ry. Co. v. Andrews*, 130 Fed. 65, 64 C. C. A. 399; *Blumenthal v. Boston, etc., R. Co.*, 97 Me. 255, 54 Atl. 747. The subject is well summarized by the Supreme Court of Missouri in *Hook v. Missouri Pac. R. Co.*, supra, as follows: "When to look is to see, the mere utterance that one did look and could not see will be disregarded as testimony by the court, and no additional value is to be given to the utterance because of the fact that a jury, under the direction of the trial court, has predicated a finding thereon. As the law does not permit a witness to blind his eyes to the sight of an approaching train in full view of a crossing he is to pass, neither will the eye of the law become blinded to the true situation of the case merely because of the absurd statement of a witness or witnesses, 'I looked and could not see,' or the jury's indorsement of it by a finding predicated thereon, when to look was to see." It is in the category of the cases last referred to that appellants insist the case at bar belongs. Their contention, in brief, is that, giving all the credit to plaintiff's testimony to which it

is entitled, the physical facts and circumstances demonstrate that he could not have met with the accident without contributing fault of his own.

[5] We are thus brought to a consideration of the evidence, and, since the jury's determination from that evidence was to exonerate plaintiff from the charge of contributory negligence, we must, in considering it, bear in mind that, of the reasonable inferences which the evidence will bear, those supporting plaintiff's contention are to be regarded as having been adopted by the jury.

The accident occurred about half past 9 o'clock in the evening of July 12th. Plaintiff's occupation was the breeding and training of trotting horses. He was expecting certain of his horses by railroad, and was going with a companion to the railroad yards to see whether they had arrived. The two were proceeding westerly along the southerly line of Tulare street, a public highway in the city of Fresno. Tulare street crosses the right of way of the defendant company at practically right angles thereto—the street extending east and west, the railroad tracks north and south. Tulare street is the main artery leading from the city proper to the west side (meaning west of the railroad tracks), which was plaintiff's destination. Tulare street, going from the east side to the west side crosses eight lines of track in the freight-yards of the Southern Pacific Company. There are varying distances between these lines of track. Numbering these tracks successively, and naming the easterly one track 8, there were about 28 feet between track 8 and 7, about 20 feet between track 7 and 6, about 13 feet between track 6 and 5, and about 58 feet between track 5 and 4. It was while crossing track 5 that plaintiff was injured. Plaintiff, with his companion, had proceeded along the southerly line of Tulare street, across track 8, track 7, and track 6, and was struck by a box car which with two other cars was being pushed ahead of a freight engine from the south, northerly along track 5. No gates were maintained at Tulare street, and the flagman was over near track 4, which is 58 feet west of track 5. Upon track 4, at this time, was a freight train, several blocks in length, extending completely across Tulare street. The engine was attached, the train was about ready to proceed, and the flagman was talking to some men at or near this freight train. The night was dark. An electric light about 30 feet above the street was located on the southerly curb line of Tulare street between tracks 7 and 8, and about 60 feet from the point of the accident, but "it was not a very good light." Nothing else illuminated the scene. The shadows were deepened by warehouses to the south of and on the westerly side of Tulare street, and by freight cars standing here and there upon the easterly and westerly tracks. It was the busy season of the year in the Fresno freightyard, and there were a number

of such cars standing about. The effect of the electric light on one standing in its radiance and looking out was to intensify the outer gloom as it is intensified to one looking from a lighted room into the outer darkness. The tracks to the south of Tulare street seemed all to stretch away in clear-cut parallel lines, but a lead track, or "lead," used for convenience in switching cars from one track to another, extended in a long diagonal from track 2 at the warehouses of the Earl Fruit Company, about 800 feet south of Tulare street, northerly, cutting at an acute angle tracks 3 and 4, and coming into track 5 at a point 59 feet southerly from the southerly curb line of Tulare street, and 45 feet southerly from the southerly property line of Tulare street. It was up this lead and into track 5 that the car which struck the plaintiff was propelled. At the place where Zibbell was struck, as he approached track 5, and under the conditions there existing, there was nothing to call one's attention to the existence of this lead into track 5, and the lead itself, and its connection with track 5, were obscurely visible, if visible at all. Plaintiff's testimony is that it was a very dark night. He and his companion, McMahan, on approaching the railroad tracks from the east, stopped and looked them up and down. They saw and heard the freight train in front of them on track 4. They heard the noise of two engines working—one the freight train engine, the other seemingly a switch engine to the south. They could see the engine of the freight train on track 4. They could hear the puffing of the switch engine to the south, and judged it to be a block and a half away. Plaintiff had no knowledge of the tracks or their condition other than was afforded by his inspection on that night. He did not know of the existence of the lead from track 2, where the freight engine then was, to track 5, upon which he was struck. Just before reaching track 5, at a distance of about 3 feet from the first rail, he and his companion came to a stop, and again glanced up and down the tracks, which seemed perfectly clear. They were then standing, however, in the glare of the electric light. Plaintiff looked down the track and could see no light. The tracks which he could see and so far as he could see them were clear. Then as he walked on, hearing the sound of a locomotive in front, he looked in that direction. This locomotive was attached to the freight train, and was in the act of starting the train to proceed on its journey. It made much noise. No noise from the south was audible. No bell was rung, no whistle was sounded, no warning shouted, no lantern or other light displayed, when suddenly he and his companion were struck by the box car which, as has been said, with two other cars, had been pushed along the 800-foot lead onto track 5 by an engine placed at the far end of the cars, which engine itself was not puffing or using steam, but, after having given momentum to the cars by the use of steam,

under the headway thus gathered, was silently "drifting along."

Even in this brief statement it must be apparent that this case differs radically from those where all of the other testimony contradicts the plaintiff's testimony that he did look and listen, by establishing that, if he did look or listen, he must have seen or heard. The testimony in this case as to the existing conditions is not even that of plaintiff alone. His statements are supported by disinterested witnesses hearing testimony to the same facts. In addition, the evidence shows, though under conflict, that these cars were not only being thus silently propelled across the public highway in the nighttime, but that the approaching car carried no warning light of any kind, nor even a brakeman to give a warning, the brakeman seemingly having dropped off to turn the switch to make the connection between the lead and track 5. Plaintiff in glancing down the tracks and using both sight and hearing could not see, for the absence of a train light; could not hear, because of the silence of the train, the failure to ring the bell or sound the whistle, and the noise which the freight train and its engine on track 4, immediately in front of him, were making. The situation was further complicated by reason of the fact that the track which he was about to cross was, in fact, clear, and there was nothing to direct his attention to the fatal circumstance that the lead 60 feet away was bringing unlighted freight cars swiftly and silently onto the clear track for his destruction. We say "swiftly"; for, while the estimated speed of the train as given by a witness was "about 9 or 10 miles an hour," yet, taking into consideration the evidence of defendants that the train was checked as soon as possible upon discovery of the accident, the evidence as to the time and place of the discovery, the evidence as to the distance within which that train going at a given rate of speed could be checked, and the distance which the train actually traversed beyond the place of the accident before it was stopped, all would justify an inference that the rate of speed was even greater than that estimated by the witness. Appellants seek by a mathematical calculation and demonstration to show that plaintiff could not have looked to the southward, when standing at the place he designates, or he would have seen the approaching train. The argument upon this point cannot, in the nature of things, be conclusive. It cannot serve to remove the case from the domain of questionable fact which is the jury's province to that of positive demonstration, where alone the law withdraws the consideration from the jury.

Under this statement we think it unnecessary to enter upon an elaborate exposition of the conflicting evidence. Suffice it to set forth brief extracts from the testimony of two of the witnesses, Brooks and Cochrane.

Brooks says: "Prior to the time I turned around, having heard the noise, I did not hear any one call out, only the freight pulling out, just about to pass when they got run over, the freight to Mendota. I did not see any signals given there at that time." Cochrane says: "When I looked, I was about 80 feet away. I saw this train of cars backing up there with no light on the back car and I heard no warning at all, nobody holloed, and no warning was given. I am sure of that. The cars were rolling upon the Tulare street crossing as I looked up. I saw Mr. Zibbell and Mr. McMahan walking along together, no noise being made, nothing to warn the men at all as they walked along, they walked right square into a death trap which caught them."

[6] Clearly, therefore, the question of the contributory negligence of plaintiff was properly submitted to the jury, and the case belongs in the category of those like *Henavie v. N. Y. Central R. R. Co.*, 166 N. Y. 280, 59 N. E. 901; *Calwell v. Minneapolis Ry. Co.*, 133 Iowa, 32, 115 N. W. 605; *Meyers v. Central Ry. Co.*, 218 Pa. 305, 67 Atl. 620; *Sullivan v. N. Y., etc., Ry. Co.*, 73 Conn. 203, 47 Atl. 131; *Baltimore Ry. Co. v. State*, 104 Md. 76, 64 Atl. 304; *Baltimore, etc., Ry. Co. v. Cumberland*, 176 U. S. 232, 20 Sup. Ct. 380, 44 L. Ed. 447; *Johnson v. S. P. R. Co.*, 154 Cal. 285, 97 Pac. 520; *Antonian v. S. P. Co.*, 9 Cal. App. 718, 100 Pac. 877.

The employes of the defendant railroad who were made parties defendant in this action are M. C. Williams, foreman of the "switching crew" in charge of the train which caused the injury, G. E. Lawrence, the engineer of the locomotive engine, and F. M. Pope, a brakeman. It is insisted that the verdict and judgment against Lawrence and Pope are unsupported by the evidence. Lawrence, however, was the engineer.

[7] It is inferable from the evidence, and must have been inferred by the jury from their verdict, that he was operating his train as it approached the crossing without bell or whistle, that he was moving at undue speed, that he was coming into a straight track from a dangerous side lead, and that by reason of the cars and of the angle of this lead he could not himself see the conditions in front of his train. There was sufficient in this to uphold the verdict and judgment.

[8] It does not, however, appear that defendant Pope was responsible. True, he was a member of the switching crew, but his position was a subordinate one. He was a brakeman. It does not appear that he had the slightest control over the acts of his fellows, or that he was in authority to do other than what he might be directed to do. It is not perceived that he failed in any duty which the law exacted of him. Not being responsible for the conduct of his fellow employes, not being in such supervision or control over them that the doctrine of respondeat superior could apply, Pope could be responsible only

for his own personal negligence, and such negligence has not been shown. Against him, therefore, this judgment may not be sustained.

[9] But the contention of appellant that from this the whole judgment must be reversed, under the common-law rule that, where an entire judgment against several joint tort-feasors must be reversed as to one, it must be reversed as to all, is not sound. The early rule has been relaxed by judicial decision and modified by statute. And in this state it does not exist. Code Civ. Proc. §§ 578, 579; *Nichols v. Dunphy*, 58 Cal. 605; *Fowden v. Pacific C. S. Co.*, 149 Cal. 151, 86 Pac. 178; *Cole v. Roebbling Construction Co.*, 156 Cal. 443, 105 Pac. 255.

[10] It was shown that plaintiff had experience and skill in the breeding and training of standard bred trotting horses. Plaintiff's father, an expert in the same business, was asked: "In 1906 what was the salary paid to trainers possessing the skill and experience of your son." Over objection and exception he answered: "Well, the least I ever heard was \$2,500, any professional trainer, from that up." Plaintiff also was permitted to testify: "It (the salary) varies from \$2,000 to \$2,500 up to \$8,000 and \$10,000 a year." These questions were directed—not to the prospective profits of a business, but to the loss of earning capacity of the plaintiff by reason of his injuries. The answers, if admissible at all, were therefore admissible under the plea of general damage. Not going to the element of prospective profit from a business they did not come within the rule of *Lombardi v. California St. Ry. Co.*, 124 Cal. 319, 57 Pac. 66.

We think the evidence was properly admitted; its weight, of course, being for the jury. The plaintiff had proved what was his chosen vocation in life, and the nature of his skill and experience in following that vocation. The jury, in ignorance of the salary, emoluments, and financial returns going to one pursuing this vocation, were entitled to be advised upon the matter. This did not mean, and it cannot be supposed that the jury construed it to mean, that they were from this evidence to say that, if incapacitated by his injuries, the plaintiff lost \$2,500, or \$6,000, or \$10,000 a year, but they were entitled to consider that, if wholly incapacitated, he was excluded from the field of activity in which the usual compensations and rewards to men of his knowledge and experience reached a maximum of \$10,000 a year. The evidence was within the purview of the rule declared in *Treadwell v. Whittier*, 80 Cal. 575, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175; *Bonneau v. North Shore R. R. Co.*, 152 Cal. 413, 93 Pac. 106, 125 Am. St. Rep. 68; *Shaw v. S. P. Co.*, 157 Cal. 242, 107 Pac. 108; *Fisher v. Jansen*, 128 Ill. 549, 21 N. E. 598; *Rayburn v. Cent. Iowa Ry. Co.*, 74 Iowa, 644, 38 N. W. 521; *Mo., etc., Ry. v. St. Clair*, 21 Tex. Civ. App. 345, 51 S. W. 666;

Peterson v. Seattle Traction Co., 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 53 L. R. A. 586; *S. P. Co. v. Hall* (C. C. A.) 100 Fed. 760; *Northern Pac. Ry. Co. v. Wendel*, 156 Fed. 336, 84 C. C. A. 232.

[11] The rule is that, under the plea of general damages and to prove a loss of earning capacity, it is permissible to show what wages, salary, or emoluments would be open to the plaintiff in a business, vocation, trade, or profession which he understands, and which he would have the right and ability to follow were it not for his incapacitating injuries. In this view the evidence was pertinent and permissible. It bore directly upon an occupation for the pursuit of which plaintiff had shown himself fitted and qualified and which he was following; and the rule as we have stated it is not at all in conflict with the other rule which forbids testimony of mere hopes or mere prospects of advancement, the rule declared in such cases as *Richmond & Danville R. R. Co. v. Elliott*, 149 U. S. 266, 13 Sup. Ct. 837, 37 L. Ed. 728, and *Richmond, etc., Ry. Co. v. Allison*, 86 Ga. 145, 12 S. E. 352, 11 L. R. A. 43. Thus in the former of the two cases just cited the obnoxious evidence was to the effect that the plaintiff "thought he would be promoted" and "if promoted would receive an increased salary." In holding this evidence inadmissible the Supreme Court of the United States declared that: "Promotion was purely a matter of speculation, depending not simply upon the occurrence of a vacancy, but upon the judgment or even whim of those in control." In the latter case, where like testimony was introduced, the Supreme Court of Georgia very properly says: "To allow the jury to assess damages in behalf of the plaintiff on the basis of a large income arising from a public office which he has never received, which is merely in expectancy and might never be received, or if received at all, might come to him at some remote and uncertain period, would be wrong and unjust to the defendant."

[12] The witness, Hamilton, was asked the following question: "Did Mr. Cowley tell you in discussing this case that he had testified before the coroner's jury that he saw that train come to a dead standstill before reaching that switch and saw Williams climb down off the side step in front of the train, turn that switch, and come back again and give the signal to go ahead, and climbed up again?" After objection overruled and exception taken, he answered in the negative. As disclosed by the record, the question was improper. It does not appear to have been designed for impeachment, or for any other permissible purpose; but the answer was in the negative, the inquiry was collateral, plaintiff was foreclosed by the answer, no attempt was made to follow the question and introduce the matter in evidence, and it is clear that injury was not worked to defendants.

[13] The same witness, Hamilton, being interrogated as to the distance traveled by the train after the signal to stop, there was read to him the testimony upon this point which he had given at the coroner's inquest. On redirect examination defendants' attorney offered in evidence all of the witness' testimony given at the inquest. It was refused admission, and it is contended that this ruling was error under the familiar principle enunciated in the Code, that when part of an act, or declaration, or conversation, or writing, has been given in evidence, all of it may be shown. But this rule is, of course, subject to the very proper limitation expressed in section 1854, Code of Civil Procedure, that it is all "on the same subject," which may be developed and put in evidence. Thus defendants were entitled to all of the testimony from Hamilton's deposition, bearing upon the single question concerning which he was interrogated, namely, the distance traveled by the cars; but they were not entitled to the introduction in evidence of other different and extraneous matter which the deposition contained. The ruling was therefore proper. *Vance v. Richardson*, 110 Cal. 414, 42 Pac. 909.

[14] Complaint is made of an instruction which states to the jury that: "If you believe from the evidence that the plaintiff sustained the injuries complained of in his complaint through the carelessness and negligence of the defendant, without negligence on his part, then you should find for the plaintiff Willard R. Zibbell, and assess the damages in such sum as you believe, under all the circumstances of this case in evidence, the plaintiff ought to recover, not exceeding the amount claimed in said complaint." The instruction is criticised upon the ground that it authorizes the jury to assess damages in such sum as they believed plaintiff should recover, whereas the jury could only assess such damages as under the evidence would compensate plaintiff for the detriment proximately caused. Civ. Code, §§ 3281, 3333. This was but one instruction. The jury was repeatedly accurately and carefully instructed that "the measure of damages is the amount which will compensate plaintiff for all the detriment proximately caused by the accident." As employed in the instruction, the use of the word "believe" in connection with "all the circumstances of the case in evidence" was a clear equivalent to the words "find" or "determined," and could not have misled the jury into the misconception that they were entitled to award anything other than compensatory damages in an amount established to their satisfaction by the evidence. Herein the case differs essentially from that of *Fries v. American Lead Pencil Co.*, 141 Cal. 610, 75 Pac. 164, where the one vital instruction upon the question of damage was an instruction to the jury that it was their "duty" to "give the child such amount of damages as you feel it is entitled to"; for, under the *Fries* Case, the instruction was

positive that it was the duty of the jury—not to give damages in compensation for the injuries, but to give such damages as through their feelings, and not through their judgment, upon the evidence, they thought the child should have.

[15] By one instruction the jury was told that it could not consider the profits of any business in which the plaintiff may have been engaged, in estimating the amount of his damage. In another instruction they were told that they could consider, in estimating plaintiff's damage, the loss of the earnings which he would have earned, if any, by reason of his injuries. It is contended that these instructions are in radical conflict. But we do not so view them. Plaintiff not having charged in special damage for loss of profits, the jury was properly instructed that this element of special damage should not enter into their computation. But, upon the other hand, a loss of earnings—a direct loss, as distinguished from profits—a special and prospective loss—was a loss which the jury could properly consider under the general *ad damnum* clause. *Whittier v. Treadwell*, supra; *Bonneau v. North Shore R. R. Co.*, supra.

Toward the close of the trial, suggestion was made that the jury visit the scene of the accident. Discussion between counsel followed as to whether the visit should be made in the daytime or at night, under circumstances as nearly as possible like those existing at the time of the accident. The court then asked the jurors to indicate if they wished to view the premises. No juror seemingly so desired. The following then took place: "Mr. Cory: I think in any event they ought to go down there and look at the conditions. Mr. Roche: I am perfectly willing to stipulate now that they may go down there at any time or under any circumstances and observe the conditions, the tracks together or alone, or any other way. Juror Bennett: I think, if the court please, the majority of the jury have been down there, not together, but separately. Mr. Cory: Do I understand that you have been down there? Mr. Bennett: No, sir, not at one time, I was there." Upon this showing neither party made any objection to the conduct of the jury, nor suggested nor asked any action upon the part of the court. It is now contended that the misconduct of the jury was such as to necessitate a new trial. All that appears is shown by the statement, and not by affidavits. Respondent insists that the matter not having been presented upon affidavits is not cognizable by this court. Section 657, Code of Civil Procedure, provides that a new trial may be had "(1) for irregularity in the proceedings of the court, jury, or adverse party, by which either party was prevented from having a fair trial." Section 658 of the same Code declares that: "When the application is made for a cause mentioned in the first subdivision of the last section, it must be

made upon affidavits." See *Benjamin v. Stewart*, 61 Cal. 608; *Saltzman v. Sunset T. & T. Co.*, 125 Cal. 501, 58 Pac. 169; *Gay v. Torrance*, 145 Cal. 144, 78 Pac. 540.

[16] The present case, however, is distinguishable from the cases cited, in that the asserted misconduct appears as fully of record in the statement on appeal as it could be made to appear by affidavits. But we need not pause to consider whether the rule prescribed by section 658, Code of Civil Procedure, is designed to apply to a case such as this; for upon the merits we do not think that the appellants' proposition can be sustained. Juror Bennett's declaration to the effect that a majority of the jury had visited the scene of the accident was hearsay, as he further states, that they did not go there in a body, but separately. His declaration then amounts merely to a statement that he himself visited the spot.

[17] This was made known to the appellants during the progress of the trial, and yet no action was taken, and no suggestion made that the court should take any steps to correct any apprehended injury. Both parties to the action seemed desirous that the jury should visit the premises, and the statement that they had done so was apparently accepted and acquiesced in without demur as a substitute for a formal visit under direction of the court. That this was irregular may not be doubted, but that it was injurious is a very different question. And in this state, and in many other states, the rule is that, when knowledge of such irregularity is made known in time to apply to the court to remedy or correct it, a party may not sit by in silence, taking chances of a favorable verdict, and after a hostile verdict, then, for the first time, be heard to complain. In *People v. Hope*, 62 Cal. 291, a criminal case, it was held that the bare fact that a juror had visited the premises where the crime had been committed was not sufficient ground for discharging the jury. In *Sheehan v. Hammond*, 2 Cal. App. 371, 84 Pac. 340, defendant and his counsel, knowing of an asserted irregularity upon the part of the jury, failed to call the court's attention to it, but made their objection after the trial was over, and it was said: "The defendant cannot be allowed to remain quiet and take the chances upon a favorable verdict, and then raise a point that he knew of and could have raised during the progress of the trial." This declaration is abundantly supported by our other decisions, as witness: *Monaghan v. Rolling Mill Co.*, 81 Cal. 194, 22 Pac. 590; *Wood v. Moulton*, 146 Cal. 317, 80 Pac. 92; *Doolin v. Omnibus Cable Co.*, 140 Cal. 375, 73 Pac. 1060. And in other jurisdictions the construction to this effect is so uniform that it is laid down as a rule in the following language in 17 *American and English Encyclopedia of the Law*, p. 1206: "Failure to object to the misconduct of jurors as soon as knowledge thereof is obtained and opportunity to

object is presented is a waiver of the right to object, and the objection cannot be thereafter presented, as by a motion for a new trial." The jury's verdict in favor of the plaintiff was for the sum of \$100,000. Upon motion for a new trial, the court, with the consent of the plaintiff, remitted \$30,000 of this amount. These appeals are taken therefore from a judgment in the sum of \$70,000. It is contended that the damages are so excessive as to force the conclusion that they were given under the influence of passion and prejudice. And herein it is said that the verdict is twice the amount of the largest judgment ever rendered in the state of California in a similar case, and is the largest verdict ever presented to an appellate court for review.

[18] It has been decided by this court that the only means of discovering the existence of passion and prejudice as influencing a verdict is by comparing the amount of the verdict with the evidence before the trial court. To say that a verdict has been influenced by passion and prejudice is but another way of saying that the verdict exceeds any amount justified by the evidence. *Doolin v. Omnibus Cable Co.*, supra. Damages in cases such as this are not liquidated.

[19] No fixed amount may be recovered, no exact proof of any fixed amount can, from the nature of the case and of the elements which enter into the award of damage, ever be made. The principal elements of damage for which compensation may be awarded are the physical and mental suffering caused and which will be caused by the injury, and the partial or total impairment of earning capacity likewise caused by the injury. To the latter the law may apply a measure—a rude and inexact measure it is true, but still a measure. The extent of the partial loss of earning capacity, the duration of that partial loss of earning capacity, the total loss of earning capacity, and the earning capacity of the plaintiff himself, may all be approximated with reasonable exactness. But to put a monetary value upon the elements of physical pain and mental suffering, their nature, extent, and continuance is a much more difficult and delicate matter. It is, of course, improper for the jury to attempt to measure the damage occasioned by the injury and the sufferings attendant upon it by asking themselves what sum they would take to endure what the plaintiff has endured, and must endure. Says the Supreme Court of Wisconsin in *Heddles v. Chicago & Northwestern Railway Company*, 74 Wis. 239, 42 N. W. 237: "No rational being would change places with the injured man for an amount of gold that would fill the room of the court, yet no lawyer would contend that such is the legal measure of damages." Appellate tribunals have frequently been called upon to review verdicts under the objection here presented.

[20] It is by this court said to be the cor-

rect rule "that it is only where the verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice, and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment, that the judge is at liberty to interpose his judgment as against that of the jury." *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, 47 Pac. 1019.

[21] Viewing the evidence in contemplation of this principle of law, the character of the injuries to plaintiff first call for mention. Those injuries are admitted by the pleadings, and are as follows: "His left arm was crushed and torn below the shoulder; his right hand and wrist were crushed and torn. His left foot and ankle were crushed. The bone of one of the toes of his right foot was broken and crushed. His right heel was crushed and torn to such an extent as to almost sever it from the foot. His right leg was fractured between the knee and ankle, and the flesh on said right leg between the thigh and ankle was torn, cut, bruised and lacerated. His back, sides and shoulders, face and head were cut, bruised, and wounded, and he sustained a severe nervous shock. By reason of said injuries to said left arm, it became necessary to amputate the same, and the said arm was on said 12th day of July, 1905, amputated below said shoulder. By reason of said injuries to said left foot, it became necessary to amputate the same, and the said left foot was on said last-mentioned date amputated a short distance above the ankle. By reason of said injuries to said right hand and wrist, it became necessary to amputate the said right hand at the wrist, and the said right hand was on the 13th day of July, 1905, amputated at the wrist. By reason of said injuries, plaintiff has suffered, and will continue for a long period of time to suffer, great pain and mental anguish."

At the time of these injuries plaintiff was 27 years old, in perfect health, of robust constitution, skilled and experienced in the breeding and training of horses, earning about \$2,500 a year in that vocation, and with a reasonable expectation and fair prospect of an increase of earning capacity and a betterment of financial conditions within his chosen vocation. By the accident his condition is changed from one of virile activity and competency to helpless incompetency. There is no occasion to picture the pain, the grief, the mortification, the disfigurement, and the helplessness which have resulted, all of which will continue through the rest of his life, a period, within the mortality tables, of more than 38 years. And so it must be said that, while the damages awarded in this case are very great, the shocking character of the injuries, the loss of both arms and one leg, the permanent loss of earning capacity, the inevitable disabilities and the suffering

endured, and necessarily to be endured, for more than 38 years, present a case where the injuries are as grave as the damages are great, or, at least, a case where there is no such marked disproportion between the character of the injuries and the award made for them as to suggest at once that the award was influenced by prejudice, passion, or corruption.

For which reasons the judgment and order as to defendant Pope are reversed and as to the other defendants they are affirmed.

We concur: MELVIN, J.; LORIGAN, J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.

160 Cal. 217
PEOPLE v. BYRNE. (Cr. 1,597.)

(Supreme Court of California. June 20, 1911.
Rehearing Denied July 20, 1911.)

1. HOMICIDE (§ 253*)—MURDER—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a conviction of murder in the first degree.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 523-532; Dec. Dig. § 253.*]

2. CRIMINAL LAW (§ 938*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

Applications for new trial on the ground of newly discovered evidence are disfavored.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2306; Dec. Dig. § 938.*]

3. CRIMINAL LAW (§ 939*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

One is not entitled to a new trial on the ground of newly discovered evidence where the evidence was known to him and obtainable at the trial, or would have been known to him had he used diligence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2318-2323; Dec. Dig. § 939.*]

4. CRIMINAL LAW (§ 945*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—JUDICIAL DISCRETION.

On application for new trial on the ground of newly discovered evidence, determination of the weight to be given the evidence supporting the motion, the truth of the matters shown thereby and their materiality and probability of their effect to change the result, if believed to be true, lies within the sound discretion of the trial court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2334; Dec. Dig. § 945.*]

5. CRIMINAL LAW (§ 939*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

It was not an abuse of discretion to refuse a new trial to one convicted of murder, asked on the ground of newly discovered evidence tending to show that accused was at his lodging place the entire evening of the homicide, and that a third person, claimed by accused to be the murderer, appeared there just after the homicide, wounded and apparently a fugitive; the evidence, if true, having been available at the trial in the exercise of reasonable diligence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2318-2323; Dec. Dig. § 939.*]

6. CRIMINAL LAW (§ 945*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

Where one convicted of murder was partly identified by a blue bandanna handkerchief

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

worn by the murderer and found on accused, who claimed that a third person committed the offense, it was not an abuse of discretion to refuse a new trial asked on the ground of newly discovered evidence that such third person and his coemployes had been given similar handkerchiefs, and that he did not spend all of his evenings at home as he had testified.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324-2327, 2336; Dec. Dig. § 945.*]

7. CRIMINAL LAW (§ 945*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

It was not an abuse of discretion to refuse a new trial to one convicted of murder, asked on account of newly discovered evidence, that a state's witness, who had positively identified accused as one of the murderers, had seen accused's claimed companion the night before with another man, and was unable to state whether that man was accused.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 945.*]

8. CRIMINAL LAW (§ 1156*)—APPEAL—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—JUDICIAL DISCRETION.

An order denying a new trial asked on the ground of newly discovered evidence, is conclusive in the absence of a clear showing of abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067-3071; Dec. Dig. § 1156.*]

9. CRIMINAL LAW (§ 407*)—EVIDENCE—ADMISSIONS BY SILENCE.

Whether circumstances are such as to render accused's failure to reply to a statement made in his presence an admission, is, in the first instance, a question for the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 899, 968; Dec. Dig. § 407.*]

10. CRIMINAL LAW (§ 407*)—EVIDENCE—ADMISSIONS BY SILENCE.

In a murder trial, the prosecution can show that after accused was taken in charge, but before his arrest, a bystander told a police officer, in accused's presence, that he had the right man, and that the bystander saw accused with another known to have been one of the two murderers, to show an admission by accused through failure to reply to the statement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 898-900; Dec. Dig. § 407.*]

11. CRIMINAL LAW (§ 407*)—EVIDENCE—IMPLIED ADMISSIONS—EXPLANATION.

One against whom evidence of failure to deny an accusation has been introduced as an implied admission is entitled to explain his silence by showing that a few minutes previously he denied a similar accusation to the police officer having him in charge when the second accusation was made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 899; Dec. Dig. § 407.*]

12. HOMICIDE (§ 339*)—HARMLESS ERROR—EXCLUSION OF TESTIMONY.

In a murder trial, it was not prejudicial error to exclude a showing by accused that he had denied participation in the offense when taken in charge by police officers, offered to explain why accused did not reply to a statement made shortly afterward by a bystander to one of the officers, that the officer had the right man, and that the bystander had, the night before the crime, seen accused with another who was identified as one of the murderers.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 714; Dec. Dig. § 339.*]

13. CRIMINAL LAW (§ 404*)—DEMONSTRATIVE EVIDENCE—PISTOL.

In a murder trial, it was not error to admit in evidence a pistol found under the steps leading to the place where accused lodged; the pistol having been identified as the one with which decedent was killed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 891; Dec. Dig. § 404.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; William P. Lawler, Judge.

John Byrne was convicted of murder, and he appeals. Affirmed.

Sullivan & Sullivan, Theodore J. Roche, and Breen & Kelly, for appellant. U. S. Webb, Atty. Gen., Wm. H. Cobb, Deputy Atty. Gen., J. Charles Jones, Deputy Atty. Gen., C. M. Fickert, Dist. Atty., and F. L. Berry, Asst. Dist. Atty., for the People.

ANGELLOTTI, J. The defendant was charged by information filed February 12, 1907, with the crime of murder, committed November 15, 1906. His trial was concluded April 13, 1907, the jury rendering a verdict of guilty of murder of the first degree. A motion for new trial was made, and this was decided by the trial court on July 11, 1908, the motion being denied. On July 25, 1908, judgment of death was pronounced. A bill of exceptions was settled and approved by the trial judge in December, 1909, and the transcript on appeal was filed in this court on March 30, 1910. The appeal is from the judgment and from an order denying a new trial.

[1] While it is claimed that the evidence given upon the trial was legally insufficient to warrant the verdict, a claim that we are satisfied is not well founded, the main contention of counsel for defendant is that a new trial should have been granted upon the ground of newly discovered evidence. This claim is pressed with great ability and earnestness by counsel who are apparently convinced of the innocence of the defendant. For a proper understanding of the questions presented in this connection, it is essential that some of the facts be stated.

On November 15, 1906, between 8:20 and 8:30 p. m. the saloon of John O'Connell, at the northeast corner of Sixth and Brannan streets, San Francisco, was entered almost simultaneously by two men, one through a door opening on Brannan street, and the other through a door opening on Sixth street. Each was masked by a handkerchief, which was blue with white dots, and each was armed with a revolver. The man who entered by the Brannan street door was put by the witnesses as being a man about five and a half feet in height, as weighing from 140 to 155 pounds, and as wearing a dark coat and a soft black hat. The Sixth street door man was considerably taller. There were several men in the saloon at the time, one of them

being George O'Connell, the deceased, who had been a member of the police force. The masked men ordered all present to throw their hands up. The deceased drew his own revolver, and firing immediately ensued on the part of deceased and the two masked men, with the result that deceased, and another man in the saloon, named Lynch, were killed, and still another was severely wounded. The whole affair occupied only a few seconds. The two masked men at once left the saloon, the Sixth street man getting no further than the southeast corner of Brannan and Sixth streets, his dead body being found there very shortly after. He was discovered to be one Frank Burke, a young man well known in the vicinity. The Brannan street man ran south, along the easterly side of Sixth street, between Brannan and Townsend street, a hundred feet or so, and thence across the street, encountering in his flight a pile of tin, scrap iron and debris, on which he either fell or stepped, to a point on the westerly side of Sixth street near a five-foot alley between a small one-story wooden shack known as the Sullivan saloon, fronting on Sixth street, and another small wooden shack occupied for saloon purposes by one Dillon. The Dillon saloon had then been closed for the night. The Sullivan saloon was still open, and Thomas Sullivan, one of the brothers of Patrick Sullivan, the proprietor, and several men, were in the front room of the building, which was the barroom. A pistol was a little later, between 10 and 11 p. m., found under the steps of a rear entrance to the Sullivan shack. It contained one empty chamber, two empty shells and three loaded shells. A comparison of the bullet which had caused the death of O'Connell, with the bullets remaining in the pistol, showed that they were all of the same make and size, all being bullets of 44 caliber, Winchester rifle cartridges. There was evidence to the effect that the Brannan street man fired two shots.

The Sullivan shack contained, in addition to the barroom, two little rooms which were used for lodging purposes by a number of men who were permitted by Sullivan to occupy the same. The lodgings thus afforded were of the crudest character, being simply two small rooms, upon the floors of which, with the aid of an old mattress or two and old bed wear, some nine or ten men were permitted to sleep. It was claimed that the lodgers were men whose work compelled them to be in that vicinity, and who, by reason of the conditions following the great fire of April 18, 1906, were under the necessity of occupying some such place.

The defendant, who had known the Sullivans for some time, had been one of these lodgers for about two weeks next preceding the murder of deceased. A little after 10 o'clock on the night of the murder, the Sullivan saloon building, which had then been closed for the night, was entered by police

officers, Captain Duke being in charge. The defendant was found in one of the rooms together with five other men, all lying partially dressed, as was the custom, upon the mattress or rags upon the floor. The men other than defendant were Kelly, Canning, McGee, Morrissey, and a man named Rudolph, also known as Russell, all of whom were much larger than defendant, and who in no way tallied with the description of the Brannan street man given by the witnesses of the attempted robbery and murder. In the other room were three men, Frank McDevitt, Gallagher, and Considine, none of whom resembled the defendant in appearance. In another room in front were Peter J. Sullivan and Thomas Sullivan, brothers of the proprietor, who were barkeepers in the saloon. After some investigation, the defendant, Morrissey, and McGee were taken by the officers to the corner of Brannan and Sixth streets and put in a patrol wagon. Defendant, on being told to dress, had put on a dark coat, and a soft black hat which was declared by the witnesses to the shooting to resemble the hat worn by the Brannan street man. There was nothing about defendant's appearance to indicate that he had been engaged in an affray of any kind. While these men were in the patrol wagon, defendant was pointed out by a bystander named Poole as being a man seen by him with Burke the night before, and he was taken from the wagon and searched. In one of his pockets was found a blue handkerchief with white dots, declared by the witnesses to be similar to the one worn as a mask by the Brannan street robber. According to the testimony of the officers, one of the corners of this handkerchief was twisted somewhat and another diagonally opposite twisted a little, the idea conveyed by this testimony being that the two ends had recently been knotted together. Captain Duke called defendant's attention to this saying, according to defendant's own testimony, "That looks as if it had been twisted," and the defendant's only response was to the effect that the twisted appearance was caused by nasal discharges. This explanation Captain Duke declared was untrue in point of fact. The officers then took defendant back to Sullivan's, and it was on this visit that the pistol was found. The witnesses of the shooting agreed upon the proposition that the defendant in size and build resembled the Brannan street robber in appearance. Defendant's weight, however, did not actually exceed about 120 pounds.

The evidence warranted the conclusion that Burke, the dead robber, was an habitu  of the Sullivan saloon, was at times one of the lodgers there, and was well known to all the inmates thereof. While evidence of any special intimacy between him and defendant prior to November 14, 1906, is wanting, according to his own testimony defendant had known him for six or seven weeks and had first seen him in Sullivan's saloon.

An officer testified that he had once seen defendant in Burke's company on the street. Mrs. O'Connell, wife of the proprietor of the Sixth and Brannan streets saloon, lived over the saloon, and from a bay window the night before the robbery, had observed two men apparently skulking in the neighborhood. Being sufficiently apprehensive as to the safety of her husband to send a message to him telling him about two men hanging about whose actions indicated to her an intent to hold up his place, she observed them carefully. She was apparently quite positive that the two men were Burke and the defendant. Poole, as to whom we have already referred, said that the man he saw with Burke the evening before the shooting, resembled the defendant in size and build. He further said that such man was not Hogan, whom he had worked with and knew very well. Heffernan, a railroad man living at the Buffalo Hotel, which was at the northwest corner of Brannan and Sixth streets, was positive that he saw Burke and defendant together about 8 p. m. of November 15, 1906, about 20 minutes before the shooting. He said that he saw them approach the side entrance of that hotel and look in, and then walk toward Brannan street, coming within eight or ten feet of him. He looked particularly at these men, thinking they might be persons he knew, and testified that he could not be mistaken as to the defendant being the smaller man of the two. The smaller man, he said, had on a dark coat and a black soft hat. He subsequently heard the shooting, and saw Burke come out of the Sixth street door of the saloon. He said that he had never seen the defendant prior to this occasion.

The evidence warranted the conclusion that defendant had not been working at all since his discharge from the city and county hospital early in October, or endeavoring to obtain work. He was in the city and county hospital from September 20th or 22nd to October 11th, suffering, he said, from lead poisoning. While much was made by the defense of the fact that he was administrator of the estate of his father, who lost his life by reason of the earthquake and fire of April, 1906, it was apparent that his duties in this behalf were not of such a nature as to occupy his time, and there was no pretense that the estate was of such a character as to supply him with any appreciable amount of money, or that he had any expectation of realizing anything from the estate. It was fairly inferable from the evidence that he was without means of support, and at the same time without the disposition to work.

The trial of defendant was commenced on March 18, 1907, and continued, without intermission, to and including March 25, 1907. The defendant testified as a witness on the last-named day, his examination being concluded, and the district attorney reserving the right to recall him for further cross-

examination if desired. Owing to the sickness of two of the jurors, the trial was not resumed until April 9, 1907. Up to the time of this adjournment, defendant had contented himself with stating simply that, during the whole of the evenings and nights of November 14 and 15, 1906, from as early as 6:30 until Sullivan's saloon was closed for the night, he was in the barroom of that resort, leaving it only to go to bed when the saloon closed. His evidence was of such a nature as to preclude the idea that a man named Hogan, who will hereafter be referred to, came to the saloon at all that evening, and the record forbids the conclusion that he had ever intimated to his counsel or any other person, anything about Hogan, or the remarkable event portrayed in his subsequent evidence, given when the trial was resumed on April 9, 1907. That evidence was substantially that about 8:30 o'clock of the evening of November 15th, a man named Hogan, who did not live at the saloon, but who frequently came there and was a friend of the Sullivans and known to those frequenting the place, appeared at a door leading from the saloon into the hallway, with a gunshot wound on the right side of his jaw, at one end of which was a bullet which one of those present knocked out of his jaw with a finger, causing it to fall to the floor. Defendant picked up the bullet, looked at it, and threw it out of the door. Hogan said, "Frankie dropped" or "Frankie fell." Hogan at once left the saloon in the company of Peter Sullivan and Joe Liddy. It was made to appear on the motion for a new trial that defendant made a similar statement to his counsel between March 25th and April 9th, and, by arrangement of his counsel, had submitted to an examination before the district attorney, in which he told a substantially similar story. His expressed reasons for having previously suppressed what he claimed to be the truth in a matter most vital to himself were his fear of Hogan and the other inmates of the place who were friendly to Hogan, and his indisposition to involve another man. When during the intermission in his trial he found that Thomas Sullivan, the barkeeper on duty in the Sullivan saloon from 7 p. m. until the saloon closed, and upon whose testimony he relied to show his own continuous presence there, had disappeared, he concluded, so he said, to divulge these important facts.

This testimony having been given, much of the remainder of the trial was devoted to an investigation of the claim of Hogan's participation in the affair. No witness on the trial corroborated the remarkable story so told by defendant. Peter Sullivan, who was said by defendant to have left the saloon in company with Hogan, said that he went to his room at 7 o'clock on being relieved from duty as barkeeper, stayed there until the officers invaded the place, and heard nothing about the affair until then. Canning, one of

those present in the saloon the whole of the evening after 7:10, testified for defendant to the effect that defendant was present during all of the time, but positively denied the alleged Hogan episode, and also denied that Joe Liddy was there at all. Liddy testified that he was not at the saloon at all that evening. These appear to be the only persons claimed to have been in the saloon during the whole of the evening of November 15th who were examined on the trial, although others present were accessible.

Hogan was a married man, living with his wife and child on San Jose avenue at a point somewhat remote from Sullivan's saloon. He was a horseshoer by occupation, and had been working in San Francisco as such for a man named Krouse, almost continuously for about 3½ years prior to November 15th. Krouse's place of business was 410 Brannan street. Hogan resembled defendant somewhat in height and build, but was a little heavier and a little taller. It appears to be conceded, also, that he was a man of dark complexion, while defendant was light. As before stated, Hogan frequently visited Sullivan's saloon and was well known there. He had known Burke for a long time, and was intimate enough with him to have gone, according to his own testimony, on a hunting trip of some days' duration with him, and another person, a few weeks before November 15th. At the time of the trial he had a scar on his jaw, the result of a wound inflicted within at least a few weeks of November 15th. Hogan's testimony on the trial was to the effect that the wound was due, not to a bullet, but to a kick inflicted by another man some time before November 15th, and the evidence of Dr. Bacigalupi, based upon an examination of Hogan at the time of the trial was strongly in support of the claim that the scar was not the result of a bullet wound. There was evidence on the trial to support Hogan's claim that he was at his home during the whole of the evening of November 15th, and none opposed thereto except the evidence of defendant hereinbefore referred to. The question of the possibility of Hogan's participation in the affair of November 15th was gone into at great length on the trial, his own examination on the part of learned counsel for defendant being most searching.

While a mere reading of the record in this case necessarily leaves one in grave doubt on the question of the defendant's guilt, there is certainly enough in the evidence to sustain the conclusion of the jury and trial judge who saw and heard the various witnesses, and who were in a much better position to determine the truth than a court that does not possess such an advantage.

An apparently very strong showing was made for a new trial on the ground of newly discovered evidence, but in the light of the well-settled rules applicable in the consideration of appeals from orders of trial courts

denying such motions, we do not see how it can properly be held that the trial court abused its discretion in denying the motion.

[2, 3] The claim of newly discovered evidence warranting a new trial is universally looked upon by the courts with distrust and disfavor. Public policy demands that a litigant should be compelled to exhaust every reasonable effort to produce at his trial all existing evidence in his behalf. It has been said that the circumstance that the testimony has just been discovered when it is too late to introduce it is so suspicious that courts require the very strictest showing of diligence. *People v. Freeman*, 92 Cal. 366, 28 Pac. 261. It is recognized, however, that despite the exercise of such effort, cases will sometimes occur where, after trial, new evidence most material to the issue and which would probably have produced a different result, is discovered. For such cases, the remedy of motion for a new trial on the ground of newly discovered evidence has been given. As declared by our Penal Code, the court may grant a new trial "when new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial." It is well settled that a party who relies upon that ground must have made reasonable effort to produce all his evidence at the trial, and that he will not be allowed a new trial for the purpose of introducing evidence known to him and obtainable at the time of the trial, or which would have been known to him had he simply exercised reasonable effort to present his defense. See *People v. Freeman*, 92 Cal. 359, 28 Pac. 261; *People v. Rushing*, 130 Cal. 454, 62 Pac. 742, 80 Am. St. Rep. 141; *People v. Sullivan*, 3 Cal. App. 513, 86 Pac. 834.

In accord with these principles it has been held by this court that the testimony of a witness absent from the trial because his whereabouts were then unknown, the existence and materiality of which were known to defendant before the trial, was not newly discovered evidence on account of which a new trial could be granted, although defendant had endeavored to find the witness before the trial. The court said: "Knowing of the importance of his testimony, defendant should have moved for a continuance, and, failing to do so, it must be held that it entered upon the trial at its peril." *Germania Trust Co. v. San Francisco*, 128 Cal. 589, 61 Pac. 178.

In *Berry v. Metzler*, 7 Cal. 418, it was said: "A party is bound to know the materiality of testimony known to him, except in cases of surprise at the trial. And when the party discovers new testimony before the trial, but too late to procure it, he should apply for a continuance."

[4] When due diligence on the part of defendant to produce at the trial all evidence in his favor has been shown, the trial judge is still called upon, in the exercise of a wise

discretion, to determine the weight to be given to the evidence produced upon the motion for a new trial, the truth of the matters shown thereby, and the materiality and probability of the effect of them if believed to be true. *People v. Weber*, 149 Cal. 350, 86 Pac. 671. That counter affidavits to rebut the showing made by defendant on such a motion, by discrediting the newly discovered witnesses, or by disputing the alleged facts testified to by the new witnesses, may be presented on such a motion, was declared in *People v. Sing Yow*, 145 Cal. 1, 78 Pac. 235, where the court said that the law does not contemplate the granting of a new trial on this ground simply to enable the defendant to go through the form of another trial, "where there is no reasonable probability that the newly discovered evidence will change the result, and where it does not appear that by reason of such evidence the result ought to be different." In the case last cited, the duty and power of the trial court, in the determination of a motion on this ground, and the limited functions of an appellate court in reviewing the action of the trial court, were defined as follows: "The question as to the effect upon the case of the newly discovered evidence is from its nature peculiarly one that is addressed to the discretion of the trial court, and, of course, should be determined by that court with a full realization of the responsibility involved, and the motion should undoubtedly be granted where the showing is such as to make it apparent to the trial court that the defendant has, without fault on his part, not had a fair trial on the merits, and that by reason of the newly discovered evidence the result would probably be, or should be, different on a retrial. But unless the appellate court can plainly see that this discretion has been abused, that the showing made was of such a character as to make it manifest that the case would or should result differently on a new trial, in view of the newly discovered evidence, the order of the trial court refusing a new trial will not be disturbed."

[5] In the light of what has been said, the alleged newly discovered evidence to the effect that defendant was not absent from Sullivan's saloon at any time after 6:30 p. m. on November 15, 1906, and that Hogan appeared at Sullivan's just after the attempted robbery, wounded and apparently a fugitive, was not such as to warrant a reversal of the order of the trial court. The alleged newly discovered evidence in this regard was that of William A. Rudolph, Edward McKee, and John Morrissey, all lodgers in the Sullivan saloon, on the night of November 15, 1906, and Thomas Sullivan, barkeeper on duty therein on that night from 7 o'clock to the time when the saloon was closed. Rudolph, who at Sullivan's place went by the name of "Russell" or "Whitey," by affidavit, made May 28, 1907, in great detail corroborated defendant's evidence as to his presence in the

saloon during the whole of the evening of November 15th, and the appearance of Hogan therein wounded. He further declared that prior to this, about 7:30 p. m., Burke and Hogan came into the saloon together, when Burke treated the house and he himself talked with Hogan, and that they left the place after a stay of about 20 minutes. He said that he heard pistol shots, and shortly after Hogan appeared bleeding profusely, declaring that "they got Frankie" and "me too." He declared, however, contrary to defendant's evidence, that he had seen no bullet. He said that he left San Francisco about December 4, 1906, and had failed to disclose the facts within his knowledge because afraid of Hogan and his friends. It was shown on the motion for a new trial that on or about August 11, 1907, Rudolph was killed at Redding, Shasta county, by falling under a moving railroad car while he was attempting to leave the same. The affidavit of Edward McKee corroborated defendant as to his being in Sullivan's saloon during the whole of the evenings of November 14th and 15th, and as to Hogan appearing shortly before the closing of the saloon, with a wound in the jaw bleeding profusely, declaring "They got Frankie," or "Frankie fell," and "They got me too," and corroborated Rudolph by declaring that Burke and Hogan came into the saloon together between 7 and 7:30 p. m., when Burke treated. He had been in San Francisco all of the time between November 15th and the close of the trial, had been kept in custody during a portion of the time in order that he might be available as a witness, and said that he had kept silent as to the Hogan episode because he knew that all parties in the saloon knew that Byrne was innocent, did not think it possible that he could be convicted, and did not desire to implicate Hogan. The affidavit of John Morrissey declared that defendant had been in the Sullivan saloon during the whole of the evenings of November 14th and 15th, but said nothing about the Hogan episode. Thomas Sullivan had been subpoenaed as a witness for the trial, and had been in attendance up to the time of the intermission, but had disappeared during such intermission. He had declared to counsel for defendant that defendant was in Sullivan's saloon during the whole of the evening of November 15th. He does not appear to have been discovered up to the time of the denial of the motion for a new trial. No request was made of the trial court during the trial for any continuance on account of his absence. This is also true of the witness Rudolph. McKee and Morrissey, though present at the trial, were not called as witnesses.

Of course, none of this evidence was really discovered after the trial. If defendant and Rudolph, McKee, and Morrissey were speaking truthfully in regard to the matter of defendant's presence in Sullivan's saloon and the Hogan episode, defendant knew just as

much about the existence of this material evidence before the trial, as he did after. Under ordinary circumstances, his failure to call Morrissey and McGee as witnesses and his failure to ask for a continuance for the purpose of procuring the presence of Rudolph would show such want of diligence in the matter of obtaining this testimony as would preclude consideration of it as newly discovered evidence. But it is earnestly urged that as defendant had learned that those present in the Sullivan saloon on the evening of November 15th would not testify to the Hogan episode, a fact shown in the case of Canning, who when called as a witness by him, denied that Hogan appeared there that evening, he was justified in refraining from calling them at the trial, and is now entitled to rely on their evidence as newly discovered evidence. If we assume this to be true, a matter we do not deem it necessary to decide here, and if we further assume that Rudolph's affidavit might properly have been taken into consideration by the trial court, notwithstanding his death and the consequent impossibility of introducing his evidence on a new trial, we still cannot say that there was an abuse of discretion on the part of the trial court in refusing to allow a new trial on account thereof.

The witness Morrissey, who still remained silent as to the Hogan episode, was discredited by evidence of inconsistent statements. On the night of the shooting, when examined in the Sullivan saloon by Captain Duke, in the presence of Sergeant Regan, he had said that he went to bed before 7 p. m., and knew nothing about the affair. On December 2, 1906, he had signed a statement to the same effect. On August 16, 1907, he said to Captain Duke, referring to defendant, "You've got the right man, and that's all there is to it," and later on the same day he said to Captain Duke, in the hearing of Sergeants O'Connell and Tobin and Officer McEntie, referring to defendant, "He did it; and that is all there is to it." The witness McGee had stated to Captain Duke on the night of November 15th, that he went to bed before 8 o'clock that night, that he did not know whether defendant went out of the saloon after he went to sleep, and that he knew nothing concerning the shooting of O'Connell. On December 2, 1906, he subscribed a written statement to the effect that he went to bed about 23 minutes to 8. On April 3, 1907, he stated in the presence of Captain Duke and Mr. O'Gara, that no one, to his knowledge, had come into Sullivan's saloon on the night of November 15th with any wound upon his jaw, chin, or face, and declared that he had not seen Hogan in said saloon at any time on the night of November 15th. On June 19, 1907, he stated to Mr. O'Gara, in the presence of Captain Duke, that Hogan was not at the saloon that night, and that he did not know that any affidavit signed by him contained a statement to that effect, and it

was shown beyond the possibility of controversy that he was fully informed of the contents of his affidavit before he signed it.

Rudolph had told Captain Duke in the presence of Sergeant Regan, when questioned on the night of the shooting, that he knew absolutely nothing of the shooting, and that he had been in bed and asleep from 7:30 p. m. This statement found some support in the evidence given by Canning on the trial, wherein he testified that, when he went to bed, Rudolph was already there, asleep. According to his own story he had subsequently left San Francisco, knowing that an innocent man was in custody charged with the murder of O'Connell, willfully concealing information that would at once establish his innocence, and enable the authorities to develop the facts establishing the guilt of the real perpetrator. In his affidavit, which was surprisingly specific as to every detail that could bear in favor of defendant, even to the hearing of the pistol shots in O'Connell's saloon, just prior to Hogan's appearance, he contradicted all the evidence in the case on the question of the handkerchief, saying that a blue handkerchief with white dots was taken from defendant in the saloon, while all the evidence showed that no handkerchief was found on defendant until after he had been removed from the saloon and taken to the corner of Sixth and Brannan streets. The trial court may very reasonably have inferred that this statement was made to serve as a basis for his following statement that such handkerchiefs were in common use in San Francisco among laboring men. Shortly subsequent to the making of his affidavit, he stated to Mr. O'Gara, in the presence of defendant's attorney, that the man who came wounded into Sullivan's saloon was of fair or light complexion and about five feet four inches in height, whereas Hogan's complexion was dark and his height was at least five feet six inches. His expressed reason for his previous silence, namely, fear of Hogan and his friends, might well be regarded by the court as false. There was nothing to indicate any real reason for such fear, and nothing to show why the reason, if good, did not still obtain.

In view of all the circumstances, it can only be said as was substantially said in *People v. Weber*, supra, that potent as these affidavits may have been, if believed, it may not be said by this court that the trial court did not exercise a sound discretion in absolutely discrediting them.

[6] Another line of alleged newly discovered evidence relied on in support of the motion was evidence tending to show that Hogan and the other employes of Mr. Krouse had each been given some months before November 15, 1906, a blue bandanna handkerchief with white dots, and also evidence tending to impeach Hogan's evidence that he spent all of his evenings at home, by showing that on

several occasions he had been out in the evening with one of his fellow employes. The mere fact that Hogan may have been the possessor of a blue handkerchief with white dots was of little significance. It does not appear to be questioned that such handkerchiefs were quite common in San Francisco at that time, and the important thing in regard to the handkerchief found on defendant was, not only that it appeared to the witnesses to be similar in color and design to that worn by the Brannan street robber, but that it also appeared to the officers, when found upon defendant, to have been twisted at two ends, so as to indicate that such ends had recently been knotted together. The showing tending to impeach Hogan's evidence as to his habit of staying at home evenings was very slight, and altogether entitled to little, if any, weight in the determination of the motion by the trial court.

[7] A more important matter, probably, was the showing tending to affect the evidence given by the witness Heffernan, the witness who positively identified defendant as being the man in company with Burke at the corner of Sixth and Brannan streets a few minutes before the shooting. This testimony of Heffernan was very important to the prosecution, as he was the witness who on the trial most positively identified defendant as being in the company of Burke on that night. So far as the new evidence tended to show Heffernan to be a man unworthy of credit, it need only be said that very little was thereby added to what had been shown on the trial, and the trial court was amply warranted in concluding that even that little was so explained by the counter affidavits as to make the showing of no importance.

The real question in regard to the Heffernan matter arises from the discovery by defendant's attorney of the fact that Heffernan saw Burke in the O'Connell saloon on the night of November 14th, about 10 o'clock, when Burke came in with another man, about five feet six inches in height, and of light complexion, and had a drink at the bar, and that he could not tell whether or not such other man was the defendant. Heffernan's affidavit to this effect was presented by defendant on the motion for a new trial. He had not been questioned about this when examined on the trial, the defendant having no reason to suspect that he had seen Burke on November 14th. The importance of this testimony lay in the fact that the two men so visiting the O'Connell saloon on the night of November 14th were the same men whom Poole testified to seeing at the Buffalo Hotel door that night, and thereafter in the O'Connell saloon, one of whom, he said, resembled the defendant in appearance, and were possibly the two men referred to in the testimony of Mrs. O'Connell, and also in the doubt that might reasonably

arise concerning the identification by Heffernan on the night of the 15th, if he was unable to identify the same man on the night of November 14th. There were also presented the affidavits of counsel for defendant, to the effect that Heffernan had stated to them, first in July, 1907, and again in January, 1908, when questioned by them, that he had looked particularly at the features of the smaller man of the two in O'Connell's saloon, on November 14th, and that such smaller man was not the defendant, and that he in fact resembled Hogan more than defendant, but that on the latter occasion he would not say whether he was Hogan "or looked like Hogan." No counter showing was made to rebut the statement made by counsel in these affidavits.

We have given the claims of learned counsel as to the showing in this behalf our most earnest consideration, but cannot escape the conclusion that we are not warranted in disturbing the action of the trial court thereon. Heffernan, who was examined and cross-examined at great length on the trial, did not appear to have in any way changed his views as to the identity of the man whom he saw with Burke on the evening of November 15th, or to have made any statement inconsistent with his testimony in that regard given on the trial. That he should be able to identify the man he saw on November 15th just a few minutes before the shooting, while not able to say he was the same man he saw in the saloon the night before, is not at all incredible, and the judge of the trial court was better able than we are to determine as to the probable and proper effect of such an inability on his part. It is not at all clear that the man with Burke in O'Connell's saloon on November 14th, whom Poole and Heffernan saw, was the same man whom Mrs. O'Connell saw with Burke that evening. In fact, the testimony of Poole and Mrs. O'Connell rather indicates that they were speaking of different periods of time, Poole seeing his two men go to the Buffalo Hotel door after the place had closed for the night, and Mrs. O'Connell seeing her two men enter that place before it was closed. It may well be that the man in the O'Connell saloon on November 14th, who, according to Poole, was not Hogan, and resembled defendant, was not the defendant at all, and that Heffernan was correct in his evidence given on the trial to the effect that he had never seen defendant prior to the night of November 15th. Assuming, then, that it could be clearly shown that the man who was with Burke in O'Connell's saloon on November 14th, was not the defendant, and also was not Hogan, as is established by Poole's evidence, it cannot be doubted that the question of the probable and proper effect of such showing, as well as the question arising because of inconsistencies in statements made by Heffernan, were exclusively for the trial court.

This disposes of all substantial claims in regard to newly discovered evidence. Learned counsel say substantially that if the showing here made is not sufficient to require a reversal, it is difficult to conceive of a case where such a showing can be made. This we are by no means prepared to concede. But it is undoubtedly true, in view of the settled law relative to the discretion of the trial judge in the disposition of motions based on this ground, that such cases will necessarily be rare.

[8] While allowing such motions, it is the settled rule in this state, based on the soundest reasons of expediency and public policy, that the decision thereon of the trial court, the tribunal best fitted to correctly determine as to the genuineness and effectiveness of the showing, shall be conclusive in the absence of a clear showing of abuse of discretion. The record in the case at bar shows that the trial judge allowed the defendant unusual opportunity for the making of his showing in support of his motion, and apparently gave most careful consideration to the same and to the argument of counsel in support thereof. The case is not such as to warrant us in holding that he was wrong in his conclusion.

[9] Evidence of Captain Duke, Sergeant Regan, and Sergeant O'Connell was admitted, to the effect that while defendant, McGee and Morrissey, were in the patrol wagon at Sixth and Brannan streets, Poole told Captain Duke that he had the right man in the wagon, the one in the middle. According to Regan, Poole pointed at defendant while he spoke, and said, further, "I saw this man with Burke last night, trying Garry Welch's door." Duke also testified to the latter statement, all agreeing that defendant remained silent in the face of Poole's statement. Up to this time, defendant had not been formally arrested for this crime or searched, but had simply been taken in charge, with McGee and Morrissey, for further investigation. This evidence was received on the theory that defendant's silence in the face of the accusation was proper as tending to show a tacit admission on his part of the truth of the accusation. It has been uniformly held in this state that an accusation may naturally call for a reply even from a person under arrest. Whether the circumstances are such as to make the failure to reply proper evidence tending to show an admission, is, in the first instance, a question for the trial court.

[10] We are of the opinion that the evidence here was sufficient to support a conclusion on the part of the trial court that it, *prima facie*, showed that Poole's statement was made in the presence and hearing of defendant, that defendant understood its meaning and bearing, that it was one that might under all the circumstances shown be held to naturally call for some action or reply on his part, and that the occasion and circumstances were such as to afford him an opportuni-

ty for reply. This being so, the evidence was admissible as tending to show an admission by defendant (see *People v. Amaya*, 134 Cal. 531, 536, 66 Pac. 794), the question of its weight in that behalf being purely for the jury. While the record does not indicate to us that defendant's silence under such circumstances would be considered of much importance, we cannot say that there was error in the admission of the evidence. It should be remarked in this connection that defendant, in his evidence, said that after he had been taken from the wagon, Poole said in his presence and hearing, "He looks like the man, looks like the fellow that was with Burke last night," or something to that effect, and that he replied to Poole: "Now, you make sure, and don't say it was me unless you are positive." The record indicates that defendant was speaking of the same occasion that was testified to by the officers, for it may well be concluded therefrom that Poole made only one statement in regard to the matter. According to his own testimony, then, he did hear what Poole said, apparently understood it, and deemed the situation such as to call for a reply.

[11] We have no doubt that a defendant against whom evidence of a failure to deny an accusation has been introduced, is entitled to show as a circumstance tending to explain his silence and rebut any possible prejudicial effect thereof, that he had within a few minutes previous thereto denied a similar accusation to the police officers who had him in charge at the time of the making of the second accusation. That he had already so recently fully denied an accusation to such officers might be considered a circumstance tending to explain failure to deny the second accusation, made by another party.

[12] Both Sergeant Regan and Captain Duke were asked on cross-examination to detail any conversation had with defendant in the Sullivan saloon prior to first taking him to the corner of Brannan and Sixth streets, and objections of the district attorney on the ground that the proposed evidence was "incompetent, irrelevant and immaterial, and not cross-examination and calling for self-serving declarations" were sustained. No evidence had been given by either of them on direct examination as to any conversation in Sullivan's saloon. It is claimed here that the object of counsel in asking these questions was to show a denial of participation in the attempted robbery and murder for the purpose of explaining defendant's silence in the face of the accusation made by Poole. It is doubtful if any such purpose was as clearly stated to the trial court as it should have been. Certainly there was no intimation in the lower court and there is no claim here that it was expected to show that anything had been said in the conversation in Sullivan's saloon in relation to the matter of defendant being with Burke the night before,

which was really the whole effect of Poole's accusation, as testified to by both Duke and Regan. In effect, Poole had simply said that he had seen defendant with Burke the night before, and that consequently he must be the right man. The showing of a mere previous denial by defendant of participation in the attempted robbery and murder would not have tended to explain his silence in the face of the charge that he was with Burke the night before. It is therefore manifest that defendant could not have been prejudiced by a refusal to allow him to show a previous denial of participation in the attempted robbery and murder.

[13] There was no error in admitting in evidence the pistol found under the steps leading to Sullivan's rear entrance. It had been sufficiently identified as the pistol that had been used by the Brannan street robber and that had caused O'Connell's death.

We find no prejudicial error in the action of the trial court in striking out portions of the affidavits presented on motion for a new trial. There was no error in the rulings on cross-examination of Thomas Hogan and Catherine Hogan or in the action of the court in the matter of instructions.

We find no other matter requiring mention.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J.; HIENSHAW, J.; LORIGAN, J.; MELVIN, J.

(160 Cal. 143)

DAVIS v. HEARST et al. (L. A. 2,509.)

(Supreme Court of California. June 6, 1911.
Rehearing Denied July 6, 1911.)

1. LIBEL AND SLANDER (§ 4*)—CIVIL ACTION—ELEMENTS—MALICE—"LIBEL."

Civ. Code, § 45, defines "libel" which may be the subject of a civil action for damages as a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or has a tendency to injure him in his occupation. *Held*, that malice, under such definition, is not an ingredient of a cause of action for a civil libel, and that a recovery of full and compensatory damages may be had, though absence of malice is proved.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 111; Dec. Dig. § 4.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4112-4125.]

2. LIBEL AND SLANDER (§ 154*)—CRIMINAL PROSECUTION—ELEMENTS OF OFFENSE—MALICE—"LIBEL."

Pen. Code, § 248, defines "libel," the basis of a criminal prosecution, to consist of a malicious defamation, expressed either by writing, printing, signs, pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or publish the natural or alleged defects of one who is alive, and thereby expose him to

public hatred, contempt, or ridicule. *Held*, that while malice is an essential element of the offense of libel so defined, prima facie proof of such malice is made by evidence that an injurious publication concerning another has been made without justifiable motive, whereupon the law presumes malice sufficient to support a criminal charge, as provided by section 250.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 429; Dec. Dig. § 154.*]

3. LIBEL AND SLANDER (§ 4*)—CIVIL LIABILITY—COMPENSATORY DAMAGES—MALICE.

Since malice is not a necessary ingredient of a civil libel, nor essential to a full recovery of compensatory damages, a newspaper publisher was equally liable for compensatory damages, whether the libel was malicious or resulted from mere inadvertence, as from a proof reader's or compositor's error, or from a clerical misprision.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 111; Dec. Dig. § 4.*]

4. WORDS AND PHRASES—"MALICE"—"MALICE IN FACT"—"MALICE IN LAW."

"Malice," as usually understood, has its foundation in ill will, and is evidenced by an attempt wrongfully to vex, injure, or annoy another. This is "malice in fact," and is that referred to in Pen. Code, § 7, subd. 4, declaring that the words "malice" and "maliciously" import a wish to vex, annoy, or injure another person. There is another sort of malice, the presumption of the existence of which is raised by the law in certain cases on certain proofs, and this is the malice described in the same section as "an intent to do a wrongful act, established either by proof or presumption of law." This is a malice of pleading and proof made necessary by the exigencies of definitions of offenses against the law, and may exist with malice in fact, but may also exist independent thereof, and in some instances is conclusively presumed against a defendant, while in others the presumption is rebuttable.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4298-4304; vol. 8, pp. 7712, 7713; vol. 5, pp. 4306, 4307.]

5. LIBEL AND SLANDER (§ 154*)—CRIMINAL PROSECUTION—MALICE.

In a criminal prosecution for libel, the malice essential to establish the offense is presumed from the injurious publication alone, but such presumption is disputable and may be overcome by establishing a justifiable motive, as provided by Pen. Code, § 250.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 429; Dec. Dig. § 154.*]

6. LIBEL AND SLANDER (§ 120*)—MALICE—EXEMPLARY DAMAGES—STATUTES—CONSTRUCTION—"EXPRESS OR IMPLIED."

Civ. Code, § 3294, permits exemplary damages in an action not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied. *Held*, that the words "express or implied," as used in such section, have reference only to the evidence by which the malice is established, and that such section does not authorize exemplary damages for libel, in the absence of proof of malice in fact, as distinguished from malice in law, consisting of the actual existence of hatred and ill will, actuating the defendant in the publication.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 350, 351; Dec. Dig. § 120.*]

7. LIBEL AND SLANDER (§ 112*)—EXEMPLARY DAMAGES—MALICE—PROOF.

While malice in fact is essential to exemplary damages in a civil action for libel, it may

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

be proved either by direct or circumstantial evidence.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 325-341; Dec. Dig. § 112.*]

8. LIBEL AND SLANDER (§ 51*)—"MALICE"—INFERENCE FROM PUBLICATION—"PRIVILEGED COMMUNICATION."

Civ. Code, § 47, defines a "privileged communication" as one without malice, to a person interested therein, by one who is also interested; one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive innocent, or who is requested by the person interested to give the information; and section 48 declares that the "malice" so referred to is not inferred from the communication or publication. *Held*, that "malice" as used in section 47 meant malice in fact, or a libel published with an actual, malicious intent.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 149-150; Dec. Dig. § 51.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5591-5598; vol. 8, p. 7764.]

9. LIBEL AND SLANDER (§ 120*)—EXEMPLARY DAMAGES—MALICE—PRINCIPAL AND AGENT.

Since malice in fact must be shown to exist in every case before an award of exemplary damages may be made against a defendant, a principal may not be held in such damages for the act of his agent, unless the particular act is within the principal's specific directions or general suggestions, or the act is subsequently ratified.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 350, 351; Dec. Dig. § 120.*]

10. LIBEL AND SLANDER (§ 120*)—NEWSPAPER PUBLICATION—EXEMPLARY DAMAGES—LIABILITY OF PUBLISHER.

Where the proprietor of a newspaper has given his subordinates carte blanche to do anything and everything that will make the paper a financial success and demonstrate its superior enterprise as a news disseminator, the proprietor's authority to publish libels might be inferred, and would afford strong evidence of malice in fact on which to base a recovery of exemplary damages against the proprietor, though he had no personal knowledge of the particular libel.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 350, 351; Dec. Dig. § 120.*]

11. LIBEL AND SLANDER (§ 120*)—NEWSPAPER PUBLICATION—MALICE IN FACT.

Malice in fact, to authorize a recovery of exemplary damages against the proprietor of a newspaper for the publication of a libel, is not imputable merely from the act of an employé in making such publication.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 350, 351; Dec. Dig. § 120.*]

12. LIBEL AND SLANDER (§ 101*)—MALICE—BURDEN OF PROOF.

The burden of proving malice in fact, to sustain a recovery of exemplary damages against a newspaper publisher for a libel, is on the plaintiff.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 273-280; Dec. Dig. § 101.*]

13. LIBEL AND SLANDER (§ 123*)—EXEMPLARY DAMAGES—MALICE—QUESTION FOR JURY.

Whether malice in fact, sufficient to authorize a recovery of exemplary damages in an action for libel, has been proved is for the jury,

except that the court, in a proper case, may instruct that there is such an absence of evidence of malice in fact as to forbid exemplary damages.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 363; Dec. Dig. § 123.*]

14. LIBEL AND SLANDER (§ 112*)—MALICE IN FACT—EVIDENCE.

In an action for libel, malice in fact may be proved by direct evidence, such as declarations, acts, and conduct of the defendant showing personal ill will toward plaintiff, or by circumstances indicating a general course of conduct, including the internal evidence furnished by the character of the libel, from which the existence of actual malice may be logically inferred.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 325-341; Dec. Dig. § 112.*]

15. LIBEL AND SLANDER (§ 5*)—MALICE IN FACT—PRESUMPTIONS.

The legal presumption of malice in fact in an action for libel does not arise from the mere falsity and libelous character of the publication, though it may be inferred from the intrinsic evidence of malice which the publication affords, since the presumption referred to by Code Civ. Proc. § 1963, that an unlawful act was done with an unlawful intent, and that a person intends the ordinary consequences of his voluntary act, so far as libel is concerned, refers to malice in law, and not to malice in fact.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 278; Dec. Dig. § 5.*]

16. LIBEL AND SLANDER (§ 5*)—MALICE IN FACT—PRESUMPTION.

The only presumption touching malice in fact, as applied to the law of libel, is that prescribed by Code Civ. Proc. § 1962, declaring as a conclusive presumption the existence of a malicious and guilty intent from the deliberate commission of an unlawful act for the purpose of injuring another; such presumption arising only after the jury has found the commission of an unlawful act; that its commission was deliberate; and that it was committed with a deliberate purpose of injuring another.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 278; Dec. Dig. § 5.*]

17. LIBEL AND SLANDER (§ 101*)—NEWSPAPER PUBLICATION—OWNER'S LIABILITY—EXEMPLARY DAMAGES.

It was no defense to a newspaper owner's liability for exemplary damages for the publication of a libel that he was absent from the state at the time the libelous articles were published and had no foreknowledge thereof; the burden being on him also to prove that the publications were unauthorized, either by general or particular instructions, and that neither by act nor conduct did he ratify them when he learned of their publication.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 273-280; Dec. Dig. § 101.*]

18. LIBEL AND SLANDER (§ 120*)—EXEMPLARY DAMAGES—JOINT TORT-FEASORS.

Civ. Code, § 3333, provides that for breach of an obligation not arising from contract the measure of damages, except where otherwise expressly provided, is the amount which will compensate for all the detriment proximately caused thereby. *Held*, that though in an action for a joint tort there can be no apportionment of damages, yet where the proof of malice in fact, authorizing the recovery of exemplary damages, exists only as to part of the defendants, compensatory damages may be assessed against all the joint tort-feasors found culpa-

ble, and a specific sum, or sums, by way of exemplary damages, may be assessed against each of the tort-feasors actuated by malice in fact.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 120.*]

19. LIBEL AND SLANDER (§ 124*)—EXEMPLARY DAMAGES—INSTRUCTIONS.

Where exemplary damages were sought to be recovered for libel as against a newspaper publisher and a reporter, an instruction that the proprietor of a newspaper in which a libel is published, though he has no knowledge of the publication at the time, is as responsible for it as he would have been had it been done by him personally, or under his direct supervision, and it is no defense that it was published in his absence by an employé, however competent, while abstractly correct as to the law governing the award of compensatory damages, was misleading, in so far as the case involved exemplary damages.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 124.*]

20. LIBEL AND SLANDER (§ 124*)—EXEMPLARY DAMAGES—MALICE—INSTRUCTIONS.

Since exemplary damages in an action for libel can only be recovered on proof of malice in fact, an instruction that malice in law consisted in that which the law regards as a sufficient invasion of plaintiff's rights to sustain exemplary damages, by reason of the carelessness, negligence, or willful disregard of plaintiff's rights, was erroneous.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 124.*]

21. LIBEL AND SLANDER (§ 124*)—INSTRUCTION.

Since exemplary damages are wholly within the discretion of the jury, and on the clearest proof of malice in fact in an action for libel the jury may still refuse them, an instruction that on the jury's finding malice in fact plaintiff was "entitled" to recover exemplary damages was erroneous.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 124.*]

22. LIBEL AND SLANDER (§ 124*)—EXEMPLARY DAMAGES—MALICE—INSTRUCTIONS—PRESUMPTIONS.

An instruction that defendant was permitted to show the lack of express malice, and such circumstances by way of mitigation as would "overcome the presumption, raised by law, of malice," by showing all the steps taken by him prior to the publication of the libel to learn the truth of the charge, or to relieve him entirely from exemplary damages, or reduce the amount of exemplary damages which the jury may decide to assess, was erroneous under the rule that malice in fact is the only malice sufficient to sustain a recovery of exemplary damages, which malice cannot be presumed.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 124.*]

23. LIBEL AND SLANDER (§ 111*)—CIRCUMSTANCES IN MITIGATION—EVIDENCE—MALICE IN FACT.

Circumstances in mitigation in an action for libel may be pleaded and proved, ordinarily to overcome evidence of malice in fact, and ordinarily have no other place in an action for libel; the exceptions being when offered in mitigation to rebut evidence of special damage, and evidence of bad reputation to lessen the award of compensatory damages.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 315-324; Dec. Dig. § 111.*]

24. LIBEL AND SLANDER (§ 124*)—INSTRUCTIONS—LIBELOUS CHARGE—REPUBLICATION.

An instruction that, when a defendant republishes a libelous charge by making it a record of the court, he does so at his own risk, and if at the trial he fails to prove the truth of parts of the record alleged in his answer, and did not in good faith expect to prove the truth, he intensifies the original wrong, was not misleading as declaring that in such cases the republication of the language implied an increase of compensatory damages; whereas, it was to be considered only as evidence of the existence of malice to support the award of compensatory damages.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 124.*]

25. LIBEL AND SLANDER (§ 111*)—EVIDENCE—RUMORS.

Where alleged libelous articles asserted the existence of rumors reflecting on plaintiff, evidence of the existence and character of the rumors was inadmissible in mitigation of compensatory damages, or to negative malice in fact as a basis for exemplary damages.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 315-324; Dec. Dig. § 111.*]

26. LIBEL AND SLANDER (§ 111*)—REPUTATION—EVIDENCE—RUMORS.

Though defendant in an action for libel may impeach plaintiff's reputation generally, or as to the particular qualities embraced in the libel, to mitigate compensatory damages, he may not do so by showing either rumors of general ill repute, or rumors of ill repute as to the particular matter charged in the libel.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 315-324; Dec. Dig. § 111.*]

27. LIBEL AND SLANDER (§ 124*)—LIBELOUS PUBLICATION—REFERENCE TO PLAINTIFF—INSTRUCTION.

Where an alleged libelous publication was not ambiguous in so far as its reference to plaintiff was concerned, whether it did refer to plaintiff was for the jury to determine, and the court properly charged that the jury must not return a verdict for plaintiff, unless they were convinced by the evidence that the matter referred to, or was understood by readers to refer to plaintiff, and properly refused to charge that, if any of the defamatory matter referred to the board of education of the city where the libel was published at a time when plaintiff was not a member of the board, they should not consider it, except with the modification, "unless the readers of defendant's paper understood and had reasonable right to understand from the wording of the article that the text and context of the several parts referred to plaintiff."

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 124.*]

28. LIBEL AND SLANDER (§ 105*)—EVIDENCE—ACTUAL INTENT.

In an action for libel, defendant's actual intent to charge plaintiff is material only where the reference to plaintiff is so veiled, obscure, and ambiguous that the jury cannot say, without extrinsic evidence, that plaintiff was aimed at and was injured, and where defendant seeks in mitigation to repel the charge of malice in fact.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 283; Dec. Dig. § 105.*]

29. LIBEL AND SLANDER (§ 105*)—LIBELOUS PUBLICATION—REFERENCE TO PLAINTIFF—EVIDENCE.

Where an alleged libel was not ambiguous as to its application to plaintiff, evidence that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

readers understood the article to refer to plaintiff was immaterial.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 283; Dec. Dig. § 105.*]

30. LIBEL AND SLANDER (§ 103*)—REPUTATION—PROOF OF GOOD REPUTATION.

Affirmative evidence of plaintiff's good reputation in advance of any attack thereon by defendant, is inadmissible in an action for libel.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 103.*]

31. LIBEL AND SLANDER (§ 124*)—PLAIN-TIFF'S REPUTATION—INSTRUCTION.

In an action for libel, an instruction that there had been evidence as to plaintiff's reputation prior to the publications in question, and that it was for the jury to determine from the evidence whether plaintiff bore a good reputation for honesty and integrity in the community where he lived prior to the publication, and that a man with a good reputation for integrity and honesty could be more seriously damaged by such publication than would a man having a bad reputation for honesty and integrity, was erroneous, since defendants, not having attacked plaintiff's reputation in advance of plaintiff's introduction of evidence to sustain the same, were entitled to have the case go to the jury on plaintiff's presumed reputation for honesty and integrity alone.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 124.*]

32. LIBEL AND SLANDER (§ 103*)—EVIDENCE—SCOPE.

Where, in an action for libel consisting of a newspaper publication referring to plaintiff's acts as a member of a board of education, the headlines stated that the "exposures made by Examiner (the newspaper) were found to be true," though the body of the article seemed to contain but one specific matter, which the mayor had investigated, plaintiff was not limited to an examination of the mayor concerning the single specific matter, but was properly permitted to ask him whether in the investigation of the affairs of the school board he found any school graft, or graft at all, and whether he had found any misappropriation of moneys or school funds.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 103.*]

33. LIBEL AND SLANDER (§ 15*)—NEWSPAPER PUBLICATION—CAPTIONS AND HEADLINES.

The captions and headlines of a libelous newspaper article are a part of the libel.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 15.*]

34. LIBEL AND SLANDER (§ 100*)—MATTER IN MITIGATION—PLEADING—NECESSITY.

Code Civ. Proc. § 461, provides that in libel defendant in his answer may allege, both the truth of the matter charged as defamatory and any mitigating circumstances, to reduce the amount of damages, and whether he prove the justification or not he may give in evidence the mitigating circumstances. *Held*, that such section should not be construed to mean that, whenever any circumstances in mitigation going to the truth of the charge are relied on, they must be pleaded, but to require that if a defendant pleads justification he may at the same time plead with his affirmation of good faith and honest belief all facts and circumstances within his knowledge at the time of the publication which support that knowledge and belief, even if they tend to establish the truth of the charge; that if he desires to plead justification, and also truth or partial truth in mitigation, he must plead such facts and circumstances in mitigation, in which event they will be considered on the question of malice,

even though proof of justification fail, and that, while evidence tending to prove the truth of the charge must be pleaded, all other circumstances in mitigation, not tending to establish the truth, may be proved without being pleaded.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 246-272; Dec. Dig. § 100.*]

35. TRIAL (§ 241*)—INSTRUCTIONS—DISCUSSION OF DIFFERENT CASE.

An instruction consisting of an argumentative discussion by the Supreme Court of the law of qualified privilege as a defense to libel, taken from an opinion in another case, was improper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 562, 563; Dec. Dig. § 241.*]

In Bank. Appeal from Superior Court, Los Angeles County; F. W. Houser, Judge.

Action by M. W. Davis against William Randolph Hearst and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Davis & Rush and Garret W. McEnerney (Andrew F. Burke, of counsel), for appellants. J. H. Merriam and Edwin A. Meserve, for respondent.

HENSHAW, J. Plaintiff brought this action to recover damages for certain alleged libelous matters published of and concerning him in the Los Angeles Examiner. Of the defendants, W. R. Hearst is the proprietor and publisher of the paper, Henry Lowenthal the business manager, and James T. Belcher a reporter and author of the defamatory articles. Trial was had before a jury. The action was dismissed as to the defendant Lowenthal, and proceeded to verdict and judgment against the remaining defendants. The verdict awarded plaintiff compensatory damages in the sum of \$10,000, and exemplary damages in the sum of \$25,000, against both defendants. The judgment followed the verdict.

The complaint contained three causes of action, based upon three separate publications, one and all directed against the acts and conduct of plaintiff as a member of the board of education of the city of Pasadena and the clerk of that board. The first publication was made upon September 13th, under headlines declaring that the

"School Board Faces Rigid Investigation.

"Demand for Inquiry into Mismanagement and Waste of Public Money May be Made."

The article itself purported to deal with the exposure which the Examiner had made "of the extravagance and recklessness, if not criminal, waste, of public school funds by the Pasadena Board of Education." It declared that it was an easily demonstrated fact that there had been bad management, "if nothing worse," in connection with the erection of almost every school building during the past few years, and that rumors had been rife for

many months reflecting upon the management of the public business by the board of education. It asserted that the school board "had been braggingly active in politics," had furnished misleading reports to the press, and that charges of favoritism in the awarding of public contracts had been hinted at time and time again. It asserted the existence of a growing distrust amongst the people touching the management by the board of education of the affairs intrusted to it. It declared that whenever there had been such a report of trouble in connection with the construction of a new school the secretary, M. W. Davis, and other members of the board, when appealed to, falsely asserted that there was nothing amiss, and that "something more than mere denial will be necessary to explain the waste of so many thousands of dollars in the Garfield school, money which was wasted as completely as if it had been actually thrown into the public streets." It also declared that as soon as the Examiner's exposure became known the board of education put in practice its "usual tactics" of making excuses through a friendly press, "with the evident purpose of hiding the real seriousness of the case." It stated that "the Examiner's articles have charged plainly and unqualifiedly" certain enumerated matters showing extravagance, incompetency, and waste of the public funds.

The second cause of action sets forth the publication of another article upon the day following, which is here quoted at length.

"School Graft Would Make a Rueful Blush.
"Pasadena Citizen Declares Education Board
Has Juggled Funds for Years.

"Pasadena, Sept. 14.—No matter what may be the outcome of the evident waste of public funds by the Board of Education, there is hope that the people of Pasadena have at last awakened to the necessity of demanding a more general and satisfactory explanation of the way the School Board attends to its public duties. There is no longer any concealment of the fact that there have been ugly stories afloat concerning the alleged misconduct in office of men who were expected to be protecting the public school interests. It is true that there have been allegations of 'graft' made freely in connection with almost every expenditure of the school funds for several years past, both with the present and previous Boards of Education.

"The members of the Board at present are Benjamin E. Page, who is also president; M. W. Davis, who is the clerk; C. E. Chamberlain, J. B. Beardsley and W. W. Ogier. The last two were elected recently to succeed D. W. Lewis of North Pasadena and C. M. Parker, who had served terms of four years each. Messrs. Ogier and Beardsley have had nothing to do with the erection or awarding of contracts for the building of any new schools since their induction in

office, although they are officially connected with the later questionable transactions at the Garfield schools.

"With the uncovering of the manner in which money has been expended in this connection, there is a revival of alleged mismanagement and waste of public money at other school buildings. These reports are numerous. At the Lincoln School, for instance, the fact is pointed out that sewer pipe of vitrified brick was laid in face of the advice of men familiar with such work and such material. The School Board was advised to install iron pipes that would last a lifetime, but they decided to lay vitrified brick. Even Contractor Buckins, who had the job, recommended iron pipes, which would have cost but a small sum more than the brick. No attention was paid to these recommendations, and after a period of about three years new pipe had to be laid to replace the original pipe, as the latter had become worthless.

"At the McKinley School even a more serious mistake was made, a mistake that imperiled the health of several hundred children. 'Fresh air' was carried into the school rooms that was carried across the heaters in the toilet rooms.

"Every well informed citizen in Pasadena William H. Reeves, who has had much to do with the new school buildings in connection with his official duties, 'that the condition of affairs in the different school buildings is simply rotten. That is all there is to it.'

"As usual it is difficult to have proper officials discuss the situation for publication, but a man familiar with the Board of Education's method of doing business during the past four years, said today to the 'Examiner' correspondent:

"Every well informed citizen in Pasadena is aware that school funds have been recklessly wasted for years past. The members of the Board seem to feel that they are not responsible to anybody for what they may do. They prate of providing for the future needs of the schools, while as a matter of undeniable fact, they have never kept within years of the present needs. There has been scandal in connection with every school building erected in recent years, members of the Board have scorned the advice of men informed as builders and architects, and yet they seem never to have profited by their past mistakes. If some citizens of standing would bestir themselves and force an open and public investigation, some of these gentlemen of the School Board might feel inclined to hang their heads in shame. It is simply incredible that the taxpayers will tolerate the misuses of money that should go for the education of the boys and girls in this city. Every dollar that is wasted, as money has evidently been wasted in the Garfield Schools, is nothing more or less than robbing the rising generation of just that much educational opportunity.

"The great trouble here has been that a certain element or clique of men, whose integrity is not so immaculate that we may not even look at it, have sneered at the people and laughed at all opposition and all questioning of their public acts as members or officials of the Board of Education. It is only a few years ago that members of the Board begged the taxpayers for funds for new schools, specified plainly what they wanted the money for and after getting it voted to their uses as outlined by them, they deliberately used the money for other purposes. These men are prone to talk of their integrity, but such misrepresentations and juggling of public funds would make Abe Ruef blush for shame. If the members of the Board of Education are under bonds for the efficient discharge of their public duties they should be proceeded against. If they are not under bonds, they should be compelled to give them or be forced to resign from office.

"M. W. Davis, clerk of the Board, is generally regarded as the worst offender against the public interests in connection with the schools. It is charged against Clerk Davis as an example of his manner of discharging his official duties, that in the year 1905 he was notified by Building Inspector A. C. Shaver that the plumbing in the Franklin School, that was at that time in course of construction, was not good or sanitary, and that at the time of the final inspection he would be compelled to condemn it. The Building Inspector also took occasion to notify Clerk Davis that the specifications were not being lived up to, and that the material being used was not up to the quality called for. This notice was served in writing and after verbal notice had been given. No attention was paid, as usual, but when the plumbing was condemned by the City's Inspector of Buildings, as he had notified Davis would be done, the work was changed and done over again after the building had been practically completed."

The third cause of action charged upon a publication made upon October 7th following, whose headlines read as follows:

"Mayor Investigates the Board of Education's Acts.

"Exposures Made by 'Examiner' Found to be True.

"Pasadena Council Will Act."

The body of the article declared that as the result of the exposures made in the Examiner in regard to the loose manner of "doing business that has been in vogue in the Board of Education it is reported tonight that the City Council will be asked at its meeting tomorrow to enforce more stringent regulations to protect the taxpayers.

"Upon information obtained from the 'Examiner' Mayor Earley on Saturday afternoon visited the office of City Auditor and Asses-

sor Kellogg and inspected the bills filed in that office by M. W. Davis, member and Clerk of the Board of Education.

"The Mayor found that Clerk Davis has been making copies of all bills submitted to him, that he approves the same, swears to their correctness, and it is said, has been collecting the money and making it his personal business to pay the person holding the claim against the Board of Education. The Mayor was doubtful that such a loose practice was in vogue, but a brief conference with Auditor Kellogg convinced him of the truth of the statements that have been made in the 'Examiner' in this connection."

The complaint contained appropriate innuendos as to the meaning of the alleged libelous matter and of its designed application to plaintiff, and charged that it was published with express malice on the part of each of the defendants directed against the plaintiff. The answer by denial raised the general issue. It pleaded also justification and certain matters in mitigation. It pleaded the absence of Mr. Hearst from the city of Los Angeles and from the state of California at the time of these publications, and his employment during his absence of skilled, careful, and competent men, and that the defendant James T. Belcher was such a man. Defendants all joined in one answer, and it was specifically averred that neither the defendant Hearst nor the defendant Lowenthal had any personal knowledge whatsoever of the publication of the articles or of the statements therein contained.

The questions brought up for review upon appeal are numerous. It is impossible even to enter intelligently upon their consideration in advance of a clear understanding of certain fundamental principles, propositions, and even words, which throughout must guide, control, and govern the discussion. And it should be said that this discussion, except where it is otherwise specifically pointed out, is addressed to the civil law of libel. For at the outset it is to be remembered that not only are the defenses to a criminal libel different from those permissible in a civil action of libel, but the very definitions of civil and criminal libel vary radically.

[1] A libel upon which a civil action may be founded is: "A false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Civ. Code, § 45.

[2] A libel as the foundation for a criminal action is "a malicious defamation, expressed either by writing, printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or publish the natural or alleged defects of

one who is alive, and thereby to expose him to public hatred, contempt, or ridicule." Pen. Code, § 248.

Under our law of civil libel, therefore, malice forms no ingredient of the offense, and a recovery of full compensatory damages may be had in every case, even where an absence of malice is positively established. Upon the other hand, in criminal law, malice is made a necessary ingredient of the offense, though to make prima facie proof of it it is only necessary for it to appear that an injurious publication has been made without justifiable motive. Thereupon the law raises a presumption of the malice sufficient to support the criminal charge. Pen. Code, § 250.

[3] Malice, as has been said, is not a necessary ingredient of a civil libel nor essential to the full recovery of compensatory damages. If a libel results from mere inadvertence, from a proof reader's or compositor's error, or from any clerical misprision, the liability upon the publisher is just as great, and no greater, for compensatory damages than the liability that would be cast upon him if the same publication were most evilly and malignantly designed. Civ. Code, § 3333. Thus we are brought at the outset to a consideration of the part which malice plays in actions for civil libel. Because of the many definitions which have been given to this word, of the many varying attributes which have been accredited to it, of the many jurisdictions which have been called upon to deal with the law under as many different definitions of libel itself, because, also, of the inevitable confusion which has arisen by a failure carefully to distinguish between the law of civil libel and the law of criminal libel, and, finally, because of the decisions of those jurisdictions where punitive or vindictive damages have been or are allowed without an express statute controlling the award, the word "malice," it has been aptly said, has come to be the "bugbear of the law of libel." Says Gaynor, J.: "The jumble in some modern text-books on slander and libel concerning malice, actual malice, malice in law, malice in fact, implied malice, and express malice (all derived from judicial utterances, it is true) is a striking testimony of the limitations of the human mind." Ullrich v. New York Press Co., 23 Misc. Rep. 163, 171, 50 N. Y. Supp. 788, 790. Says a learned judge, in *Abrath v. Northeastern R. Co.*, 11 App. Cas. 247, 253: "That unfortunate word 'malice' has got into cases * * * for libel. We all know that a man may be the publisher of a libel without a particle of malice or improper motive. Therefore the case is not the same as where actual and real malice is necessary. Take the case where a person may make an untrue statement of a man in writing, not privileged on account of the occasion of its publication; he would be liable, although he had not a particle of malice against the man." And in

Odgers on Libel & Slander (4th Ed.) p. 320, it is said: "It is true that the word 'malicious' is usually inserted in every definition of libel or slander, that the pleader invariably introduces it into every statement of claim, and that the older cases contain many dicta to the effect that 'malice is the gist' of an action of libel or slander. But in all these cases the word 'malice' is used in a special and technical sense; it denotes merely the absence of lawful excuse; in fact, to say that defamatory words are malicious in that sense means simply that they are unprivileged, not employed under circumstances which excuse them. But I have thought it best to drop this technical and fictitious use of the word altogether—a use which has been termed 'unfortunate' by more than one learned judge."

Malice in Law and Malice in Fact.

It has been said and cannot be said with too much emphasis, that a full recovery in compensatory damages may be had under our civil law of libel without the pleading of malice, without the proof of malice, and without the existence of malice. The doctrine that malice is the gist and essence of a charge of libel grew up in those jurisdictions where the definition of the wrong embraced the element of malice, as it still does in this state in the definition of criminal libel, and thus we find in our own cases such language as the following: "Malice in law may be defined as a wrongful act done intentionally without just cause or excuse. Such malice is necessary to the life of every cause of action for libel, and is conclusively presumed in publications of the character here involved." *Childers v. Mercury Pub. Co.*, 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40. In endeavoring to follow this case, the learned commissioner, in *Taylor v. Hearst*, 107 Cal. 262, 40 Pac. 392, declares: "To constitute libel, there must be malice, actual or implied, on the part of the publisher. Actual malice exists when the publication is made through motives of ill will, and with intent to injure or defame, and the law presumes malice when the article published is libelous per se. Such malice is called malice in law, and it signifies a wrongful act intentionally done." But as an evidence of the inextricable confusion which has arisen from the use of this word, it may be pointed out that in this case, while it is seemingly declared that malice existed, and that it is known as malice in law, elsewhere in the opinion it is stated that it was proved that the publication was made "by mistake and without any malice toward the plaintiff." The case itself is illustrative of the proposition that malice is not an essential to our civil law of libel, and that plaintiff's right to recover is based simply upon the tort and the damages which it has caused him, even though the tort consist of negligence, pure and simple. In *Taylor v. Hearst* the libelous article charged a fraud upon

the public in connection with furnishing basalt blocks to the city, and accused J. W. Taylor of the fraud. A mistake had occurred. J. W. Taylor had no connection with the fraud. J. N. Taylor was the person meant to be charged. A prompt retraction and explanation was made by the newspaper upon discovery of this typographical error, completely exonerating J. W. Taylor. In the action brought by J. W. Taylor all these facts were established, with many more, showing the care of the paper in gathering the news and presenting it to the public, and by this court it was said that the libel was based wholly upon a mistake, "without any malice toward the plaintiff; the middle initial of Taylor's name being printed 'W,' when it should have been 'N.'" An oft-quoted definition of malice in law is that it is a wrongful act, done intentionally, without just cause or excuse. It is plain that the act of defendant in Taylor v. Hearst did not in fact measure up to this definition, since the wrongful act was done not intentionally, but unintentionally. But in law the act did measure up to the definition, since the publication (the act) was wrongful, was intentional, and the defendant would not be permitted to rebut the presumption of malice in law by proof that the publication was misdirected. The truth is that an understanding of the law of civil libel has been much embarrassed by this fiction of legal malice. And still more has the law been complicated by the varying definitions which have been given of this legal malice.

[4] "Malice," as universally understood by the popular mind, has its foundation in ill will, and is evidenced by an attempt wrongfully to vex, injure, or annoy another. This malice may be designated "malice in fact." It is the malice described in section 7, subd. 4, of the Penal Code, where it is said: "The words 'malice' and 'maliciously' import a wish to vex, annoy or injure another person." There is still another malice, the presumption of the existence of which is raised by the law in certain cases upon certain proofs. That is the malice described in the same section of the Penal Code, when it further declares that "malice" is shown by "an intent to do a wrongful act, established either by proof or presumption of law." This a malice of pleading and proof made necessary by the exigencies of definitions of offenses against the law. This malice may exist with malice in fact; but, upon the other hand, it may exist quite independent of it. In some instances this latter malice—malice in law—is conclusively presumed against the defendant. In other instances the presumption is disputable. Thus, in those jurisdictions where malice, by force of the definition of libel, is held to be essential to the action, it is conclusively presumed from the publication.

[5] In our own criminal action, it is presumed from the injurious publication alone,

but the presumption is disputable and may be overcome by establishing a justifiable motive for the publication. Pen. Code, § 250. If any terms of description were universally understood and accurately and uniformly employed, there would be no occasion for cavil. But employed, as they are, in different jurisdictions with different meanings, all possibility of accurate reasoning and fair exposition is at once destroyed. In those jurisdictions where malice is of the essence of a civil libel, this malice is considered to be in its nature a pure legal fiction, conclusively established by proof of the falsity and nonprivileged character of the matter. This but introduces another embarrassment in the law—an embarrassment which we need not take upon ourselves, in view of the fact that neither in the pleadings nor in the proof is malice necessary to sustain a charge of civil libel. And it must very often happen that, aside from this fictional malice of the law, the constructive malice of the law, presumed from the intentional doing of a wrongful act without just reason or excuse, will exist where there is an entire absence of malice in fact, and where the tortious act of libel arose through pure negligence. The instance of Taylor v. Hearst, above cited, is typical of this class of cases. So, in Bigelow on Torts (7th Ed.) § 319, it is said: "It is indeed common to say that malice is presumed or implied upon proof of the publication; but that means nothing, and is only misleading, for the presumption or implication cannot be overthrown by evidence of want of malice. Malice touching the making of a prima facie case is only a name arbitrarily applied—simply a fiction." And Lord Justice Brett, in Clark v. Molyneux, 3 Q. B. D. 246, treating of the malice which destroys a qualified privileged communication, says: "Malice does not mean malice in law, a term in pleading, but actual malice; that which is popularly called malice. * * * It has been decided that if the word 'maliciously' is omitted in a declaration for libel, and the words 'wrongfully' or 'falsely' substituted, it is sufficient, the reason being that the word 'maliciously' as used in a pleading has only a technical meaning; but here we are dealing with malice in fact, and malice then means a wrong feeling in a man's mind." So, too, most instructive is the language in Wrege v. Jones, 13 N. D. 267, 100 N. W. 705, 112 Am. St. Rep. 679, where the court is discussing the malice which the law presumes in civil actions for libel. Says the court: "But the conclusion that, because in such cases it is said that malice is conclusively presumed, evidence upon the question of actual malice (that is, as to the motive or intent with which the publication was made) is incompetent, when offered under a sufficient answer, is entirely erroneous. The malice which by legal fiction is thus presumed to exist is known as 'legal malice,' as

distinguished from actual or express malice, or malice in fact. * * * In many cases there may be no malice at all, and no intent to injure, or, at most, thoughtlessness or negligence. It is well settled that in such cases the absence of actual malice will not defeat the action, and the party injured may recover his actual damages. In other words the absence of malice is never a complete defense. But where actual malice is charged in the complaint, and more than compensatory damages are claimed for the injury—and that is this case—the actual motive or intent with which the publication was made becomes an important, and indeed a vital, fact, from which to determine the amount of damages to be awarded." But still further to complicate the consideration, even greater confusion results from the fact that in some jurisdictions the malice which is a legal fiction is termed "implied malice," as in *New York*, where the definition of libel is "a malicious publication," etc. See *Ullrich v. New York Press Co.*, 23 Misc. Rep. 168, 50 N. Y. Supp. 788; *Van Ingen v. Star Co.*, 1 App. Div. 429, 37 N. Y. Supp. 114; *Walker v. Best*, 107 App. Div. 304, 95 N. Y. Supp. 151; *Krug v. Pitass*, 162 N. Y. 154, 56 N. E. 526, 76 Am. St. Rep. 317; *Prince v. Brooklyn Daily Eagle*, 16 Misc. Rep. 186, 37 N. Y. Supp. 250. In the last case cited, a protest against the misuse and confounding of terms is voiced in the following language: "The confusion in respect of the meaning of the word 'malice' in actions for libel and slander, involved in trying to distinguish between two kinds of malice, whereas there is and can be in such actions only one kind, seems to be preserved now only because it has existed so long, even though against many protests. The only malice there is in actions for libel or slander is such as is proved. When such malice exists, punitive damages may be given for it."

It must therefore be apparent without more prolonged exposition that even our own law of libel cannot be satisfactorily discussed without an understanding of the meaning that is to be given to words and phrases; and we shall, for the purposes of this discussion, define malice as it is defined by section 7 of the Penal Code—a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy, or injure another person. We shall call this "malice in fact." We shall bear in mind that it may be established either by direct proof of the state of mind of the person, or by indirect evidence so satisfying to the jury that they may from it infer and find the existence of this malice in fact.

We shall define "malice in law" as being that malice which the law presumes (either conclusively or disputably) to exist upon the production of certain designated evidence, which malice may be fictional and construc-

tive merely, and which, arising as it usually does from what is conceived to be the necessity of proof following a pleading, which in turn follows a definition, is to be always distinguished from true malice or malice in fact. The following brief quotations—and they could be indefinitely multiplied—will show how the courts have been compelled to struggle with the meanings and definitions of malice. In *Hemmens v. Nelson*, 138 N. Y. 517, 34 N. E. 342, 20 L. R. A. 440, the court was speaking of the malice necessary to be shown in an action for words uttered under a qualified privilege (the malice which we have designated "malice in fact"), and it says: "This kind of malice which overcomes and destroys the privilege is of course quite distinct from that which the law in the first instance imputes with respect to every defamatory charge, irrespective of motive." And in *Templeton v. Graves*, 59 Wis. 95, 17 N. W. 672, the court, discussing what we have termed "malice in fact," under the designation of "express malice," says: "Such malice may be inferred from all the circumstances of the case; indeed, it would ordinarily be very difficult to prove its existence by direct evidence. But it is not to be inferred from the facts alone that the words are false and injurious to the plaintiff, although malice is implied from those facts."

Exemplary Damages.

[6] It has been said that malice is not a necessary ingredient, and is no part of the gist, of our civil action for malice. No particular harm can be worked by the declaration that malice is a necessary part of every action for libel, if it be understood that the particular malice there referred to is the constructive or fictional malice which we have designated "malice in law." There is, however, a general provision of the law allowing punitive damages in the discretion of the jury, in an action not arising from contract; in other words, in any action sounding in tort, "where the defendant has been guilty of oppression, fraud, or malice, express or implied." Civ. Code, § 3294. Enough has been said to show what a fertile field for error is the language just quoted, when attempt is made to apply it to malice, express or implied, under all their varying definitions. Thus "express malice" is sometimes employed synonymously with what we have designated "malice in fact." Implied malice is as frequently used to designate the fictional malice of the law. So construed, section 3294 of the Civil Code, would allow damages in libel suits in any and every case without regard to the actual existence of malice in fact. The manifest injustice of such an interpretation becomes at once apparent, when it is considered that the publisher of a libel is responsible for compensatory damages, even if the libel be published without his knowledge and against

his will or assent, if so published by his authorized agents or employés. Such a construction of the law would make him also liable for punitive damages. It should be apparent that the malice, and the only malice, contemplated by section 3294 is malice in fact, and that the phrase "express or implied" has reference only to the evidence by which that malice is established; "express malice" thus meaning that the malice is established by express or direct evidence going to prove the actual existence of the hatred and ill will; "implied malice" referring to the indirect evidence from which the jury may infer the existence of this malice in fact. We say this should be evident from the reading of the section itself, under the maxim of *noscitur a sociis*. It is in those cases where the defendant has been guilty of oppression or fraud, or of a malice akin to oppression and fraud, that punitive damages may be awarded. But throughout the whole history of the law, whatever may be the mode of proving the existence of malice in fact, it is only upon some showing regarded by the law as adequate to establish the presence of malice in fact (that is, the motive and willingness to vex, harass, annoy, or injure) that punitive damages have ever been awarded. And this the adjudications abundantly and without controversy establish.

When consideration is paid to the fact that the sole object of an action at law is to return full compensation in terms of money for a legal wrong inflicted upon a plaintiff, and when in any action a plaintiff has been made whole, in contemplation of law, by the receipt of such an award in damages, it is indeed an anomaly to find that in any case more than full compensation may be awarded him. And it is well said in *Haines v. Schultz*, 50 N. J. Law, 481, 14 Atl. 488, that "the ingrafting of this notion (punitive damages) into personal suits has resulted in an anomalous rule; the doctrine of punitive damages being a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine; but, whether we regard it in the one light or the other, it is the wrongful personal intention to injure that calls forth the penalty." And this is necessarily so, for the law, having made full compensation for the act, can thereafter be concerned solely with the motive of the act. The wrongful act has been redressed by full compensation. The improper motive which actuated it may be punished by an award of exemplary damages. "Malice in fact," says this court, in *Childers v. Mercury Pub. Co.*, supra, "is only material in libel as establishing a right to recover exemplary damages, or to defeat defendant's plea that a publication is privileged." And while in the cases this malice, the existence of which we have declared to be essential to a recovery in punitive damages, is sometimes called

express malice, sometimes actual malice, sometimes real malice, and sometimes true malice, it is always in its analysis malice of the one kind—the malice of the evil motive. *Witcher v. Jones* (Com. Pl.) 17 N. Y. Supp. 491; *Union Mutual Life Ins. Co. v. Thomas*, 83 Fed. 803, 28 C. C. A. 96; *Minter v. Bradstreet Co.*, 170 Mo. 486, 73 S. W. 668; 18 Am. & Eng. Ency. of Law (2d Ed.) p. 1093; *French v. Deane*, 19 Colo. 504, 36 Pac. 609, 24 L. R. A. 387; *Inman v. Ball*, 65 Iowa, 543, 22 N. W. 666; *Miller v. Kirby*, 74 Ill. 242; *Sedgwick*, Dam. § 363.

[7] While such malice in fact is essential to an award of exemplary damages, it may be proved directly or indirectly; that is to say, by direct evidence of the evil motive and intent, or by legitimate inferences to be drawn from other facts and circumstances in evidence. To this proposition reference may be made to the cases of *Nailor v. Ponder*, 1 Marv. (Del.) 408, 41 Atl. 88, and *French v. Deane*, 19 Colo. 504, 36 Pac. 609, 24 L. R. A. 387. Thus, in *Brewer v. Jacobs* (C. C.) 22 Fed. 217, it is said: "It is express malice where the party evinces an intention to do a wrong, and implied where it is inferred from the character of the facts proven." It is precisely in this sense that the words "express" and "implied" are used in the section of the Code limiting the award of exemplary damages, and it is no other or different from the malice which must always be established to maintain an action for malicious prosecution. Thus, in *Gonzales v. Cobliner*, 68 Cal. 151, 8 Pac. 697, this court quotes from *Harkrader v. Moore*, 44 Cal. 153, to the following effect: "Malice in fact must be shown in order to support the action (malicious prosecution) * * * and while the jury may find the fact of malice from the circumstance of the want of probable cause, or from other circumstances established in the case, they are not to be told that a wrongful charge made without probable cause is per se malicious in fact." In *Humphries v. Parker*, 52 Me. 502, it is said: "There is no doubt that malice in fact, as distinguished from malice in law, is essential to the maintenance of an action for malicious prosecution." And the principle is recognized and announced in the English courts in such cases as *Hicks v. Faulkner*, 8 Q. B. Div. 167, where it is said: "It is true, as a general proposition, that want of probable cause is evidence of malice; but this general proposition is apt to be misunderstood. In an action of this description the question of malice is an independent one—of fact purely—and altogether for the consideration of the jury, and not at all for the judge. The malice necessary to be established is not even malice in law, such as may be assumed from the intentional doing of the wrongful act (see *Bromage v. Prosser*, per *Bailey, J.*), but malice in fact—*malus animus*—indicating that the party was actuated, either by

spite or ill will towards an individual, or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody."

[8] It should be added that when the Civil Code (section 47) speaks of privileged publications, and in section 48 declares that malice is not inferred from the publication of such matters, it means nothing but this malice in fact, as abundantly appears from the authorities above cited, and as is expressly laid down in such cases as *Hemmens v. Nelson*, 133 N. Y. 517, 34 N. E. 342, 20 L. R. A. 440, and *Clark v. Molyneux*, 3 Q. B. Div. 246. And, finally, it should be remarked that in all classes and kinds of cases in which exemplary damages are sanctioned, there must be made to appear to the satisfaction of the jury the evil motive—the animus malus—shown by malice in fact, or by its allied malignant traits and characteristics evidenced by fraud or oppression.

Imputed Malice in Fact.

[9] Since the animus malus must be shown to exist in every case before an award in punitive damages may be made against a defendant, since the evil motive is the controlling and essential factor which justifies such an award, it follows of necessity that no principal can be held in punitive damages for the act of his agent, unless the particular act comes within the principal's specific directions or general suggestions, or unless the principal has subsequently ratified it; such ratification presupposing, it is said, original authorization. As to specific directions, of course nothing need be said.

[10, 11] Under general suggestions would come that class of cases where the policy and conduct of a newspaper show that its proprietor has given his subordinates carte blanche to do anything and everything that will make the paper a financial success and demonstrate its superior enterprise as a news disseminator. Herein is implied a willingness of the proprietor to publish libels against anybody, and it would, of course, afford strong evidence of malice in fact, closely allied to oppression, in the case of each victim. Upon this, our own cases present a line of unbroken authority, and the decisions elsewhere are overwhelming. Upon the general proposition, reference may be made to *Wardrobe v. California Stage Co.*, 7 Cal. 118, 68 Am. Dec. 231; *Nightengale v. Scannell*, 18 Cal. 315; *Turner v. North Beach, etc., Co.*, 34 Cal. 594; *Wade v. Thayer*, 40 Cal. 586; *Warner v. S. P. Co.*, 113 Cal. 105, 45 Pac. 187, 54 Am. St. Rep. 327; *Trabing v. California Nav. Co.*, 121 Cal. 137, 53 Pac. 644; *Nixon v. Rauer*, 66 Pac. 221; *Foley v. Martin*, 142 Cal. 256, 71 Pac. 165, 75 Pac. 842, 100 Am. St. Rep. 123; *Railway Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97; *Western Union Tel. Co. v. Brown*, 58 Tex. 170, 44 Am. Rep. 610. While to the specific proposition that malice in fact is not imputable to the master merely from the act

of the employé, reference may be made to *Haines v. Schulz*, 50 N. J. Law, 481, 14 Atl. 488; *Detroit, etc., Co. v. McArthur*, 16 Mich. 447; *Eviston v. Cramer*, 57 Wis. 570, 15 N. W. 760; *Krug v. Pitass*, 162 N. Y. 154, 56 N. E. 526, 76 Am. St. Rep. 317; *Clark v. Newsam*, 1 Exch. 131; *State v. Mason*, 26 Or. 273, 38 Pac. 130, 26 L. R. A. 779, 46 Am. St. Rep. 629, and note; and *Odgers on Libel and Slander* (4th Ed.) 367, where it is said: "In all these cases the malice proved must be that of the defendant. If two persons be sued, the motive of one must not be allowed to aggravate the damages against the other. * * * Nor should the improper motive of an agent be matter of aggravation against the principal."

Burden of proof and nature of proof of malice in fact.

[12, 13] It follows necessarily from the foregoing that, since malice in fact goes to the state of mind and evil motive of the defendant, the burden of proving the existence of that state of mind is, in every case, upon the plaintiff who seeks an award of punitive damages based upon its existence. The fact, like every other fact in issue, is to be determined by the jury, though there is always the reserved power and duty in the court, in a proper case, to instruct the jury that there is such an absence of evidence of the malice in fact as to forbid an award in punitive damages. *Taylor v. Hearst*, 107 Cal. 269, 40 Pac. 392; *Trabing v. California Nav. Co.*, 121 Cal. 138, 53 Pac. 644.

[14] As to the nature of the evidence as has been said, it may be direct (or express, as the Code names it), going to declarations, acts, and conduct of the defendant, showing personal ill will toward the plaintiff; but it will more usually be indirect or inferred (the implied malice in fact of the Code definition), and to this end of proving the malice inferentially all legitimate evidence is admissible bearing upon the general course of conduct of the defendant toward the plaintiff, the internal evidence furnished by the character of the libel, and any other specific facts and circumstances not in direct proof of the malice, but from which the existence may be logically inferred, herein including the circumstance, if it be found to exist, of wanton recklessness and heedlessness of plaintiff's rights. When malice in fact is found to exist, an award based upon it should bear relation to the gravity of that malice. For, surely, the man who in mere wantonness slaps another upon the cheek in not actuated by the same degree of malice as would be shown, if, brutally, and without provocation, he shot him down.

Presumptions Touching Malice.

[15] Malice in fact does not arise as a legal presumption from the mere falsity and libelous character of the publication. It may be inferred from the intrinsic evidence of malice which the publication affords; but

whether it does or not is for the jury to say. The presumptions that an unlawful act was done with an unlawful intent, and that a person intends the ordinary consequences of his voluntary act (Code Civ. Proc. § 1963) are, in libel, presumptions going to malice in law, and not to malice in fact. They are important in libel only in those jurisdictions where, as has been said, malice is considered as the gist of the action. Says Folkard, (*Slander & Libel* [7th Ed.] p. 206): "Where a libel has been published of the plaintiff by which actual or presumptive damage has been occasioned, the malice of the defendant is a mere inference of law from the very act; for the defendant must be presumed to have intended that which is the natural consequence of his act. In such instances, therefore, it is unnecessary to give evidence of malice in fact, except for the purpose of enhancing the damages." And Odgers, who, it will be remembered, in his learned work declines to consider the existence of any malice but malice in fact, sums up the English law as follows: "Mere inadvertence or forgetfulness, or careless blundering, is no evidence of malice. *Brett v. Watson*, 20 W. R. 723; *Kershaw v. Bailey*, 1 Exch. 743; 17 L. J. Ex. 129; *Pater v. Baker*, 3 C. B. 831; 16 L. J. O. P. 124. Nor is negligence or want of sound judgment (*Hesketh v. Brindle* [1888] 4 Times L. R. 199), or honest indignation. *Shipley v. Todhunter*, 7 C. & P. 690. That the words are strong is no evidence of malice, if on defendant's view of the facts strong words were justified. *Spill v. Maule*, L. R. 4 Ex. 232; 38 L. J. Ex. 138; 17 W. R. 805; 20 L. T. 675. That the statement was volunteered, if it was defendant's duty to volunteer it, is no evidence of malice. *Gardner v. Slade et ux.*, 13 Q. B. 796; 18 L. J. Q. B. 336. That the statement is now admitted or proved to be untrue is no evidence that it was made maliciously (*Caulfield v. Whitworth*, 16 W. R. 936; 18 L. T. 527), though proof that defendant knew it was untrue when he made it would be conclusive evidence of malice. *Fountain v. Boodle*, 3 Q. B. 5; *Clark v. Molyneux*, 3 Q. B. D. 237; 47 L. J. Q. B. 230. 'If you want to show that a statement was malicious, it is not sufficient to show that it was not true.' Per North, J., in *Hayward & Co. v. Hayward & Sons*, 34 Ch. D. at p. 206. And see the observations of Williams, J., in *Harris v. Thompson*, 13 C. B. at p. 352."

[16] The only presumption touching malice in fact is that announced in section 1962, Code of Civil Procedure, which declares as a conclusive presumption "the existence of a malicious and guilty intent from the deliberate commission of an unlawful act for the purpose of injuring another." But before this presumption arises, the jury is to find as facts (1) the commission of an unlawful act; (2) that its commission was deliberate; and (3) that it was committed with the deliberate purpose of injuring another. In

these three findings it will be noted are all the elements of malice in fact. With the enunciation of these principles and the understanding of these definitions, we may enter upon a consideration of the questions advanced for determination upon this appeal with reasonable confidence and expectation of conveying a meaning free from uncertainty and doubt.

[17] 1. It is argued that the defendant Hearst is not liable for exemplary damages under the evidence. Herein it is said: "The fact that the defendant Hearst was absent from the scene of publication at the time of the publication, did not actually participate therein, and had no knowledge of any of the acts complained of precluded any award of punitive damages against him." Such a state of facts would unquestionably exempt a newspaper proprietor from liability for punitive damages in the absence of evidence, direct or indirect, that the publication, of libelous matter, though not of the particular libelous matter, was authorized by him, or sanctioned and ratified by him after knowledge of the fact. Plaintiff had established the publication of a series of articles containing grave charges and reflections upon his official and personal character and conduct. He had shown that the defendant Hearst had affirmed the truth of these charges by justification in his answer. Their falsity upon trial was sufficiently established. These and other facts and circumstances afforded evidence from which the jury could legitimately have inferred the existence of malice in fact, and more proof was required by the defendant to repel this inference than was actually offered. It was not sufficient merely to show—and to this extent only does the showing go—that the defendant was absent from the state and had no foreknowledge of the actual publication of these particular articles. Such a state of facts, in the mind of the jury, could well coexist with positive instructions to attack the plaintiff's character, leaving it to the employé to select the mode of attack. We are not to be understood as implying that such instructions did exist, but as stating merely the incontrovertible fact that, where the evidence offered by the plaintiff is such that from it the jury may infer the existence of malice in fact, the burden is cast upon the defendant of destroying this inference by proof that, neither by general nor particular instructions, were the publications authorized, and that, neither in fact nor by his conduct, were they ratified when knowledge of their publication was brought home to him. To this extent the evidence of defendant failed to go, and for this reason it cannot be said that the evidence of plaintiff was insufficient to sustain a verdict against the defendant Hearst in punitive damages.

[18] 2. The court instructed the jury as follows: "You can only give as exemplary damages such sum as you believe to be the

amount that should be assessed against the defendant against whom the lowest amount of exemplary damages should be given. If you find that exemplary damages are justified as against only one of them, you must not add anything at all for exemplary damages." This instruction is more favorable to the appellants than the law warrants, and of course the appellants are not here complaining of it; but in contemplation of the new trial which must be ordered it becomes necessary to say that the instruction is mistaken in its law. In an action for compensatory damages against joint tort-feasors (the action contemplated by the Civil Code, § 3333), the law will not permit an apportionment of the damages, since it will not attempt to measure the degrees of culpability of the joint tort-feasors; nor in an action for malicious prosecution, where the existence of malice in fact must be found against every tort-feasor, before any judgment can be rendered against him, will the law, for the same reason, admit or permit an apportionment of damages. Also, in those jurisdictions, as in England, where the verdict must be for a single sum, and there is included in it damages, both compensatory and punitive, there can be, from the nature of the practice, but a single verdict against all defendants. But, under our system of procedure where the jury may, and upon the request of defendant must, segregate and make separate awards of compensatory and punitive damages, the reason for the rule we have been considering ceases to exist. There is nothing in our system to prevent the award of compensatory damages against all joint tort-feasors who are found culpable, and to add a specific sum or sums, by way of punitive damages, against such of the tort-feasors as the jury shall find to have been actuated by malice in fact. Not only is this permissible, but it tends to simplicity and avoids the multiplicity of actions which otherwise would become necessary. Particularly applicable is this principle to cases of punitive damages sought against both principal and agent, where the agent has been guilty of malice, fraud, or oppression, but where, as above pointed out, the improper motive of the agent is not made matter in aggravation against the principal. There is a scarcity of authority upon this proposition, but we think the principle as we have enunciated it is sound. In *Mauk v. Brundage*, 68 Ohio St. 89, 67 N. E. 152, 62 L. R. A. 477, the court had under consideration an instruction to the effect that if the jury awarded exemplary damages they must find that all the defendants had actual malice, and the court says: "On the other hand, if it was intended, as we think it was, to instruct that in no event could compensatory damages be awarded against some and exemplary damages against others, then we think the instruction incorrect. Perhaps the question is not without difficulty, but it would appear

practicable to allow a recovery of an amount against all as compensatory damages, and a further amount against some as exemplary damages (and such verdict would be just if the evidence warranted it), and it would not seem impracticable to so shape the verdict as to bring about this result." This, we think, enunciates the true rule.

[19] 3. In connection with, and as a part of its instructions upon the subject of exemplary damages, the court instructed the jury as follows: "The proprietor of a newspaper in which a libel is published, though he has no knowledge of the publication at the time, is as responsible for it as he would have been had it been done by him personally, or under his direct supervision, and it is no defense to a libel that it was published in the absence of the proprietor by an employé, however competent said employé may be." This instruction is unobjectionable as a rule of law governing the award of compensatory damages in an action for libel. It is misleading and mistaken as a part of the law governing the award of punitive damages, in which latter connection it was employed. The instruction was one proposed and given in the case of *Dunn v. Hearst*, 139 Cal. 239, 73 Pac. 138, where the plaintiff was seeking compensatory damages alone. For support of the soundness of the instruction, that court made reference to the case of *Taylor v. Hearst*, 107 Cal. 269, 40 Pac. 392, which, as has been shown, was a case not involving punitive damages, and where the instruction to the jury forbade the award of punitive damages.

4. The court instructed the jury as follows: "In order to recover exemplary or punitive damages, it is necessary that there should be on the part of the defendant malice toward the plaintiff, and this malice is of two kinds: First, express malice, or, as it is known in the law, malice in fact; and, second, that malice which is not connected by any personal feeling on the part of the defendant, but which the law regards as a sufficient invasion of the rights of the plaintiff to sustain exemplary damages by reason of the carelessness, negligence, or willful disregard of the rights of the plaintiff by the defendant as to impute to the defendant what is known in law as implied malice or malice in law, as distinguished from express malice. In order to recover exemplary damages, in addition to actual or compensatory damages, it is necessary for you to find from the evidence, either express malice or implied malice, as above defined, on the part of the defendants, or the particular defendant or defendants against whom such exemplary damages are assessed, for without such malice, either express or that which the law implies by reason of the carelessness or negligence of the defendant or defendants, exemplary damages may not be awarded."

It will be noted that by these instructions the trial court defined express malice to be

malice in fact, and implied malice to be malice in law, and further declared that exemplary damages could be awarded by the jury upon a finding of either malice in fact or malice in law. That the court in this fell into the common error of confounding the different meanings given to malice, must be apparent from what has already been said. It was the equivalent, as has been pointed out, of telling the jury that malice in law (which is always conclusively presumed from the publication of an article libelous per se in those jurisdictions where malice is of the essence of a civil libel) was sufficient as the basis of an award for punitive damages; and thus, in effect, declared that in the case of every false and libelous publication punitive damages could be awarded. But, to remove the question from possible doubt in the minds of the jury, the court further instructed them as follows: "Malice in law is defined as a wrongful act done intentionally without just cause or excuse"—and thus declared to the jury in terms that punitive damages could be awarded upon their finding of this malice which the law always when necessary conclusively presumes to exist.

[20] What has already been said establishes the serious substantive error of these declarations. But further the court in the same instruction advised the jury that malice in law consists in that "which the law regards as a sufficient invasion of the rights of the plaintiff to sustain exemplary damages, *by reason of the carelessness, negligence or willful disregard of the rights of the plaintiff by defendant.*" From this the jury could only have understood that the law regards carelessness or negligence as establishing malice in law, and that malice in law will support an award in punitive damages. But the truth is that mere negligence or mere carelessness can never be evidence of malice in fact. In the same act they cannot even coexist. Malice necessarily imports an evil purpose. Negligence necessarily implies an absence of intent or purpose, or is at least independent of either. The train dispatcher who inadvertently or mistakenly telegraphs instructions from which a wreck ensues is guilty of no evil motive, but of negligence, pure and simple. If he sends the same message designedly, there is no element of negligence. He is guilty of malice in fact. It is sometimes said that malice in fact may be inferred from "gross negligence"—a phrase somewhat in vogue in the earlier cases, but now practically abandoned in the learning and literature of the law. *Milwaukee, etc., Ry. Co. v. Arms*, 91 U. S. 489, 23 L. Ed. 374; *Wilson v. Brett*, 11 Mees. & W. 113. But even in those cases the gross negligence was defined as negligence that evidenced a wanton and reckless disregard of the consequences and of the rights and of the feelings of others. And herein, and by this very definition, it is shown that the gross negligence

thus meant in itself displayed an active and evil intent. Thus it is said in *Philadelphia, etc., Ry. Co. v. Quigley*, 21 How. 202, 16 L. Ed. 73, discussing the liability of a defendant for exemplary damages in a civil action for libel: "Whenever the injury complained of has been inflicted maliciously or wantonly and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person, but the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief or of criminal indifference to civil obligations." And to the effect that negligence is not to be confounded with malice, and that proof of negligence does not justify an inference of malice, see *Moody v. McDonald*, 4 Cal. 297; *Yerian v. Linkletter*, 80 Cal. 135, 22 Pac. 70; *Badostain v. Grazide*, 115 Cal. 425, 47 Pac. 118; *Spencer v. San Francisco Brick Co.*, 5 Cal. App. 126, 89 Pac. 851; *Jenkins v. Gilligan*, 131 Iowa, 176, 108 N. W. 237, 9 L. R. A. (N. S.) 1087; *Arkansas, etc., Ry. Co. v. Stroude*, 77 Ark. 109, 91 S. W. 18, 113 Am. St. Rep. 130; *East Tennessee, etc., Ry. Co. v. Lee*, 90 Tenn. 570, 18 S. W. 268; *Peterson v. Western Union Tel. Co.*, 72 Minn. 41, 74 N. W. 1022, 40 L. R. A. 661, 71 Am. St. Rep. 461.

[21] 5. The jury was instructed as follows: "If you should find that the article or articles in question was or were published wantonly, recklessly, and with an utter disregard as to whether true or false, then I charge you the plaintiff is entitled to recover exemplary or punitive damages, as well as compensatory." The vice of this instruction is that it tells the jury that, upon finding malice in fact, the plaintiff is *entitled*, as of right, to an award of punitive damages. A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammelled discretion, has made the award. It follows, therefore, that the courts have felt compelled rigidly to suppress such an invasion of the jury's prerogative, and we find, in *Railroad Co. v. Castineau*, 83 Ky. 119, that it was held error to instruct the jury that if the defendant was guilty of willful neglect they *ought* to award punitive damages. In *Hawk v. Ridgway*, 33 Ill. 473, it was held error to instruct the jury that they

must, after finding the fact, give exemplary damages. In *Boardman v. Goldsmith*, 48 Vt. 403, where the evidence was sufficient to support a judgment in exemplary damages, it was held error to instruct the jury that they must give them. In *Ferguson v. Moore*, 98 Tenn. 342, 39 S. W. 341, it was held error to instruct the jury that it was *their duty* to award punitive damages. In *Gambrell v. Schooly*, 93 Md. 48, 48 Atl. 730, 52 L. R. A. 87, 86 Am. St. Rep. 414, it was held that it was error to reject defendant's instruction, "since thereby the jury were practically told that they must give exemplary damages, and, where there is evidence sufficient to uphold a verdict for exemplary damages, the question whether they shall be given or not is one for the jury." Further, says the court: "In no case has a plaintiff any legal right to exemplary damages." In *Railroad Co. v. Rector*, 104 Ill. 296, the jury was instructed, as here, that, if the plaintiff was wantonly, willfully, and maliciously expelled from the train, "then the plaintiff is not limited in his recovery to such actual damages sustained, but plaintiff is entitled, in addition thereto, to such additional damages as the jury may in their judgment assess by way of punishment for such act." In holding the instruction erroneous, the court said: "But it is not understood the injured party is 'entitled' to such damages as a matter of right, and that instruction that tells the jury, as a matter of law, the injured party is 'entitled' to such damages goes too far, and is for that reason vicious." To the same effect are *Snow v. Carpenter*, 49 Vt. 426; *Kenyon v. Cameron*, 17 R. I. 122, 20 Atl. 233; *Berg v. St. Paul City Ry.*, 96 Minn. 513, 105 N. W. 191; *Burkhardt v. Press Pub. Co.*, 130 App. Div. 22, 114 N. Y. Supp. 451; *Robinson v. Superior, etc., Co.*, 94 Wis. 345, 68 N. W. 961, 34 L. R. A. 205, 59 Am. St. Rep. 897, where many cases are reviewed; and 25 Cyc. 536. Justification for the giving of this instruction is sought to be found in *Graybill v. De Young*, 140 Cal. 328, 73 Pac. 1067. There this court had under consideration an instruction to the following effect: "If you find that the article in question was published wantonly, recklessly and with an utter disregard as to whether it was true or false, then I charge you that plaintiff is entitled to recover exemplary and also compensatory damages." But in the *Graybill* Case no attack was made upon this instruction because of the use of the word "entitled." The question was not before the court, and therefore was not considered by the court, nor decided by the court. The sole ground of attack on the instruction was that it was directed against the defendant, De Young, who, at the time of the publication, was absent in Europe, and knew nothing about it. In answer to this attack it was said that the language employed was general and was designed to "state the general proposition of

law as to the circumstances under which punitive damages *may be permitted*." Elsewhere and repeatedly the jury were told in effect that nothing but compensatory damages could be allowed, "unless they found from the evidence that in publishing the article the defendant, Mr. De Young, was actuated by malice in fact, actual or presumed." At the time of this decision the section touching punitive damages read "malice, actual or presumed," where now it reads "express or implied." In *Childers v. San Jose Mercury Pub. Co.*, supra, it was held that the malice, actual or presumed, was always malice in fact, and the equivalent of what we have heretofore considered and described as malice in fact, express or implied. *Hearne v. De Young*, 132 Cal. 357, 64 Pac. 576.

[22] 6. Upon the subject of exemplary damages, the court further instructed the jury as follows: "The defendant is permitted the fullest opportunity to show, first, the lack of express malice on his part, and, second, such circumstances by way of mitigation as would *overcome the presumption raised by the law of malice*, by showing all the steps taken by him prior to the publication of the article, to learn the truth of the charge therein contained in order to relieve him entirely from exemplary damages, or to reduce the amount of such exemplary damages as you may from the evidence decide to assess against him."

[23] Circumstances in mitigation are allowed to be pleaded and proved, usually to overcome evidence of malice in fact. Circumstances in mitigation ordinarily have no other place or purpose in an action for libel; the exception being the use of evidence in mitigation to rebut evidence of special damage, and evidence of bad reputation to lessen the award in compensatory damages. Therefore, when the court instructed the jury that the circumstances in mitigation would "overcome the presumption raised by the law of malice," it could only mean the presumption raised by the law of malice in fact. But presumptions are wholly creatures of the law. And, unless some law does declare that the presumption of malice in fact is raised or created by certain specific evidence, it is error for the court to do so, first, because it is violative of section 19 of article 6 of the Constitution, which provides that judges shall not charge juries with respect to matters of fact, and, second, because there is worked an unlawful invasion of the province of the jury in that by such an instruction they are told that the law erects from certain evidence a presumption which they are to follow; whereas in fact the utmost that the law has done has been to say that from that evidence the jury may, if it sees fit, draw an inference of the existence of the fact. "A presumption is a deduction which the law expressly directs to be made from particular facts." Code Civ. Proc. § 1959. Therefore in this state, presumptions can be only such deductions as the law enu-

merates. "An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect." Code Civ. Proc. § 1958. In the case of a presumption, the jury must make the deduction which the law directs. In the case of an inference, the jury may make any logical, reasonable deduction which the facts permit. "A presumption, unless declared by law to be conclusive may be controverted by other evidence, direct or indirect; but, unless so controverted, the jury are bound to find according to the presumption." Code Civ. Proc. § 1961.

It is therefore a matter of substance and consequence that the distinction, between inferences and presumptions should be carefully maintained. Frequently the inexact use of the word "presumption" by courts, where it is not meant to declare an evidentiary presumption of law, but rather the inference which court or jury draws or may draw, has led to confusion. And this was appreciated by the Supreme Court of Vermont, in *Sheldon v. Wright*, 80 Vt. 298, 67 Atl. 807, where it is said: "In view of the doctrine in this state that a true legal presumption is in the nature of evidence and is to be weighed as such, unguarded and inexact expressions about presumptions should here be scrupulously avoided." In *Kauffman v. Maier*, 94 Cal. 269, 29 Pac. 481, this court said: "That deduction called a 'presumption,' which the law expressly directs to be made from particular facts, is uniform, and not dependent upon the varying conditions and circumstances of individual cases. To weigh the evidence and find the facts in any case is the province of the jury, and that province is invaded by the court whenever it instructs them that any particular evidence which has been laid before them is or is not entitled to receive weight or consideration from them." In *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871, it is declared: "Under our system the court is not allowed to instruct the jury as to what inference of fact they are to draw, though of course the court may instruct as to the presumptions which the law draws." In *People v. Walden*, 51 Cal. 588, where the court instructed the jury that the possession by the defendant, unexplained, of certain incriminatory articles raised "a reasonable presumption," etc., it was said: "In no view can this charge be sustained. If it be said that it was an attempt to charge in respect to a legal presumption, it was clearly error, since no such presumption would arise from the fact stated, as a matter of law. If it was an attempt on the part of the court to instruct the jury that the existence of one fact, in view of the ordinary experience of mankind, and connection of events, must be presumed from the existence of another, this was an interference with what, as we have shown, is the exclusive province of the jury. It was charging the jury 'with respect to matters of fact,'

and was in contravention of section 17, art. 6, of the Constitution of the state." To the same effect is *Stone v. Geyser Quicksilver Co.*, 52 Cal. 315; *People v. Wong Ah Ngow*, 54 Cal. 151, 35 Am. Rep. 69; *Helbing v. Svea Ins. Co.*, 54 Cal. 156, 35 Am. Rep. 72; *Wallace v. Sisson*, 114 Cal. 42, 45 Pac. 1000; *Linforth v. San Francisco Gas & E. Co.*, 156 Cal. 58, 103 Pac. 320; *State v. Pilling*, 53 Wash. 464, 102 Pac. 230, 132 Am. St. Rep. 1080; *Stooksberry v. Swan*, 85 Tex. 563, 22 S. W. 963; *Cox v. Aberdeen, etc., Co.*, 149 N. C. 117, 62 S. E. 884.

Countenance is given to this instruction by the misconception of the language employed in the case of *Childers v. San Jose Mercury Printing Co.*, 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40. The law governing punitive damages then described the malice as actual or presumed, and we have pointed out, and the *Childers* Case points out, that that means malice in fact; "actual" being the equivalent of "express," and "presumed" being the equivalent of "implied," as the words are at present employed in section 3294 of the Civil Code. The court was there considering an instruction to the effect: "As I have already charged you, the law presumes the existence of malice from the fact of the publication of the false, unprivileged, and defamatory article in the newspaper regarding the person so charged." It is said of the instruction from which the extract is quoted that it correctly tells the jury that if malice in fact, actual or presumed (express or implied), has been proven, exemplary damages may be recovered; but then commits the error of saying that the publication is such that malice is presumed; in other words, conclusively presumed. "This is true of malice in law, but the court in this instruction was dealing with malice in fact, as bearing upon exemplary damages, and the presumption of malice in fact from the libelous character of the publication is not conclusive, but disputable." Elsewhere in that case it is with accuracy said of presumed malice (implied malice in fact) that: "It is an inference of fact to be drawn from the libelous character of the publication; and, if the article is libelous per se, we see no reason why the law should not declare that upon its introduction in evidence a prima facie case of malice in fact is established." Of this last language no criticism need be made; for to say that an inference of malice may be drawn from the character of the publication is quite within the reason of the law. To say that that inference makes out a prima facie case does not mean that the jury is bound to find in plaintiff's favor upon such evidence, but that they may do so if the evidence satisfies them. Upon the other hand, however, to say that from those same facts a presumption arises is to instruct the jury that, in the absence of rebutting evidence, they not only may find for plaintiff, but must do so, since "the jury are bound to find according to the presumption," if not

controverted. Code Civ. Proc. § 1961. In *Tingley v. Times-Mirror Co.*, 151 Cal. 1, 89 Pac. 1097, it is said with exactness that the malice in fact "may be proven by the article published itself," but where later the opinion declares that, "where the publication is libelous per se the law presumes malice in fact in its publication," the statement is stronger than the law warrants. There is no such presumption of law declared by our Codes or statutes, and for the court to say that it exists is for the court itself to usurp the legislative function by creating such a presumption, and then invade the province of the jury by forcing its acceptance upon them. So in *Westerfield v. Scripps*, 119 Cal. 607, 51 Pac. 958, the discussion was addressed to the evidence from which malice in fact might be inferred by the jury, and to the sufficiency of that evidence in overcoming the positive testimony upon the part of the defendants as to their ignorance of the publication of the original article. It was said with accuracy that this evidence and these facts were circumstances "which the jury could consider as tending to contradict the testimony on behalf of defendants upon the question of malice, and the publication of the article in question was also a circumstance tending to contradict such evidence." And further it is said: "As we have seen, there was evidence upon which the jury were at liberty to find the existence of actual malice; and in that view the question was correctly submitted to the jury." But the expression employed in the opinion that the "publication (of the libelous article) was presumptive evidence of that fact (malice in fact), the burden of overcoming which rested with them" (the defendants) as we have said and shown, overstates the law, if it be construed as meaning that a presumption of law does in fact arise. Such presumption, as we have seen, does not arise. That such a presumption does arise could not be justly declared by the court, in the absence of a statutory declaration to that effect. And what is meant—and all that can be accurately stated—is that such evidence is sufficient to support an inference of malice in fact if the jury shall so infer. The truth is that malice in fact is never presumed, but is always to be proved, and the utmost limit of the law is reached when it is declared that by proof of the unprivileged character of a publication, libelous per se, the jury may infer the existence of this malice. *Erber v. Stickler & Dunn* (C. C.) 12 Fed. 526; *Smith v. Singles* (Del.) 72 Atl. 977; *Todd v. Evening Printing Co.*, 6 Pennewill (Del.) 233, 66 Atl. 97; *Nailer v. Ponder*; 1 Marv. 408, 41 Atl. 88; *Carpenter v. New York Journal Pub. Co.*, 111 App. Div. 266, 97 N. Y. Supp. 478; *Parker v. Parker*, 102 Iowa, 500, 71 N. W. 421; *Wright v. Hayter*, 5 Kan. Op. 638, 47 Pac. 546; *McGowan v. McGowan*, 122 N. C. 145, 29 S. E. 97; *Wyatt v. Burdette*, 43 Colo. 208, 95 Pac. 336; *Ton v. Stetson*, 43 Wash. 471, 86 Pac. 668.

We have heretofore pointed out that the malice in fact, to sustain exemplary damages in civil libel, is the same malice in fact necessary to support every action for malicious prosecution. Touching this question, this court has said: "Malice in fact must be shown in order to support the action, and the instruction as given would seem to mean that such malice must necessarily be inferred from the want of probable cause. * * * The jury may find the fact of malice from the circumstances of the want of probable cause, or from other circumstances established in the case. They are not to be told that a wrongful charge made without probable cause is per se malicious in fact." *Harkrader v. Moore*, 44 Cal. 144. And in *Griswold v. Griswold*, 143 Cal. 617, 77 Pac. 672, the jury was instructed on the question of malice as follows: "You are instructed that malice is a question of fact for you to determine; but that it may be inferred by you from the circumstances proved, and may be presumed to exist from the want of probable cause." The court, holding this instruction erroneous, said: "This instruction is somewhat ambiguous. If it means that the legal presumption of malice followed proof of want of probable cause, it is erroneous. A jury may infer malice from want of probable cause, but the former is not a necessary legal presumption from the latter." So in the civil action or libel the jury may infer the existence of malice in fact from the unprivileged publication of a false article, libelous per se, as it may infer the fact from other circumstances addressed to this end. But the inference is always an inference to be drawn by the jury, and is not a presumption which the law has made, or which the court can make for the control of a jury. Thus it is said in *McCarthy v. Weir*, 113 App. Div. 435, 99 N. Y. Supp. 372: "And the existence of malice is always a question exclusively for the jury. It must be found by them, or the action cannot be sustained. Hence it must always be submitted to them, to find whether it existed. The court has no right to find it, nor to instruct the jury that they may return a verdict for the plaintiff without it. Even the inference of malice from the want of probable cause is one which the jury alone can draw."

[24] 7. The court instructed the jury as follows: "When a defendant republishes a libelous charge by making it a record of the court, he does so at his own risk. If at the trial he fails to prove the truth of the parts of the article in his answer alleged to be true, and did not in good faith expect to prove their truth, he intensifies the original wrong." This language was approved in *Westerfield v. Scripps*, 119 Cal. 607, 51 Pac. 958, and later in *Dauphiny v. Buhne*, 153 Cal. 757, 96 Pac. 880, 126 Am. St. Rep. 136. The attack upon this instruction is that it declares that the original wrong is intensified under the circumstances given; that this language implies an increase of compensatory damage;

whereas the matter is to be considered by the jury only as evidence of the existence of malice in fact, to support an award of punitive damages. That such is the purpose, and the sole purpose, for which the evidence may be considered is unquestionable. *Norris v. Elliott*, 39 Cal. 72; *Chamberlin v. Vance*, 51 Cal. 75; *Schoonover v. Rowe*, 7 Blackf. [Ind.] 202; *Meyer v. Bohlffing*, 44 Ind. 238; *Register Newspaper Co. v. Worten*, 111 S. W. 693, 33 Ky. Law Rep. 840; *Sickra v. Small*, 87 Me. 493, 33 Atl. 9, 47 Am. St. Rep. 344; *Murphy v. Hobbs*, 7 Colo. 541, 5 Pac. 119, 49 Am. Rep. 366; *Bee Publishing Co. v. World Pub. Co.*, 59 Neb. 713, 82 N. W. 28; *Wabash Printing & Publishing Co. v. Crumrine*, 123 Ind. 89, 21 N. E. 904; *Browning v. Powers* (Mo.) 38 S. W. 943. But it does not follow that because the instruction could have been more explicit, it is necessarily misleading. In jurisdictions such as England and our own states which still follow its practice, the jury renders a single general verdict, including in its award both compensatory and exemplary damages. It has been the very accurate custom in those jurisdictions to speak of all evidence tending to show malice in fact as evidence in aggravation of damage, since it is precisely the function which such evidence performs. It makes heavier the general award. So, too, upon the theory that there is a direct consequence of malice in fact which justifies the award for punitive damages to the plaintiff as a *solatium*, and not to the state as a *penalty*, and that that direct consequence is the increased mental suffering of plaintiff because of the malice in fact (*Welsh v. Ware*, 32 Mich. 84), it is common to speak of evidence of such malice as "intensifying the wrong." It is true that the damages are aggravated and the wrong intensified in this sense only by the malice in fact, and that compensatory damages as such should not be increased thereby. But we do not think the jury could have failed to perceive the true meaning and application of the phrase in question.

[25] 8. The libelous articles contained in various forms the assertion of the existence of rumors reflecting on plaintiff. Thus: "Rumors have been rife for many months that reflect on the management of the public business by the board of education;" "charges of favoritism in the award of public contracts have been hinted at time and again;" "there have been ugly stories afloat of the alleged misconduct in office of men who were expected to be protecting the public school interests." The court refused to admit evidence of the existence and character of these rumors, which evidence, it is insisted, was admissible in mitigation both on the question of compensatory damages, and to negative malice as the foundation for exemplary damages. For neither purpose, however, was the evidence admissible.

[26] It is, of course, well settled that defendant may impeach the reputation of plaintiff generally, or as to the particular quali-

ties embraced in the libel, for the purpose of reducing compensatory damages. But it is equally well settled that he may not do this by showing either rumors of general ill repute, or rumors of ill repute as to the particular matter charged in the libel. If the rumor exists, and is believed, bad repute would follow from the belief, and this bad repute may be shown. If the rumor exists and is not believed, it does not affect plaintiff's reputation, and is therefore valueless in mitigation. *Odgers on Libel & Slander*, p. 376. Nor can the existence of the rumor be shown to negative malice, even if the statement in the libel be predicated upon the existence of such rumor; for if the rumor be true the truth may be proved, and there is an end to the matter. But if it be not true it does not dispel an inference of malice for a defendant to show that he has aided in and added to the dissemination of the defamatory report. Such is the rule in this state, consistently adhered to. *Wilson v. Fitch*, 41 Cal. 363; *Preston v. Frey*, 91 Cal. 110, 27 Pac. 533; *Edwards v. Publishing Co.*, 99 Cal. 436, 34 Pac. 128, 37 Am. St. Rep. 70; *Hearne v. De Young*, 132 Cal. 362, 64 Pac. 576; *Tingley v. Times-Mirror Co.*, 151 Cal. 26, 89 Pac. 1097. The one relaxation of it noted by *Odgers* in the English cases is that, where on the face of the libel it appears that it was founded on an article in a newspaper, or where in uttering the libel the defendant gave the name of his authority for it, in the one case the defendant may show the newspaper publication and his belief in its truth; in the other he may show that in fact he was informed by the party named, and that he believed the information, not, of course, as a defense, but in mitigation to dispel the idea that the defamation originated with himself.

[27] 9. The court instructed the jury as follows: "You must not return a verdict for this plaintiff, unless the evidence convinces you that the said matter referred to, or was understood by its readers to refer to, this plaintiff." The defendant requested the following instruction: "If you find from the evidence that any of the alleged defamatory matter published in the articles complained of referred to acts of the board of education at a time when the plaintiff was not a member of such board, then the truth or falsity of such matter is immaterial in this action, and you are not to take any such matter into consideration in arriving at your verdict," which the court gave with the following modification: "Unless you find that the readers of the paper understood, and had a reasonable right to understand from the wording of the articles and the text and context of the several parts thereof, that the same did refer to the plaintiff." The error assigned in the giving of these instructions is that the actual intent of the defendant is the foundation of his liability, while the instruction made that foundation the understanding of the readers. It is further de-

clared that the effect of the instructions was to make defendants liable for defamatory matter referring to acts of the board of education when plaintiff was not a member of that board, so that reference to him could not have been intended. This all has to do with the following portion of the article above quoted: "It is only a few years ago that members of the board begged the taxpayers for funds for new schools, specified plainly what they wanted the money for and after getting it voted to their uses as outlined by them, they deliberately used the money for other purposes. These men are prone to talk of their integrity, but such misrepresentations and juggling of public funds would make a Ruef blush for shame." It is admitted that there was a bond issued before plaintiff became a member of the board, and one after he became a member. It is admitted that everything touching the latter was regular and proper. It is insisted "that the misrepresentations and juggling" had reference to the bond issue antedating plaintiff's membership on the board, and therefore could not have been intended to refer to him.

[28] The actual intent of defendant to charge the plaintiff becomes of consequence in but two instances; the first where the reference to plaintiff is so veiled, obscure, and ambiguous that the jury cannot see and say, without extrinsic evidence, that the plaintiff was aimed at and was injured; the second where defendant seeks in mitigation to repel the charge of malice in fact. In the first instance evidence is offered by those who, familiar, as the jury is not, with the veiled allusions and obscure references, testify to their understanding that plaintiff was meant. A very learned discussion of the purposes for which evidence of the understanding of the readers of a libel may be considered is found in *Smart v. Blanchard*, 42 N. H. 137, decided in 1860, but the earlier cases have been much modified, and the rule now stands more in consonance with reason. The rule is that the question under such circumstances is not one of defendant's intent. It is not, did the defendant intend to injure plaintiff? But did he in fact injure plaintiff's reputation? *Folkard, Libel & Slander* (7th Ed.) p. 77. The inquiry is not as to the meaning intended to be conveyed, but as to the meaning in fact conveyed. *Fisher v. Clement*, 10 B. & C. 472. Says *Folkard (Slander & Libel [7th Ed.] p. 276)*: "But, where the libel is covertly expressed or ambiguously worded, evidence is required to show that the plaintiff is the party to whom it applies, or was intended to apply. But, whatever the intention, if the jury find that any person to whom it was published would understand it as applying to the plaintiff, that will be sufficient to sustain the verdict." As to the second employment of evidence of intent, whether the reference in the libel be ambiguous or not, defendant may offer evidence that he

did not intend to refer to the plaintiff, to negative malice in fact. Upon this nothing further is required than a reference to *Taylor v. Hearst*, where the libel clearly referred to plaintiff, but the intent to refer, not to him, but to another, was established to destroy any inference of malice.

[29] If it can be said that in the case at bar ambiguity exists, it did not arise from the fact that plaintiff was not a member of the board at the time of the bond issue, which defendants plead was the only one meant. If defendants had in terms charged that plaintiff was a member of the board of education in 1904, and that the members of the board "juggled funds" in a way "that would make Abe Ruef blush with shame," it would raise no ambiguity if defendants pleaded and proved that plaintiff was not a member of the board at that time, and so argue therefrom that there could have been no intent to refer to him. The whole article was before the jury, with its declarations that the "school graft would make a Ruef blush;" that "a Pasadena citizen declares education board has juggled funds for years;" that "it is true that there have been allegations of graft made freely in connection with almost every expenditure of the school funds for several years past, both with the present and previous board of education;" and that "M. W. Davis, clerk of the board is generally regarded as the worst offender against the public interests in connection with the schools." The jury was therefore properly charged that it was for them to say whether the newspaper article would be understood by its readers as referring to plaintiff. Nor was the testimony of outside readers to this point required. The jurymen themselves became the readers. No other evidence was offered or needed than the article itself.

[30, 31] 10. The court allowed evidence upon the hearing of plaintiff's case in chief to the effect that he bore a good reputation. That affirmative evidence of good reputation in advance of any attack upon it by defendant is inadmissible is supported by a practical unanimity of authority. *Morgan v. Barnhill*, 118 Fed. 24, 55 C. C. A. 7, and note; *Shipman v. Burroughs*, 1 N. Y. Super. Ct. 442; *Chubb v. Gsell*, 34 Pa. 114; *Blakeslee v. Hughes*, 50 Ohio St. 490, 34 N. E. 793; *Hitchcock v. Moore*, 70 Mich. 112, 37 N. W. 914, 14 Am. St. Rep. 474; *Miles v. Vanhorn*, 17 Ind. 245, 79 Am. Dec. 477; *Hall v. Dairy Co.*, 15 Wash. 542, 46 Pac. 1049; *Kennedy v. Holladay*, 25 Mo. App. 503; *Cooper v. Phipps*, 24 Or. 357, 33 Pac. 985, 22 L. R. A. 836; *Mayo v. Samples*, 18 Iowa, 306; *Houghtaling v. Kilderhouse*, 1 N. Y. 530; *Wright v. Schroeder*, 2 Curt. 548, Fed. Cas. No. 18,091; *Odgers, Libel & Slander*, p. 366; *Folkard, Libel & Slander*, p. 260. There is nothing in our decisions to lend support to the contrary view. In *Edwards v. Pub. Society*, 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70, relied upon

by respondent, it is said that: "The defendants were entitled to an instruction, if they requested it, that in fixing the amount of damages the jury might consider the previous character of the plaintiff as they might believe it to be from the evidence." This was in a case where the plaintiff's reputation had been attacked by the defendant and the attack met, or attempted to be met, by the plaintiff. Of course, in such a case, either party is entitled to such an instruction as this court was there considering. In *Turner v. Hearst*, 115 Cal. 394, 47 Pac. 129, no question of reputation was involved, nor was any evidence addressed to it. The court merely declared that in estimating general compensatory damages the jury was entitled to know "plaintiff's position and standing in society, and the nature and extent of his professional practice." The rule of all the authorities is that the good reputation of the plaintiff is assumed, and that he can, and must, rest upon this, until his reputation is attacked. "The plaintiff cannot give evidence of general good character in aggravation of damages merely, unless such character is put in issue on the pleading, or has been attacked by the cross-examination of the plaintiff's witnesses; for until then the plaintiff's character is presumed good." *Odgers, Libel & Slander*, p. 366. In this case the defendants did not attack the plaintiff's reputation. They were entitled to have the case of plaintiff rested upon the presumption of good reputation which the law accords. Yet the court instructed the jury as follows: "There has been evidence given as to the reputation of the plaintiff prior to the publications involved in this case, and it is for you to determine from the evidence whether or not plaintiff bore a good reputation for honesty and integrity in the community where he lived prior to the time of the publication. A man with a good reputation for integrity and honesty could be more seriously damaged by such publication than would be a man having a bad reputation for honesty and integrity."

[32,33] 11. The third cause of action was based upon an alleged libel, fully quoted above. It will be seen that the headlines charged that the mayor investigated the board of education's acts and the "exposures made by Examiner were found to be true." The body of the article seemingly contains but one specific matter, which the mayor investigated—the making copies of the bills, etc., by plaintiff. The mayor of Pasadena was called as a witness, and the court permitted him to be specifically examined as to the "exposures" and as to the matters which he found to be true. Thus he was asked whether in his investigation of the affairs of the school board he had found any school graft, or any graft at all; whether he had found any misappropriation of moneys or school funds, with much other matter of the same import. To all these inquiries the mayor an-

swered in the negative, testifying in effect that he had discovered no wrongs or improprieties, and had never reported that he had discovered them. All of this evidence was admitted under objection, though it was subsequently, upon the court's own motion, stricken out. It is to be noted in this connection that the statement in the publication is general that the mayor had investigated the acts of the board of education (meaning all the acts which had been charged in the paper), and that the exposures (meaning all the exposures which the paper had made or purported to have made) had been by the mayor found to be true. While the falsity of defamatory matter will be presumed, still it is competent for the plaintiff, if he so desires, to offer affirmative evidence showing that falsity. It was therefore competent for the plaintiff to show the fact that in that investigation which the mayor made he did not find the exposures to be true, and did not so report. This evidence, of course, was not to be considered by the jury upon the question of the truth or falsity of the matters themselves, but was pertinent to be considered upon the question as to whether the mayor, as charged, did find the exposures to be true and did so report. The mere fact that in the body of the article the mayor's investigations are limited to a single charge is not controlling. The captions and headlines of a libelous article are themselves a part of the libel. *Bishop v. Latimer*, 4 L. T. 775; *Odgers, Libel & Slander*, p. 109.

[34] 12. The court excluded certain offered evidence in mitigation, upon the ground that the offered evidence had not been pleaded in mitigation. The case, in short, was tried upon the theory that the defendant could prove in mitigation only that which he had pleaded in mitigation. Aside from the question as to whether some of the offered evidence was competent evidence in mitigation, the court's ruling that no evidence could be received in mitigation, unless pleaded, first demands attention. The Code provision upon the subject is found in section 461 of the Code of Civil Procedure, where it is said: "The defendant may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not he may give in evidence the mitigating circumstances." This is a re-enactment of section 63 of the earlier practice act. It will be found that this section is a remedial section, and, as it is the duty of a court in dealing with remedial statutes so to construe them as to suppress the mischief and advance the remedy, the mischief which the statute sought to suppress, and the method by which it may be suppressed, must first be clearly understood. To this understanding, a consideration of the common-law rules becomes necessary. At common

law, if a defendant proposed to plead *in bar of the action*, he alleged that his utterance or publication was true. This was the plea of justification, and, if successfully maintained, resulted in a verdict in his favor. But the plea was a dangerous one, in that it was required that "the justification should be as broad as the libel," and if the justification failed in any material particular, malice in fact to aggravate the damages was conclusively presumed against the defendant. Resort to the plea of justification was therefore never had, except in the clearest of cases, and the defendant usually rested his defense upon the general issue under which he was allowed to prove any circumstances repelling the inference of malice in fact, thus mitigating the damages. All of this class and kind of evidence became known as evidence in mitigation. It did not constitute a *defense* to the action since evidence offered in mitigation necessarily admitted the falsity of the publication; the offer being merely to dispel from the minds of the jury a belief in the malicious character of the utterance. As these circumstances in mitigation did not constitute a defense, they were not pleaded, and, indeed, under the English system, could not have been pleaded. They were probative facts, and therefore had no place in a pleading. It was always permissible for a defendant, amongst other circumstances, in mitigation to show that at the time of his utterance or publication he entertained an honest belief in the truth of the matter charged, and to give evidence of the foundations upon which that belief rested. Thus it was always permissible, under the general issue, to prove facts and circumstances going to the truth of the matter charged, even if they completely established the truth. Not, as has been said, in bar of the action (for to work this result a plea in justification was necessary), but by showing the solid and substantial foundation for the belief, to dispel, as has been said, the idea that defendant was actuated by malice.

Such continued to be the English rule until the case of *Underwood v. Parks*, 2 Strange, 1200, was decided by the judges. There the defendant, under the plea of not guilty, offered to prove the truth of the words, in mitigation of damages. The Chief Justice refused to permit it, saying: "At a meeting of all the judges upon a case that arose in the common pleas, a large majority of them had determined not to allow it for the future, but that it should be pleaded, whereby the plaintiff might prepare to defend himself, as well as to prove the speaking of the words." Here, for the law of libel, was the opening of a Pandora's box of evils. The case soon came to be construed (or misconstrued) as forbidding, under the general issue, not alone truth, but any evidence tending to establish the truth. What, then, was the result? The defendant could

no longer offer any evidence tending to establish the truth in mitigation, and thus could offer no evidence in support of his declaration of his good faith and honest belief in the truth at the time of the publication. If, on the other hand, forced out of this opportunity, he had resort to the plea of justification, he did so under the grave peril of having malice in fact conclusively presumed against him by a failure fully to justify. Since failure fully to justify was regarded as conclusive evidence of malice in fact in aggravation of damages, it followed, necessarily that, having pleaded justification, he was put to his proof upon it at the outset. If he failed then, no evidence in mitigation of any kind was available to him, because of the conclusive presumption of malice which sprang up by reason of his failure. If he successfully established his justification, then no evidence of any kind in mitigation was necessary. Such was the condition at common law in England, and in the states of the United States which made the common law the basis of judicature. The grave hardship to defendants was recognized and severely denounced. Instructive upon this point are such cases as *Bush v. Prosser*, 11 N. Y. 346; *Bisbey v. Shaw*, 12 N. Y. 67; *Huson v. Dale*, 19 Mich. 17, 2 Am. Rep. 66; and *Van Derveer v. Sutphin*, 5 Ohio St. 293. It is appropriate here to quote the learned Justice Selden, in *Bush v. Prosser*, *supra*:

"First, then, malice was presumed from the falsity of the charge; to this the plaintiff might superadd proof of positive malice, and thus aggravate the damages, while the defendant was precluded, by the rule which excluded all proof of facts tending to establish the truth of the charge, from giving any evidence to rebut malice in mitigation. Upon what did this rule of exclusion rest? Certainly, not upon the *intrinsic impropriety* of the evidence. This is clear from the positions already established. It must have had some other foundation. What was it? The answer to this question is both simple and certain. The rule is merely an unforeseen consequence of that which excluded proof of *the truth of the charge*, under the general issue, in mitigation of damages; a rule which originated with the case of *Underwood v. Parks*, 2 Strange, 1200. The courts have implicitly followed that case, without even seeming to consider that the rule it laid down was not only a departure from the principles of the common law, and a pure piece of judicial legislation, but that, in its consequences, it must necessarily deprive defendants of all power to mitigate the verdict.

"Prior to that case, defendants in this class of actions were permitted to prove, not only the absence of malice, but *the truth of the charge itself*, in mitigation. This is shown by the case of *Smithies v. Harrison*, 1 Lord Raym. 727. The reception of this evidence was in perfect accordance with the

general principles of law. Courts have sometimes, in their speculations upon this subject, seemed to suppose that there was some inherent legal objection to proving, in mitigation merely, that which might amount to a justification; and have applied the rule which excludes proof of the truth of the charge in mitigation, as though that were its foundation. This, however, is an obvious error. It was never any objection to evidence in mitigation that under a different state of the pleadings it would amount to a full defense; the rule in *Underwood v. Parks* was not put upon any such ground. That was an action of slander. The defendant, under the plea of not guilty, offered to prove the words to be true, in mitigation of damages; the Chief Justice refused to permit it, saying that: 'At a meeting of all the judges upon a case that arose in the common pleas, a large majority of them had determined not to allow it for the future, but that it should be pleaded, whereby the plaintiff might be prepared to defend himself, as well as to prove the speaking of the words.' The very terms here used show that this was the introduction of a new doctrine by the common consent of the judges. It is clear, from the reason given, that the intrinsic propriety or impropriety of the evidence had nothing to do with the adoption of this rule. It was a rule of pleading merely, having no other object than to prevent plaintiffs from being taken by surprise, upon the trial, by evidence of the truth of the charge. It was not designed to deprive defendants of the benefit of such evidence, or any evidence, but simply to secure due notice to the plaintiff of what he would be required to meet. This was all very well, in cases where the defendant was prepared to justify, which cases alone the judges had in view in adopting the rule; but when the doctrine came to be applied to cases where all the defendant could or desired to do was to mitigate the damages, by showing the absence of malice, it operated unjustly. It took away the right altogether, since the rules of pleading did not allow anything short of a complete defense to be spread upon the record. The whole difficulty would have been obviated if the judges had simply added to this rule a clause permitting defendants to give, with the general issue, a notice of the facts intended to be proved in mitigation of damages. It would have been no greater stretch of power to have done this, than was required to prescribe the rule itself. But they evidently failed to foresee the conflict which must necessarily arise between the conceded right of the defendant to mitigate the damages, by showing the absence of malice, and the rule they adopted; a conflict which can be clearly traced from that day to the present. The right and the rule were directly repugnant to each other, and no question has ever given rise to a more protracted struggle.

"The courts in England, under a sense of the admitted right, have in a number of cases decided that facts and circumstances falling short of proving, although tending to prove, the truth of the charge might be received in mitigation. *Knobell v. Fuller*, *Norris' Peake*, Append. 32; *Leicester v. Walter*, 2 Camp. 251. But the courts in this state and in Massachusetts, with less justice, but better logic, have uniformly held that a rule which excluded proof of the truth of the charge, must necessarily exclude evidence tending to prove it. But it is a little surprising to observe how often judges have asserted in the same paragraph both the right to mitigate by disproving malice and the rule which effectually precluded the exercise of the right, without any apparent consciousness of the conflict between the two. I will refer to a few only out of the many instances. In the case of *Root v. King*, 7 Cow. (N. Y.) 613, Judge Savage says that the defendant 'may show in evidence, under the general issue, by way of excuse, anything short of a justification which does not necessarily imply the truth of the charge or tend to prove it true, but which repels the presumption of malice arising from the fact of publication.' The same judge, in *Purple v. Horton*, 13 Wend. (N. Y.) 9, 27 Am. Dec. 167, says: 'Facts and circumstances may be shown in mitigation, when they disprove malice, and do not tend to prove the charge, or form a link in the chain of evidence to prove a justification.' Again, Judge Bronson, in *Cooper v. Barber*, 24 Wend. (N. Y.) 105, says: 'Facts and circumstances which tend to disprove malice, by showing that the defendant, though mistaken, believed the charge true when it was made, may be given in evidence in mitigation of damages; but if the facts and circumstances offered tend to establish the truth of the charge, or form a link in the chain of evidence going to make out a justification, they are not admissible in mitigation of damages.' It does not appear to have occurred to either of these eminent judges that there was any incongruity between the two branches of the proposition thus asserted by them. But it is certainly difficult to comprehend how a defendant is to disprove malice, by showing 'that he believed the charge true when it was made,' without giving evidence tending to establish its truth, since a belief based upon information derived from others cannot be shown."

It is to be noted that one of the just complaints made by the courts, of the hardship thus worked to defendants was that, under the English system, where nothing but a complete defense was allowed to be pleaded, defendants were not allowed to plead their honest belief and the foundations for it, and, of course, under the interpretation of *Underwood v. Parks*, they could not prove anything which tended to establish the truth. It was recognized that the rule in this regard must be relaxed. It was relaxed in some jurisdic-

tions by declarations that, to show honest belief, evidence under the general issue could be given, even if that evidence went to establish the truth of the charge, so long as it did not fully establish the charge. It was met in other jurisdictions, such as our own, by statutory provision, allowing the defendant to *plead*, in mitigation, his belief in the truth of the charge and his foundation for that belief. So the section of the Code, in the light of the evil sought to be remedied, is not to be construed as allowing the circumstances in mitigation going to the truth of the charge to be pleaded and proved only where justification is pleaded, but it is to be construed as a declaration quite foreign to and in derogation of the common-law rule that, even where justification is pleaded, the defendant still may prove facts and circumstances going to the truth of the charge in mitigation of damages, or, in other words to negative malice in fact. It is clear, therefore, that the design of the section was to correct the abuses and broaden the rules of common law. It was not designed to narrow those rules. But it is to be remembered that at common law, even under its narrowest and harshest doctrine, it was always permissible, without pleading, to prove any and all other circumstances in mitigation that did not go to establish the truth of the charge.

To construe section 461, therefore, as meaning that in this state, whenever *any circumstances* in mitigation are relied on, they must first be pleaded, is to that extent a contraction of the common-law rule. What the section then means is, to summarize, this: If a defendant pleads justification, he may at the same time plead with his affirmance of good faith and honest belief all facts and circumstances within his knowledge at the time of the publication which support that knowledge and belief, even if they tend to establish the truth of the charge. Moreover, if he desires to plead justification, and also the truth or partial truth in mitigation, he must plead these facts and circumstances in mitigation, in which event they will be considered (as they never were or could have been at common law after *Underwood v. Parks*). Even if the justification fails, these matters will be considered by the jury upon the question of malice. Moreover, as at common law after *Underwood v. Parks*, there was much contrariety of opinion as to whether evidence tending to prove the truth of the charge could be given under the general issue, the Code provision is designed to declare the rule that such evidence, if it goes to the truth of the charge, may be proved, but must be pleaded. But, upon the other hand, where the common law itself was liberal, the Code section was not designed to impair that liberality, and, as at common law all other circumstances in mitigation, excepting those tending to establish the truth of the charge,

could be proved under the general issue, so in this state all other circumstances in mitigation may be so proved without pleading them.

Thus, at great length, though we trust not at unnecessary length, we come to a consideration of the evidence rejected in this case. But, before taking up that consideration, it is proper to add that the plea in mitigation considered in *Tingley v. Times-Mirror Co.*, 151 Cal. 1, 89 Pac. 1097, is precisely such a plea as we have said the section of the Code contemplates *must* be made; that is to say, it was a plea directed to showing the good faith and honest belief of the defendant at the time of the publication, with the facts and circumstances upon which the belief was founded. But there is in this case no declaration and no intimation to the contrary of what has been here stated, namely, that circumstances in mitigation, other than those which go to establish the truth of the libel, need not be pleaded.

Certain of the evidence rejected was evidence of the existence of rumors. If, in fact, evidence of the existence of rumors was admissible in mitigation, as the mere existence of rumors does not go to the truth of the charge, the evidence would be admissible without pleading; but, as has been before shown, the evidence of rumors was not under the circumstances admissible at all. This, of course, is not in derogation of the rule which permits evidence to be given of a reliable source of information, and the due investigation of the matter before publication. *Tingley v. Times-Mirror Co.*, 151 Cal. 1, 89 Pac. 1097. Evidence was rejected which was offered to show that, in other respects than in those specified in the articles, the recommendation of the plumbing inspector and health officer had been disregarded by the board of education. This evidence was offered in mitigation as tending to prove the truth of the charge of loose methods, etc. Therefore it could and should have been pleaded in mitigation with an allegation of the knowledge of the defendants of the fact at the time of the publication. For there is this broad distinction between a plea in justification and evidence of the truth given in mitigation: The truth, whenever discovered, is a complete defense to the defendant. But to repel the conception of malice in the publication only so much of the truth as the defendant knew at the time of the publication can avail him. The same ruling of the court was proper in reference to evidence directed to specific acts of favoritism which had not been pleaded in justification. The offered evidence to show that the manner of filing demands from the school board and the delivery of the warrants in favor of the claimants had been changed since the publication could not, of course, be evidence tending to repel the existence of malice at the time of the publication. And, if the

charge against plaintiff in this regard was libelous, the evidence could only be considered as tending to show the truth of the charge, and was properly rejected as not having been pleaded in mitigation. Evidence to substantiate the charge that plaintiff, as a member of the school board, gave out false information could have been shown under a plea in mitigation, specifically naming the persons to whom such false information was given. *Odgers, Libel & Slander*, p. 591. But, in the absence of such a plea in mitigation, the evidence was properly excluded.

[35] There was given to the jury, as an instruction, an argumentative discussion by this court in *Dauphiny v. Buhne*, 153 Cal. 757, 96 Pac. 880, 126 Am. St. Rep. 136, where there was under consideration the question of qualified privilege as a defense to libel—a question not in this case at all. In the *Dauphiny Case* it is pointed out that "it is always injudicious to take the language of a court, in discussing a proposition of law, as correct instruction to be given to a jury." This is necessarily so, for it is always proper and frequently imperative upon a court of review, in answering arguments pro and con, itself to indulge in argumentative discussion, which is appropriate to the question under consideration, but has no place in an instruction to a jury. Moreover it frequently happens that the Legislature passes an unjust law, which sleeps upon the books until such time as this court is called to rule upon it. In declaring the law as the Legislature has enacted it, it is proper for the reviewing opinion to point out the hardship or injustice which the law may work, as being a most appropriate way of advising the legislative department of its need of correction or amendment. An instance of this, indeed, may be seen in this very case, in the language of *Selden, J.*, quoted from *Bush v. Prosser*, supra. But it does not follow that because a reviewing court may point out the hardship and injustice of an existing rule of law, primarily to the end that the legislative attention may be directed to it, the same statements can be made by a trial judge to the jury, where the effect of them would be an implied invitation to the jury to disregard the law because of its injustice. So in this case the argumentative discussion of this court, dealing with the question of qualified privilege, has no place in an instruction to a jury, especially in a case where no such question of privilege is involved.

We have thus considered all of the questions presented which appear to merit attention, in contemplation of the new trial which must be ordered, and for the reasons given the judgment and the order denying a new trial are reversed, and the cause remanded.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; MELVIN, J.

159 Cal. 742

JENSEN v. DORR. (L. A. 2,616.)

(Supreme Court of California. May 12, 1911.
On Application for Rehearing in
Bank, June 9, 1911.)

1. PLEADING (§ 204*)—COMPLAINT—SUFFICIENCY.

A complaint containing several counts is good as against general demurrer on the ground that the complaint does not allege facts sufficient to constitute a cause of action, where one count states a cause of action.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 486-490; Dec. Dig. § 204.*]

2. MARITIME LIENS (§ 19*)—STATUTES—CONSTRUCTION.

Civ. Code, § 3060, providing that debts of at least \$50 contracted for the benefit of ships are liens, construed in connection with Code Civ. Proc. § 813, giving a lien for materials and services furnished for the construction of vessels, contemplates an existing completed vessel, and refers only to such debts as are contracted for the benefit of a completed vessel, and section 813 gives a lien for construction work, regardless of the amount.

[Ed. Note.—For other cases, see *Maritime Liens*, Cent. Dig. §§ 24, 25; Dec. Dig. § 19.*]

3. MARITIME LIENS (§ 19*)—"CONSTRUCTION WORK"—"SHIP."

Everything originally done in making a vessel complete and ready for use as an instrument of commerce or navigation is construction work, and a structure becomes a ship within the maritime law only when construction work has been fully completed.

[Ed. Note.—For other cases, see *Maritime Liens*, Cent. Dig. §§ 24, 25; Dec. Dig. § 19.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1465-1468; vol. 7, pp. 6485-6488.]

4. MARITIME LIENS (§ 74*)—ENFORCEMENT—COMPLAINT.

A complaint to enforce a lien for work and materials furnished on a vessel which shows that the services and materials were not only furnished in the actual construction of the vessel, but for use in such construction, states a cause of action for the enforcement of a lien given by Code Civ. Proc. § 813 et seq.

[Ed. Note.—For other cases, see *Maritime Liens*, Dec. Dig. § 74.*]

5. MARITIME LIENS (§ 74*)—ENFORCEMENT—COMPLAINT—"ACCOUNT."

A complaint to enforce a lien for work and materials for the construction of a vessel which does not specify the amount due, respectively, for labor and material is not demurrable for uncertainty, for the word "account" in Code Civ. Proc. § 454, providing that the items of an account need not be set forth in a pleading, but the party relying thereon must furnish the same to the other party on demand, includes such demands as are stated in the complaint.

[Ed. Note.—For other cases, see *Maritime Liens*, Dec. Dig. § 74.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 86-96; vol. 8, p. 7561.]

6. PLEADING (§ 345*)—JUDGMENT ON PLEADINGS—ISSUES.

In a suit to enforce liens for labor and materials for the construction of a vessel furnished by plaintiff and his assignors, an answer alleging that defendant has no information or belief sufficient to enable him to answer the complaint, and, basing his denial on that ground, he denies each and several the allegations thereof, raises issues, and a judgment on the pleadings is erroneous, for the matters

of the alleged assignments at least are not presumably within the knowledge of defendant; so the form of denial is permissible.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1055-1059; Dec. Dig. § 345.*]

7. BANKRUPTCY (§§ 421, 433*)—DISCHARGE—EFFECT.

A discharge in bankruptcy bars a personal judgment against the bankrupt for debts incurred in the construction of a vessel, but does not bar the lien given by Code Civ. Proc. § 813 et seq., giving a lien for work done or materials furnished for the construction of vessels.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. §§ 421, 433.*]

8. PLEADING (§ 280*)—SUPPLEMENTAL PLEADING—ALLOWANCE—DISCRETION OF COURT.

It is an abuse of discretion to refuse leave to a defendant to set up by supplemental answer a bankruptcy discharge obtained subsequent to the commencement of the action as a bar to any personal judgment, where proper application is made therefor within a reasonable time.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 280.*]

Department 1. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by Lawrence Jensen against Fred Dorr. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

See, also, 9 Cal. App. 18, 98 Pac. 45; 157 Cal. 437, 108 Pac. 320.

Wilbur Bassett, for appellant. Patterson Sprigg, for respondent.

ANGELLOTTI, J. This is an appeal from a judgment given in favor of plaintiff upon motion for judgment on the pleadings. The complaint was in 19 counts, each of which set up a cause of action for services or material furnished in this state, at the special instance and request of defendant, for the yacht *Yankee Girl*, in the construction of said yacht, owned by said defendant. Three of said counts set up causes of actions for services and materials furnished by plaintiff, and the remaining counts were for services and materials furnished by various other persons who had assigned their respective claims to plaintiff. Some of these claims were for less than \$50. The total sum sought to be recovered was \$4,001.76. Each count stated facts sufficient to warrant a judgment in personam against defendant for the alleged value of the services and material, but plaintiff stated in his complaint that he "claims a lien in and upon said yacht *Yankee Girl* under and by virtue of section 813 of the Code of Civil Procedure of the state of California as to each and all of said causes of action herein set forth." The action was commenced in the year 1907, which was within one year from the time each cause of action accrued. Judgment was given October 21, 1909. By the judgment it was decreed that plaintiff have judgment against the defendant for the sum of \$4,001.76 with interest and costs, and, further, that said yacht *Yankee Girl* be sold to satisfy such

judgment, and that execution be issued against said yacht or whatever securities had been given in lieu of the attachment levied in the action, and payment of the amount due plaintiff under the judgment be made from the proceeds of the sale.

It is not questioned that an attachment was levied on the vessel at the inception of this action under section 817 et seq., Code of Civil Procedure, or that an order refusing to dissolve this attachment was reversed by this court on March 28, 1910, on the ground that the writ of attachment issued, under which the sheriff made his levy, was not in substantial compliance with the requirements of section 819, Code of Civil Procedure. *Jensen v. Dorr*, 157 Cal. 437, 108 Pac. 320. It will be assumed for all the purposes of this decision that there never was any valid attachment of the vessel. The demurrer to the third amended complaint was properly overruled.

[1] There is no basis for the claim that such complaint does not state a cause of action. If a cause of action were stated in only one of the nineteen counts, it would be sufficient as against the demurrer on this ground, which is simply "that said complaint does not allege facts sufficient to constitute a cause of action." But we are satisfied that each count sufficiently states a cause of action against defendant personally, and also states facts sufficient to serve as a basis for a claim of lien on the vessel under section 813, Code of Civil Procedure.

[2] The principal contention of defendant in this behalf is that some of the causes of action are for a less sum than \$50, and that no lien is given unless the debt amounts to \$50. This contention is founded on section 3060 of the Civil Code, enacted in 1872, providing that "debts amounting to at least fifty dollars, contracted for the benefit of ships, are liens in the cases provided by the Code of Civil Procedure." But section 813 of the Code of Civil Procedure, as adopted at the same time, gives a lien for materials and services furnished in connection with steamers, vessels, and boats, in certain specified instances, regardless of the amount of the demand therefor, among which specific instances is that of "work done or materials furnished in this state for their construction, repair or equipment" (subdivision 3). It may be conceded that section 3060, Civil Code, and section 813, Code of Civil Procedure, are to be considered together as though they had been "passed at the same moment of time, and were parts of the same statute." Sec. 4480, Pol. Code; *St. Louis Nat. Bank v. Gay*, 101 Cal. 288, 35 Pac. 876; *The Louis Olsen*, 57 Fed. 845, 6 C. C. A. 608. But we do not think that section 3060 should be construed as applicable to debts contracted in the original construction of a vessel. The section is limited by its express terms to

debts "contracted for the benefit of ships," just as the section giving a lien to the master of a ship (section 3055, Civ. Code) is limited by its terms to advances made or liabilities incurred "for the benefit of the ship." This language appears to contemplate an existing, completed vessel, the marine entity known as a ship after she has been completed and made ready for use as an instrument of commerce or navigation, and the section reasonably construed refers only to such debts as are "contracted for the benefit" of such a completed vessel.

[3] The weight of authority is in favor of the proposition that everything originally done in making a vessel complete and ready for use as an instrument of commerce or navigation is construction work, and that a structure becomes a ship within the meaning of the maritime law only when such construction work has been fully completed. See 26 Cyc. 761, 762, 763. Construing section 3060 as we do, it in no way conflicts with or affects the provision of section 813, Code of Civil Procedure, giving a lien for construction work, regardless of the amount of the debt. How it may affect any other provision of that section it is unnecessary here to determine.

[4] Each count sufficiently shows as against a general demurrer that the services and materials were not only furnished in the actual construction of such vessel, but also were furnished to be used in such construction. This sufficiently answers any objection based on the decision in *Bennett v. Beadle*, 142 Cal. 239, 75 Pac. 843.

[5] There is no force in the points made in defendant's brief in support of his special demurrer for uncertainty, ambiguity, and unintelligibility. The facts alleged in each count clearly show the right to a lien under subdivision 3 of section 813, Code of Civil Procedure, for work done and materials furnished in this state for the construction of the vessel. Basing his claim upon the fact that in four of the counts in which the charge is for both material and labor there is no specification of the amounts due, respectively, for labor and materials, it was urged by the defendant that the complaint is uncertain, etc., in that it cannot be ascertained therefrom what part of the claim is for labor and what part is for materials. These counts were for \$60.35, \$38.85, \$344.35, and \$36.10, respectively, and each may be taken as indicating but a single claim rather than two different causes of action. *McFarland v. Holcomb*, 123 Cal. 84, 55 Pac. 761. The words "the account" as used in section 454, Code of Civil Procedure, providing that the items of an account need not be set forth in a pleading, but that the party relying thereon must furnish the same to the other party if the same be demanded, included such demands as are stated in this case (*Long Beach, etc., v. Dodge*, 135 Cal. 407, 67 Pac. 499), and the demurrer on this ground

was properly overruled (*Long Beach, etc., v. Dodge*, supra; *McFarland v. Holcomb*, supra; *Pleasant v. Samuels*, 114 Cal. 34, 45 Pac. 998; *Wise v. Hogan*, 77 Cal. 184, 19 Pac. 278). The case of *Minor v. Baldrige*, 123 Cal. 187, 55 Pac. 783, decides nothing that would make the complaint here bad in the face of the special demurrer interposed.

Regardless of the question of the correctness of the action of the trial court in refusing to allow defendant to file a supplemental answer, to which question we shall refer later, it must be held that the court erred in granting the motion for judgment on the pleadings.

[6] All of the allegations of each count of the complaint were denied by the answer, the following being the form of denial as to the first count: "For answer to the first cause of action herein defendant has no information or belief sufficient to enable him to answer the allegations of said complaint, and, basing his denial upon that ground, he denies each and several the allegations thereof." The denial as to each of the other causes of action was in precisely the same language; the number of the cause of action being stated in each case. Whatever we might think of this form of denial were the question a new one in this state, it is settled by the decisions that as to matters not presumably within the knowledge of a defendant such a form of denial is permissible, and that a specific denial of each of the allegations as to such matters is not essential, notwithstanding that the complaint is verified. Section 437, Code Civ. Proc. See *Etchas v. Orena*, 121 Cal. 270, 53 Pac. 798; *Read v. Buffum*, 79 Cal. 77, 21 Pac. 555, 12 Am. St. Rep. 131. This is recognized in *Raphael Weill & Co. v. Crittenden*, 139 Cal. 488, 73 Pac. 238, the granting of the motion for judgment on the pleadings being sustained in that case upon the theory that all of the material matters alleged in the complaint were presumably within the knowledge of the defendant, and the case being expressly distinguished from the cases above cited by reason of that fact. In 16 of the 19 causes of action set forth in the complaint at bar, the plaintiff was not the original owner of the claim alleged, but sued as assignee, alleging as to each an assignment from the original claimant. Whatever may be said as to any other allegation, it is clear that it cannot be held that the matters of the alleged assignments were presumably within the knowledge of defendant. See *Read v. Buffum*, supra. This being so, it necessarily follows, in view of the decisions cited, that issue was properly joined on the question of assignment at least, and plaintiff was not entitled to judgment upon any of the alleged assigned claims without proof made of the fact of assignment. We are not to be understood as deciding that the allegations as to assignment are the only matters alleged in the complaint not presumably within the

knowledge of the defendant. The error of the trial court in this behalf is such as to necessarily require a reversal of the judgment.

[7] Defendant asked leave to file a supplemental answer setting up bankruptcy proceedings instituted by him on August 12, 1908, resulting in a decree made by the District Court of the United States for the Southern District of California on July 26, 1909, discharging him from all debts and claims made provable by law against his estate and existing on August 12, 1908. This covered all the debts embraced in this action so far as any personal liability on the part of defendant was concerned. The only answer to this application was a showing of the levy of an attachment on the vessel under the writ which was held defective in *Jensen v. Dorr*, 157 Cal. 437, 108 Pac. 320, and the trial court refused leave to file the supplemental answer. Nevertheless the court, in addition to judgment for the enforcement of the liens on the vessel, gave a personal judgment against the defendant for the full amount of the claims sued on. While plaintiff may have been entitled to enforce the liens on the vessel regardless of the bankruptcy proceedings, he was not entitled to a personal judgment against defendant in the face of such a decree; and, in view of the nature of the judgment actually given, the refusal of the trial court to permit the filing of the supplemental answer was prejudicial error.

[8] It cannot be doubted that it is an abuse of discretion for a trial court to refuse leave to a defendant to set up by supplemental answer a bankruptcy discharge obtained subsequent to the commencement of the action, as a bar to any personal judgment, where proper application is made therefor within a reasonable time after obtaining such discharge.

For the purpose of possible future proceedings in this case, it is proper to consider some other points made by defendant.

By his reply brief certain points are made, based upon the assumption that there was never any valid attachment of the vessel, an assumption that we shall concede is well based. We, however, regard that fact as immaterial so far as the portions of the judgment enforcing the lien are concerned. The existence of the liens declared by section 813, Code of Civil Procedure, is not dependent upon an attachment of the vessel. The claimant has such a lien which he may enforce by action, whether he attaches or not; the attachment remedy, being given simply for purposes of more adequate security. This was early determined in this state in the light of certain sections of the practice act differing in no respect material to this question from section 813 et seq., Code of Civil Procedure. See *Meiggs v. Scannell*, 7 Cal. 408. The views expressed in the case last cited have never been departed from.

There is no force in the claim that without an attachment of the vessel plaintiff's liens expired with the expiration of one year from the time his cause of action accrued, although this proceeding to enforce the liens was instituted within such year. It is true that the statute expressly provides that "such liens only continue in force for the period of one year from the time the cause of action accrued." This is the only provision as to the time within which a claimant must take any step to preserve and enforce his lien. It can reasonably be taken as meaning no more than that the lien will expire at the end of the year unless a legal proceeding has then been instituted and is still pending to enforce it, and any proceeding instituted for that purpose within the year must be determined, so far as the question of the existence of a lien is concerned, upon the facts as they existed at the time of the commencement of such proceeding. We see no warrant in the statute for any other conclusion.

We see no reason why the trial court, in a proceeding of this character, may not by its judgment order the sale of the vessel to satisfy the liens adjudged, even though no attachment has been levied on the vessel, and no other execution is essential to enable the officer to carry out the judgment than a certified copy of such judgment.

It is further to be observed that, the attachment having been discharged, any bond previously given by defendant to procure the release of the vessel from the invalid attachment is also invalid, and cannot be resorted to, as the judgment now directs, for the purpose of satisfying the judgment.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

We concur: SHAW, J.; SLOSS, J.

On Application for Rehearing.

ANGELLOTTI, J. Referring to the matters set up in defendant's petition for rehearing:

(1) Regardless of the question of the expiration of the liens, the case must be remanded for further proceedings. It has not yet been determined in this case that defendant was ever adjudged a bankrupt, or discharged as a bankrupt from all debts and claims existing on August 12, 1908. He sought to tender this issue, but was denied the right to do so. We have held that he should have been allowed to make this defense. But we cannot assume that the allegations of his proposed supplemental answer in that behalf are true. That is a matter to be determined by the trial court on a new trial, if such supplemental answer is presented.

(2) In view of the argument contained in the petition for rehearing, we are not entirely satisfied as to the correctness of some

of the statements made in the opinion, in discussing, for the purpose of possible future proceedings, certain points made by defendant. As the case must, in any event, be remanded for further proceedings, we deem it preferable to strike out the portion of the opinion referring to such points, rather than to grant a rehearing solely for the purpose of now reconsidering the matter therein contained.

The opinion heretofore filed is modified by striking out all that portion thereof commencing with the words, "for the purpose of possible future proceedings in this case," etc., and ending with the words, "as the judgment now directs, for the purpose of satisfying the judgment."

The petition for a rehearing is denied.

We concur: BEATTY, C. J.; SHAW, J.; SLOSS, J.

160 Cal. 106

WESTERN UNION TELEGRAPH CO. v.
HOPKINS, County Assessor.
(L. A. 2,445.)

(Supreme Court of California. June 5, 1911.)

1. TAXATION (§ 276*)—FRANCHISES—PLACE OF ASSESSMENT.

The franchise granted by Civ. Code, § 536, authorizing telegraph or telephone corporations to construct telegraph or telephone lines on any public highway, etc., vests when actually accepted by the exercise of the right granted, and is assessable only in the place where such franchise is exercised.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 453-468; Dec. Dig. § 276.*]

2. TELEGRAPHS AND TELEPHONES (§ 10*)—RIGHTS IN STREETS—"POST ROADS"—WHAT ARE.

Under Rev. St. U. S. § 3964 (U. S. Comp. St. 1901, p. 2708), declaring that all letter carrier routes established in any city for the collection and delivery of mail shall be post roads, and Code Civ. Proc. § 1875, subd. 3, requiring the courts to take judicial notice of acts of the executive departments of the United States, the streets of a city kept up and maintained as such are letter carrier routes established in the city for the collection and delivery of mail, and are post roads; and a telegraph company maintaining telegraph lines on the terms imposed by Act Cong. July 24, 1866, c. 230, 14 Stat. 221, empowering any telegraph company accepting the obligations of the act to construct, maintain, and operate telegraph lines over any military or post roads of the United States, has such right to the streets of a city, constituting post roads, as are granted by the act, and such rights constitute a federal franchise.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 10.*]

For other definitions, see Words and Phrases, vol. 6, p. 5473.]

3. TELEGRAPHS AND TELEPHONES (§ 10*)—FRANCHISES—STATE AND FEDERAL.

The right of a telegraph company granted by Act Cong. July 24, 1866, c. 230, 14 Stat. 221, empowering telegraph companies to construct and operate lines over military and post roads, and Civ. Code, § 536, authorizing telegraph corporations to construct telegraph lines

on any public road, to use the streets of a city organized under Pol. Code, § 4354 et seq., exists independently of any grant by the city, where the company had established its system in the streets prior to the incorporation of the city, and the city cannot add to its right in that behalf, and anything enjoyed by the company not covered by the act of Congress must be derived from Civ. Code, § 536.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 10.*]

4. COURTS (§ 97*)—CONTROLLING DECISIONS—FEDERAL QUESTIONS.

The question of the extent and character of the rights granted by Act Cong. July 24, 1866, c. 230, 14 Stat. 221, empowering any telegraph company accepting the obligations of the act to construct and operate telegraph lines over military or post roads, is exclusively a federal question on which the decisions of the federal Supreme Court are final.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 329-334; Dec. Dig. § 97.*]

5. TELEGRAPHS AND TELEPHONES (§ 10*)—FRANCHISES—RIGHTS ACQUIRED UNDER FEDERAL ACT.

Act Cong. July 24, 1866, c. 230, 14 Stat. 221, empowering any telegraph company accepting the obligations of the act to construct and operate telegraph lines over military or post roads of the United States, though preventing a city from absolutely prohibiting a telegraph company accepting the act from operating under the act, does not permit the company to appropriate to its exclusive use portions of highways without being subject to the charges on behalf of the state by way of compensation for such use, as the state has a property interest in its public highways which is not divested by a grant under the act.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 6; Dec. Dig. § 10.* Municipal Corporations, Cent. Dig. § 1487.]

6. TAXATION (§ 276*)—TELEGRAPHS AND TELEPHONES—FRANCHISES—STATE FRANCHISE.

Where the state grants to a telegraph company having a franchise under Act Cong. July 24, 1866, c. 230, 14 Stat. 221, empowering any telegraph company accepting the act to construct and operate telegraph lines over military or post roads, the right to exclusive possession of portions of its public highways without compensation, the company obtains a franchise having, for purposes of assessment, a local situs, and is assessable in the particular city or county in which the streets so occupied are situated.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 453-468; Dec. Dig. § 276.*]

7. TELEGRAPHS AND TELEPHONES (§ 10*)—FRANCHISES—ACCEPTANCE.

Where a valid state statute purports to grant to a telegraph company, having a franchise under Act Cong. July 24, 1866, c. 230, 14 Stat. 221, to construct and operate telegraph lines on military or post roads, the right to the exclusive possession of portions of its public highways without compensation, the exclusive occupation by the company of portions of public highways for the authorized purposes is an acceptance by it of the offered franchise.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 10.*]

8. TELEGRAPHS AND TELEPHONES (§ 10*)—FRANCHISES—STATUTES—EFFECT.

Under Pol. Code, § 2618, defining highways, and section 4408, empowering the council of any city to regulate the streets in the city and the use thereof, a city may not exclude a

telegraph company from such use of its streets as is expressly authorized by Civ. Code, § 536, nor exact compensation for such use, but it may make regulations for the use incident to a proper exercise of the police power.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 6; Dec. Dig. § 10;* Municipal Corporations, Cent. Dig. § 1487.]

9. MUNICIPAL CORPORATIONS (§ 71*) — STREETS—LEGISLATIVE CONTROL.

The state in its sovereign capacity may control all public streets, and, except as the control is relinquished to municipalities, it remains with the state Legislature to be exercised in a manner not prohibited by the state Constitution.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 175; Dec. Dig. § 71.*]

10. TELEGRAPHS AND TELEPHONES (§ 10*)—FRANCHISES—STATUTES—CONSTRUCTION.

Civ. Code, § 536, empowering telegraph corporations to construct telegraph lines on any public highway, grants to a telegraph company, having a franchise under Act Cong. July 24, 1866, c. 230, 14 Stat. 221, empowering any telegraph company accepting the obligations of the act to construct and operate telegraph lines over the military or post roads of the United States, a franchise in addition to the franchise given by the federal act, and the state franchise includes the right to such exclusive occupation by a telegraph company of parts of the streets as is maintained for the purpose of its system.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 10.*]

11. TELEGRAPHS AND TELEPHONES (§ 10*)—FRANCHISES—CONSTRUCTION.

A franchise granted by the state to a telegraph company to construct and operate telegraph lines over public highways necessarily implies the right to maintain such lines.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 10.*]

12. CONSTITUTIONAL LAW (§ 101*)—EMINENT DOMAIN (§ 85*)—FRANCHISES—GRANTS—ACCEPTANCE—VESTED RIGHTS.

Where a telegraph corporation constructed its telegraph lines in the streets of a city prior to Civ. Code, § 536, empowering telegraph companies to construct lines over public highways, and it continued to maintain its lines after the adoption of the Code, the continued maintenance of exclusive possession of portions of highways without compensation was an acceptance of the franchise, and it acquired vested rights, and, in the absence of any right of revocation reserved in the Code, its rights could not be taken away without compensation.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 101;* Eminent Domain, Cent. Dig. §§ 221-226; Dec. Dig. § 85.*]

13. STATUTES (§ 72*)—GENERAL APPLICATION—NECESSITY.

Civ. Code, § 536, empowering telegraph companies to erect telegraph lines over public highways, is not in conflict with Const. 1849, art. 1, § 11, providing that all laws of a general nature shall have a uniform operation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 72; Dec. Dig. § 72.*]

14. STATUTES (§ 79*)—GENERAL AND SPECIAL LAWS.

Civ. Code, § 536, empowering telegraph or telephone corporations to erect lines over public highways, is not in conflict with the present Constitution, prohibiting special legislation be-

cause limited to corporations, and not including natural persons or partnerships.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 84, 85; Dec. Dig. § 79.*]

15. CONSTITUTIONAL LAW (§ 48*)—STATUTES—VALIDITY—PRESUMPTIONS.

To warrant the court in adjudging legislation void on the ground of special legislation, it must clearly appear that there is no sufficient reason to warrant the Legislature in finding a difference and making a discrimination, and every presumption is in favor of the validity of the act.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

16. CONSTITUTIONAL LAW (§ 101*)—VESTED RIGHTS—FRANCHISES.

Const. 1879, art. 12, § 6, declaring that all existing franchises under which an actual organization has not taken place shall have no validity, does not affect Civ. Code, § 536, empowering telegraph corporations to erect lines over public highways, for, so far as any corporation has not at the time of the adoption of the Constitution accepted the provisions of the section, there is no existing franchise to be annulled.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 101.*]

17. TAXATION (§ 117*)—FRANCHISE—POWER OF STATE.

A tax on the franchise of a telegraph corporation granted to it by Civ. Code, § 536, empowering telegraph corporations to erect lines over public highways, is solely on property within the state, and the franchise is taxable, though the corporation possesses a federal franchise which is not taxable.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 214; Dec. Dig. § 117.*]

In Bank. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by the Western Union Telegraph Company against Ed. W. Hopkins, county assessor of the county of Los Angeles. From a judgment for plaintiff, defendant appeals, Reversed.

J. D. Fredericks, Dist. Atty., and Hartley Shaw, Chief Deputy, for appellant. Beverly L. Hodghead (Brown & Wells and Geo. H. Fearons, of counsel), for respondent. Leslie R. Hewitt, City Atty., J. P. Wood, City Atty., W. B. Mathews, John W. Shenk, Wm. J. Carr, and Pillsbury, Madison & Sutro, amici curiae.

ANGELLOTTI, J. The assessor of Los Angeles county levied an assessment against the plaintiff for the fiscal year ending June 30, 1908, in the sum of \$50,000, upon its "franchise granted by the state of California to use the public highways of the city of Los Angeles," fixed a tax on said assessment at the rate of taxation applicable to property as to which he was authorized to collect taxes, the same amounting to \$520, and was proceeding, in accordance with the law relative to enforcement of the tax in cases where he was authorized to collect, to seize, and sell certain personal property of plaintiff in satisfaction of the tax. This

action was thereupon commenced by plaintiff to enjoin him from proceeding with the collection of such tax, on the ground that said assessment and tax are void. This claim of plaintiff was sustained by the trial court, and judgment was accordingly given in favor of plaintiff. This is an appeal by defendant assessor from such judgment. The case was submitted to and decided by the trial court upon an agreed statement of facts. No question is made as to the propriety of the remedy by injunction in this case, "if in fact the assessment made against plaintiff was invalid." The question presented for our determination on this appeal is the validity of this assessment upon the agreed facts.

Plaintiff, a New York corporation engaged in an interstate telegraph business, on June 12, 1867, duly accepted the terms and privileges, restrictions, and obligations of the act of Congress approved July 24, 1866, (chapter 230, 14 Stat. 221), entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal and military and other purposes." That act provides that any telegraph company accepting in writing the restrictions and obligations required by the act "shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States; provided, that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads." Plaintiff ever since its acceptance of this act has been entitled to the privileges granted thereby. In the year 1870 plaintiff first constructed its telegraph system in the city of Los Angeles, and has ever since maintained and operated it therein, repairing, reconstructing, adding thereto, and changing the location of its wires in some cases from one street to another, all as the demands of its business in said city required. For many years last past, it has continuously maintained its lines of telegraph through, over, and upon the public roads, streets, and highways, kept up and maintained as such in the county of Los Angeles, in the city of Los Angeles, in the state of California, and elsewhere throughout the United States. On the first Monday of March, 1907, it had erected and was maintaining and operating on certain streets and highways of said city, kept up and maintained as such, as a part of its general telegraph system, poles with wires strung thereon, all so placed as not to interfere with ordinary travel on said streets or highways, and also a little less

than one mile of underground conduit underneath the surface of said streets. Plaintiff has never obtained or received any franchise from the city of Los Angeles for the use of any of its streets for the construction or maintenance of its telegraph system, and it has no franchise whatever for such use of the streets of the city other than its federal franchise granted by the act of Congress of July 24, 1866, and other than such franchise, if any, as it has under section 536 of the Civil Code of California. Plaintiff has never claimed to have or to have exercised any franchise under said section 536 of the Civil Code.

It is to be borne in mind that the only right or franchise here involved is the one granted by the state, if any, to use the public highways of the city of Los Angeles, the assessment being limited by its terms to that particular right, and not including the right to use public highways in the county of Los Angeles outside of said city.

[1] The franchise alleged to have been so granted was one for the construction of lines of telegraph along and upon any public road or highway by any telegraph corporation, which like the grant made by section 19 of article 11 of the Constitution regarding the use of streets for water or gas pipes, would vest only when actually accepted by the exercise of the right granted and would be assessable only in the place where such exercise is had. *Stockton, etc., Co. v. San Joaquin Co.*, 148 Cal. 318, 83 Pac. 54, 5 L. R. A. (N. S.) 174.

[2] It was erroneously stated in the opinion of Mr. Justice McFarland in *Western Union Co. v. Visalia*, 149 Cal. 744, 87 Pac. 1023, that section 3964 of the Revised Statutes of the United States provides that "all public roads and highways while kept up and maintained as such are declared to be post roads." That section contains no such provision; it being limited so far as public streets or roads are concerned to certain roads during the time mail is carried thereon. The provision referred to in that opinion is in another act of Congress, and is incorrectly quoted in that the words "post routes" are used in the act instead of "post roads." 23 U. S. Stats. 3 (U. S. Comp. St. 1901, p. 2708). It has been held that the terms are not synonymous, and that letter carrier routes in cities were not post roads until declared such by said section 3964, although they were post routes. *Blackham v. Gresham (C. C.)* 16 Fed. 611. Said section 3964 provides that "all letter carrier routes established in any city or town for the collection and delivery of mail matter" shall be post roads. We think that we are warranted in assuming that the streets of the city of Los Angeles kept up and maintained as such are letter carrier routes established in such city for the collection and delivery of mail matter, and consequently are post roads under section 3964, U. S.

Revised Statutes. Code Civ. Proc. § 1875, subd. 3. If this be so, it is unnecessary to determine the effect of the statute declaring all public roads and highways to be post routes. What we have said in this matter is called forth by the claim of defendant that, as the agreed statement of facts does not state whether the streets of the city of Los Angeles occupied by plaintiff are letter carrier routes, plaintiff has failed to show that its federal franchise granted by the act of July 24, 1866, covers such streets, a question considered material in determining whether as to the streets of the city of Los Angeles plaintiff has acquired any valuable right under section 536 of the Civil Code of this state.

It was held by the United States Supreme Court in the case of *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708, that the act of July 24, 1866, is not limited to such military and post roads as are upon the public domain, but extends to all in the United States, including those in the various states. It was said: "These are all within the dominion of the national government to the extent of the national powers, and are, therefore, subject to legitimate congressional regulation." The power to make such provision as to military and post roads situated in the various states was held to be included in the powers granted to the national government to regulate commerce among the several states and to establish post offices and post roads. There has been no modification of these rules by any subsequent decision of that court, which, of course, is the final arbiter on such questions. It is clear, therefore, that plaintiff has under this act of Congress such rights in regard to the streets of the city of Los Angeles as are granted by the act in regard to military or post roads. Such rights constitute its federal franchise. There is no pretense that this federal franchise may be assessed for taxes by the state, county, or municipality, and the assessment here involved does not purport to include it, being confined in terms to an alleged franchise granted by the state of California.

The claim of grant of franchise by the state is based solely on section 536, Civil Code. That section as originally adopted in 1872 was as follows: "Telegraph corporations may construct lines of telegraph along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters." A very similar provision was to be found in our laws relating to telegraph companies or associations organized under laws of the state of California for many years prior to

the adoption of the Code. See Stats. 1850, p. 369, and Stats. of 1857, p. 171. This section has never been expressly repealed or amended in any particular except by expressly extending the privileges therein granted to telephone corporations, which was done in the year 1905 by a repeal of the section and its re-enactment by the same act in such a form as to expressly include telephone corporations. The ultimate question in this case is whether this section grants any right to plaintiff in regard to the streets of the city of Los Angeles in addition to the rights therein granted by the act of Congress, which right so granted by the section has been accepted and is being exercised by plaintiff. If this question be answered in the affirmative, it is clear that plaintiff has under the section a right in the streets of the city of Los Angeles, in the nature of a franchise, granted by the state, constituting property assessable as other property in the place where it is situated. *Stockton Gas, etc., Co. v. San Joaquin Co.*, supra. If, on the other hand, this question is answered in the negative, it appears necessarily to follow that plaintiff has no franchise granted by the state. The question of the effect of section 536 of the Civil Code with relation to telegraph corporations operating under the provisions of this act of Congress, has never been determined by this court, except in so far as it was determined in *Western Union Tel. Co. v. Visalia*, 149 Cal. 744, 751, 87 Pac. 1023. In *San Francisco v. Western Union Tel. Co.*, 96 Cal. 140, 31 Pac. 10, 17 L. R. A. 301, it was assumed that the assessment was on the federal franchise, and it was one of the things taken as granted that the company "has derived no franchise from the state of California." In *Western Union Tel. Co. v. Visalia*, supra, the assessment was on "a franchise granted by the city of Visalia." The company had erected and was using its lines of poles and wires through what were afterwards streets of the city of Visalia before the city was incorporated, and had ever since used the same. The city of Visalia in the year 1892 purported to grant to the company by ordinance the right to use its streets for its poles and wires. The city was then existing under a special act of the Legislature which made sections 4354 to 4456, Political Code, a part of the charter. Stats. 1873-4, p. 171. The majority opinion held that, in so far as the ordinance of Visalia purported to grant any rights, it merely attempted to give to plaintiff that which it already had and was of no legal effect whatever. It was not expressly decided by that opinion what was the source of the company's rights in that regard, the federal act or the state law. The opinion of Justice McFarland, concurred in by Justice Lorigan, did say that the company had the right to operate a telegraph line along the streets of the city "not only from the

act of Congress above referred to, but also from section 536 of our Civil Code," but there was no expression of opinion therein as to whether said section 536 granted any rights that were not already possessed by the company under the act of Congress.

[3] The case, however, did necessarily decide that in view of the act of Congress and section 536, Civil Code, the right of the company to use the streets of a city organized and existing under the general laws of the state relating to municipal corporations contained in sections 4354 to 4456, Political Code, where it had established its system therein prior to the incorporation of the city, existed independently of any grant by the city, and that the city could not add to its right in that behalf. It also necessarily decided that, if there was anything enjoyed by the company that was not covered by the act of Congress, its rights in that behalf were derived from section 536, Civil Code.

[4] The question of the extent and character of the rights granted by the federal act is, of course, exclusively a federal question, upon which the decisions of the United States Supreme Court are necessarily final. There is apparently considerable difference in the views of learned counsel appearing in this case, and also in the views of different judges, both federal and state, as to the effect of various decisions of the United States Supreme Court touching this question. But we think there can reasonably be no difference of opinion as to the meaning of those decisions so far as all questions necessary to the determination of this case are concerned. It was clearly and definitely established by the decision of that court in *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380, that the privilege conferred by the act of July 24, 1866, on telegraph companies to construct, maintain, and operate lines of telegraph over such post roads as are public streets or highways of a state, is subject to the right of the state to charge and receive compensation from the telegraph company for the use by it of so much of the street or highway as is exclusively devoted to its purposes. That case involved the validity of a charge imposed by the city of St. Louis, held to represent the state, upon telegraph companies, for the privilege of using the streets of the city of a certain amount per annum for each pole erected or used by them in such streets, and the right to impose such a charge, held to be in the nature of rental for the use of property belonging to the city, was upheld. The court having considered the nature of the use made by the company, showing that such use differed from that of the general public, which was temporary and shifting, in that it is "in respect to so much of the space as it occupies with its poles, permanent and exclusive," effectually and permanently dispossessing the general pub-

lic as if it had destroyed that amount of ground, proceeded to consider the claim of the telegraph company that, by reason of the provisions of the act of July 24, 1866, it had the right to so occupy the streets with its poles free of charge on the part of the state or city. Upon this point the court, after declaring that it is a misconception to suppose that the franchise or privilege granted by the act of 1866 carries with it the unrestricted right to appropriate the public property of a state, and that a grant from one government cannot abridge any property rights of a public character created by the authority of another sovereignty, said: "No one would suppose that a franchise from the federal government to a corporation, state or national, to construct interstate roads or lines of travel, transportation or communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a state. It would not be claimed, for instance, that under a franchise from Congress to construct and operate an interstate railroad the grantee thereof could enter upon the statehouse grounds of the state, and construct its depot there, without paying the value of the property thus appropriated. Although the statehouse grounds be property devoted to public uses, it is property devoted to the public uses of the state, and property whose ownership and control are in the state, and it is not within the competency of the national government to dispossess the state of such control and use, or appropriate the same to its own benefit, or the benefit of any of its corporations or grantees, without suitable compensation to the state. This rule extends to streets and highways. They are the public property of the state. While for purposes of travel and common use they are open to the citizens of every state alike, and no state can by its legislation deprive the citizens of another state of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or corporation of the same or another state, or a corporation of the national government, it is within the competency of the state, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation. It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the state may, if it chooses, exact from the party or corporation given such exclusive use pecuniary compen-

sation to the general public for being deprived of the common use of the portion thus appropriated."

These views were reaffirmed and applied in *Postal Tel. Co. v. Baltimore*, 156 U. S. 210, 15 Sup. Ct. 356, 39 L. Ed. 399, and approved in *Richmond v. Southern Bell T. & T. Co.*, 174 U. S. 771, 19 Sup. Ct. 778, 43 L. Ed. 1162, and they have not been modified by any subsequent decision.

[5] It thus appears to be settled by the decisions of the court of last resort on such questions that, even if a state has no power to absolutely prohibit such exclusive use of portions of its public highway by a telegraph company operating under said act (see, however, *Western Union Tel. Co. v. Pennsylvania, etc., Co.*, 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Ed. 312), it nevertheless has a property interest in its public highways which is not divested by a grant of the United States to the telegraph company, and which may be the subject of grant from the state to the company. Notwithstanding the act of Congress, the telegraph company cannot appropriate to its exclusive use portions of such highways without being subject to charges on behalf of the state by way of compensation for such use.

[6] It is obvious, then, that, if the state grants to such a company the right to such exclusive possession of portions of its public highways without compensation, the company obtains thereby something not acquired by it under the act of Congress, and that such right so acquired by the company is nothing more nor less than a franchise, within a well-recognized meaning of that term, granted by the state, having for purposes of assessment a local situs, and being assessable in the particular city or county in which the streets so occupied are situated. *Stockton, etc., Co. v. San Joaquin Co.*, supra.

[7] It is also clear that, where there is a valid law of the state purporting to grant such right to telegraph companies generally, the exclusive occupation by a company of portions of public highways for the authorized purposes is an acceptance by it of the offered franchise. *Stockton, etc., Co. v. San Joaquin Co.*, supra.

[8] In the light of what we have said, it appears that the case of *Western Union Tel. Co. v. Visalia*, 149 Cal. 744, 87 Pac. 1023, does necessarily decide that section 536, Civil Code, was effectual to grant this right as to all highways lying outside of municipalities, and that where such a grant was accepted by a company the subsequent inclusion of a highway so occupied by a municipality existing under such laws relating to municipal corporations as were contained in sections 4354 to 4456, Political Code, would not operate to impair the effect of such grant. Section 536, Civil Code, has, however, never been confined in terms to highways outside of municipalities, but always purported to apply to all public highways in the state. The term

"public highways" includes streets in cities. Pol. Code, § 2618. It is not claimed that at any time prior to the construction of its telegraph system by plaintiff in the city of Los Angeles the state had vested in that municipality any right of control over public highways therein, except in so far as the Legislature had empowered the common council of any city, among other things, "to regulate the streets, wharves, piers and chutes in the city and the use thereof." Section 4408, Pol. Code. Manifestly this provision, when considered in connection with section 536, Civil Code, adopted at the same time, cannot be construed as conferring any greater power than that of doing such things in regard to the streets and the use thereof as were justified in the legitimate exercise of the police power, and would not have warranted the municipality in attempting to exclude a telegraph company from such use of its streets as was expressly authorized by section 536, Civil Code, or in exacting compensation for such use. It warranted such regulation of the use as was incident to a proper exercise of the police power, and nothing more.

[9] It is universally recognized that the state in its sovereign capacity has the original right to control all public streets and highways, and that except in so far as that control is relinquished to municipalities by the state, either by provision of the state constitution or by legislative act not inconsistent with the Constitution, it remains with the state Legislature to be exercised in any manner not prohibited by the state Constitution.

[10] From what we have said it is apparent that the case of *Western Union Tel. Co. v. Visalia*, supra, necessarily determined material questions arising in this case in such a manner as to sustain the validity of the assessment involved. In other words: If that decision is to be followed, section 536, Civil Code, constituted a grant to telegraph companies of rights in regard to the streets of cities, in addition to the rights given by the act of Congress, which to the extent that they were accepted and availed of by any company, constituted a franchise granted by the state and accepted by the company. This so-called state franchise included the right to such exclusive occupation by the company of portions of the streets as is maintained for the purpose of its system, leaving nothing in that behalf to be granted by the municipality. Under that decision, so far as the telegraph company holds these rights, it holds them solely under and by virtue of section 536, Civil Code. It is proper to say that there is no question in this case of any attempted revocation or modification by either state or city of any privilege purported to be granted by the state to plaintiff, and that the city of Los Angeles has never purported to grant any of such privileges to plaintiff, but has apparently acquiesced in the claim of plaintiff that it is entitled to use its

streets, subject only to the lawful exercise by the city of such rights in regard to such use as it has under the police power. What those rights are is a question in no way involved in this case.

It is earnestly urged by counsel appearing as amici curiæ that section 536, Civil Code, is either unconstitutional or cannot be construed as it was in the *Visalia* Case, and that, if neither of these contentions be upheld, it nevertheless must be held that the section has been repealed by implication so far as the city of Los Angeles is concerned. As to the latter claim, it is sufficient to say that none of the laws upon which the claim of repeal by implication is based was enacted prior to 1883, which was long after the construction of plaintiff's system along the streets of the city of Los Angeles. Assuming that section 536, Civil Code, was a grant of the right to such use of the streets, we are of the opinion that it must be held, to use the language of the United States Circuit Court of Appeals in *Sunset Tel. & Tel. Co. v. Pomona*, 172 Fed. 837, 97 C. C. A. 251, that the maintenance and operation of such system "was an acceptance by it of the provisions of that statute, which thereby became a contract between the company and the state, secured by the Constitution of the United States against impairment by any subsequent state legislation." In this connection it should be said that learned counsel for plaintiff assert that inasmuch as it constructed its lines in the streets of Los Angeles in the year 1870, prior to the adoption of section 536, Civil Code, it never manifested any acceptance of the rights offered by the statute and has exercised no franchise thereunder.

[11] Of course, the grant of the right to "construct" and "erect" contained in the section necessarily implied the right to maintain.

[12] Although the construction was before the adoption of the Civil Code section, the continued maintenance of exclusive possession of portions of highways without compensation was a sufficient acceptance. It once being established that the act of Congress did not give the right to such exclusive possession without compensation, the maintenance of such possession by plaintiff was necessarily under the Civil Code section, and cannot be attributed to any other authority.

Returning to the points made as to the proper construction of section 536, Civil Code, and its constitutionality if it be given the effect attributed to it in the *Visalia* Case: While there is some conflict in the authorities cited from other states, we are of the opinion that the weight of authority and the better reasoning support the construction given by the *Visalia* Case, viz., that the section was a grant by the state to all telegraph corporations accepting the same, of the rights therein specified. The reasons given by learned counsel in support of a contrary construction do not appeal to us as having much

force in the face of the clear and unambiguous language used. And to the extent that the offer of the state contained in the section was accepted by a telegraph company by actual occupation of highway prior to any repeal, modification, or suspension of the section, no right of revocation having been reserved, such telegraph company has vested rights that cannot be taken away by state or city without compensation.

In this connection, learned counsel claim that a right to revocation was reserved, basing their claim on the constitutional provision that all laws passed pursuant to the section providing for the formation of corporations may be altered from time to time or repealed (section 31, art. 4, Const. 1849; section 1, art. 12, Const. 1879), and on section 327, Political Code, providing that a statute may be repealed at any time except when otherwise provided therein, and that persons acting thereunder are deemed to have acted in contemplation of this power of repeal. The effect of similar provisions was learnedly discussed by Justice Cooley in *City of Detroit v. Detroit, etc., Co.*, 43 Mich. 140, 5 N. W. 275, where it was sought, under express authority of an act of the Legislature of the state, to deprive a plank road company of its right acquired under a prior statute to maintain a toll gate within the existing corporate limits of the city of Detroit. It was there concluded that the effect would be to deprive the company of property lawfully acquired, and that there was no well-considered case in which it had been held that a Legislature, under the general power to amend a charter, might take from a corporation any of its substantial property or property rights. A distinction is made in the opinion between the cases involving the question of the liability of corporations to the control of the general police laws and cases involving acts passed solely in the exercise of the reserved general power to amend and repeal charters of corporations. Of course, the liability of plaintiff to all such reasonable regulations as is warranted in the proper exercise of the police power cannot be disputed. In fact, this is expressly stipulated by the provisions in section 536, Civil Code, that the system of the telegraph company must be constructed "in such manner and at such points as not to incommode the public use of the road or highway." But in so far as actual occupation of a highway by a telegraph company was taken or had under section 536, Civil Code, we are of the opinion that a vested right resulted, subject only to the proper exercise of the police power, and that it must be held that there was no such reservation as warranted such right being taken away without compensation.

We are satisfied, too, that there was nothing in the old Constitution of this state which was in force at the time of the adoption of the Codes and up to the year 1880 that prohibited the granting of such rights to telegraph corporations.

[13] The only provision referred to by learned counsel is section 11 of article 1 of that Constitution, which provided that "all laws of a general nature shall have a uniform operation." We do not see that this provision is at all applicable.

[14] The claim is that the grant made by section 536, Civil Code, is void because it is limited to "corporations," and does not include natural persons or partnerships. It is not to be doubted that a grant of such rights to a single telegraph corporation would have been valid under the old Constitution, which contained no inhibition whatever against special legislation. Section 536 was such a grant to all corporations, and was no more objectionable so far as legal prohibition is concerned, than a grant to a single corporation. But we are not prepared to hold that the section is violative of the provisions of our present Constitution relating to special legislation. We may reasonably assume that good and sufficient reasons may be apparent to the Legislature why the right to exclusively occupy portions of the public highways for the purposes specified should be confined to corporations organized and existing for the purpose of doing a telegraph business, and why such corporations constitute a class to which such a grant may properly be restricted without violating our constitutional provisions against special legislation.

[15] If it may reasonably be so assumed, the legislation must be upheld, for it is well settled that to warrant a court in adjudging legislation void on this ground it must clearly appear that there was no sufficient reason to warrant the legislative department in finding a difference and making the discrimination. Every presumption is in favor of the validity of an act of the Legislature, until its invalidity is made to appear. See *Ex parte King*, 157 Cal. 161, 106 Pac. 578, and cases there cited.

It is suggested that section 536, Civil Code, was repealed upon the adoption of the Constitution of 1879 by reason of section 6, article 12, contained therein, declaring that "all existing charters, grants, franchises, special or exclusive privileges, under which an actual and bona fide organization shall not have taken place, and business been commenced in good faith, at the time of the adoption of this Constitution, shall thereafter have no validity." As we have seen, the repeal of section 536, Civil Code, even by a constitutional provision, could not be held to have affected the rights of plaintiff in so far as it had already acquired vested rights under section 536.

[16] But we are satisfied that this provision of the Constitution cannot reasonably be construed as affecting section 536, Civil Code, at all. So far as any company had not at such time availed itself of and thus

accepted the provisions of section 536, there was no "existing" grant or franchise to be annulled, and there was never any "special or exclusive" privilege given by the section. The constitutional provision in question was in no way applicable.

[17] It follows from what we have said that plaintiff's exclusive occupation of portions of the streets of the city of Los Angeles without liability for compensation to the extent at least to which its system was constructed therein at the time of the adoption of section 536, Civil Code, and its right to such occupation free of charge by the city are based solely on the last-named section, and that as to such occupation and right this section constitutes a grant in the nature of a franchise accepted by it, constituting property located within this state and assessable in the county of Los Angeles. The claim of plaintiff that taxation of this franchise is in any way taxation of its federal franchise is utterly without basis. The tax is one solely on valuable property within this state, viz., the right to the permanent and exclusive use of portions of the public streets of the city of Los Angeles, free of compensation—a tax differing in no material respect from one levied on its poles and wires located within such city. See generally *Central Pac. R. R. Co. v. California*, 162 U. S. 91, 118, 16 Sup. Ct. 766, 40 L. Ed. 903.

No other point is made against the validity of the assessment here involved. There is, of course, no question presented by this record as to the correctness of the valuation placed upon the property by the assessor.

The judgment is reversed.

We concur: SLOSS, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

SHAW, J., deems himself disqualified to act in this case, by reason of relationship to one of the attorneys of record.

(160 Cal. 124)

WESTERN UNION TELEGRAPH CO. v. LOS ANGELES COUNTY. (L. A. 2,446.) (Supreme Court of California. June 5, 1911.)

1. TAXATION (§ 8*)—FEDERAL FRANCHISES.

A federal franchise acquired by a corporation under a federal statute is not subject to state, county, or municipal taxation.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 21; Dec. Dig. § 8.*]

2. TAXATION (§ 117*)—CORPORATE FRANCHISES.

A state franchise acquired by the corporation is taxable under Pol. Code, § 3628, requiring the taxation of franchises.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 214; Dec. Dig. § 117.*]

3. TAXATION (§ 319*)—PRESUMPTIONS—REGULARITY OF ACTS OF OFFICERS.

An assessment for taxation is presumptively valid, independent of any statutory pro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

visions, in view of the general presumption that public officers are presumed to regularly perform their duties, and the burden of showing the invalidity of an assessment is on the party aggrieved.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 319.*]

4. TAXATION (§§ 425, 319*)—FRANCHISES—ASSESSMENT—VALIDITY—PRESUMPTIONS.

Where a corporation has two franchises, one obtained from the state and taxable by the state, and one obtained from the federal government and not taxable by the state, an assessment simply of "franchise" without other words of description or identification is not invalid for want of a proper description; and, in the absence of any showing to the contrary, the court will presume that the assessment includes only the franchise granted by the state.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 713, 714; Dec. Dig. §§ 425, 319.*]

In Bank. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by the Western Union Telegraph Company against the County of Los Angeles. From a judgment for plaintiff, defendant appeals. Reversed.

J. D. Fredericks, Dist. Atty., and Hartley Shaw, Chief Deputy, for appellant. Beverly L. Hodghead (Brown & Wells, of counsel), for respondent. J. P. Wood, City Atty., and Wm. J. Carr, Asst. City Atty., amici curiæ.

ANGELLOTTI, J. This is an action by plaintiff to recover \$550, taxes for the fiscal year ending June 30, 1907, paid under protest. Judgment was in favor of plaintiff and defendant appeals therefrom. Except that the taxes were for a different year, the material facts are the same as were the facts in the case of *Western Union Telegraph Co. v. Hopkins*, L. A. 2,445, 116 Pac. 557, this day decided, with the single exception that the description of the property assessed in the case at bar is, "Right to occupy the streets of the city of Los Angeles," without other words of description or identification, the valuation thereof for purposes of assessment being placed at \$50,000.

By *Western Union Tel. Co. v. Hopkins*, L. A. No. 2,445, 116 Pac. 557, it is decided that plaintiff had at the time of this assessment a right in the nature of a franchise in the streets of the city of Los Angeles, viz., the right to the exclusive occupation without compensation of portions thereof used for its poles and wires and underground conduit, derived from and held under section 536 of the Civil Code, which constituted no part of its federal franchise, and which was taxable for state and county purposes in the county of Los Angeles. If the assessment in the case at bar was exclusively of that right, it follows from the views announced in that case that the tax was valid. The only difficulty in this case arises from the wording of the description in the assessment.

[1, 2] It is admitted that plaintiff has certain rights in regard to the streets of the city of Los Angeles by virtue of its federal franchise acquired under Act July 24, 1866, c. 230, 14 Stat. 221, and, of course, that franchise cannot be assessed by state, county, or municipality. It is claimed by plaintiff that its federal franchise is included in this assessment, and, if so included, that the entire assessment must fall as illegal, because the values of the two rights, federal and state, are so blended together that the unlawful part cannot be separated from the lawful part. If the first of these claims is well founded, the second necessarily follows. *California v. C. P. R. Co.*, 127 U. S. 1, 29, 45, 8 Sup. Ct. 1073, 32 L. Ed. 150. Plaintiff alleged in its complaint that the assessment was upon its federal franchise. By its answer defendant fully denied the allegations in this behalf, denying that the assessment was intended to or did impose any burden or tax on any federal franchise, and alleging that the only franchise or right assessed was that derived by plaintiff from the state of California, under section 536 of the Civil Code. No evidence was introduced by either side on this issue, the case being submitted for decision upon the pleadings and upon a stipulation as to the facts, which stipulation is silent upon this proposition. There were no findings of fact.

We are satisfied that it must here be held that the assessment was limited to rights in the streets of Los Angeles derived by plaintiff from the state of California, and not covered by the federal franchise, and that the description was not so imperfect as to invalidate the assessment. Under the views announced in *Western Union Tel. Co. v. Hopkins*, L. A. 2,445, 116 Pac. 557, the pleadings and stipulated facts in this case show that plaintiff owned certain rights of occupation in regard to the streets of Los Angeles that were derived from the state of California and were not included in the federal franchise. These constituted taxable property which it was the duty of the assessor to assess. Pol. Code, § 3628. It is not to be assumed in the absence of evidence that the assessor has included in this assessment, which in express terms certainly includes plaintiff's rights granted by the state, other property which he had no right or power to assess. The wording of the description does not necessarily imply the inclusion of any such property, but is entirely consistent with the idea that the thing assessed was the right of exclusive occupation without compensation of portions of the public streets of Los Angeles, granted by the state and owned by plaintiff. It cannot be doubted that the presumption is always in favor of the validity of an assessment, and that the burden of showing the contrary is on the person claiming to be aggrieved.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[3] Independent of special statutory provisions relative to presumptions in favor of assessments, the general presumption that public officers have regularly performed their duties and that official duty has been regularly performed (subdivision 15, § 1963, Code Civ. Proc.) applies to official action in tax matters (1 Cooley on Taxation [3d Ed.] p. 447, and note). "The presumption in all proceedings relating to taxes is in favor of regularity." *Chamberlain v. City of St. Ignace*, 92 Mich. 335, 52 N. W. 635. In *People v. Central Pacific R. R. Co.*, 105 Cal. 576, 38 Pac. 905, the assessment was upon the "franchise" of the defendant. It was claimed by the defendant in that case that the assessment was void because it included its franchise received from the United States. The court said: "We have seen that the state franchise is property susceptible of valuation, and, as the State Board of Equalization is directed to assess the franchise of the appellant, it must be assumed, in the absence of any other evidence than the assessment itself, that the board has acted upon property within its jurisdiction, rather than upon property which it has no power to include in the assessment." In that case there was a finding of the trial court that the federal franchise was not included, and it was said that section 3670, Political Code, a section not materially differing in its provisions from those of section 3789, Political Code, as to the effect of the assessment book or delinquent roll as prima facie evidence, would sufficiently sustain this finding, even if there were no other evidence. These views so expressed are assailed as dicta, because in that case there was other evidence which the court considered and held sufficient to sustain the finding. If we assume them to have been dicta, we nevertheless are of the opinion that they are correct. There is nothing in *California v. Central Pacific R. R. Co.*, 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150, opposed to this conclusion. In that case, according to the opinion of the United States Supreme Court, there was a finding of the trial court that the assessment made by the State Board of Equalization included the full value of all franchises and corporate powers held and exercised by the defendant, which necessarily included its federal franchise. The court assumed this finding to be correct, and, proceeding upon that assumption, considered the questions whether the defendant held any federal franchise, and whether such a federal franchise was assessable by the state. In a later case—*Central Pacific R. R. Co. v. California*, 162 U. S. 91, 16 Sup. Ct. 766, 40 L. Ed. 903, being the same case reported in 105 Cal. 576, 38 Pac. 905, which was taken by writ of error to the United States Supreme Court—the same court sustained a similar assessment of "franchise," upon the finding by the trial

court that the assessment was only upon the state franchise and did not include the federal franchise.

[4] The two decisions in this case, that of the Supreme Court of the United States and that of the Supreme Court of California, are certainly authority upon the proposition that where the taxpayer has two franchises, one taxable by the state and one not so taxable, an assessment simply of "franchise" without other words of description or identification, is not invalid for want of a proper description. See, also, *Stockton, etc., Co. v. San Joaquin Co.*, 148 Cal. 313, 83 Pac. 54, 5 L. R. A. (N. S.) 174, and *San Francisco v. Oakland Water Co.*, 148 Cal. 331, 83 Pac. 61. The opinion in the case of *San Francisco v. Western Union Tel. Co.*, 96 Cal. 140, 31 Pac. 10, 17 L. R. A. 301, is not in point for the reason that it was there assumed, in accord with an undisputed finding or stipulation of the parties, that the company "has derived no franchise" from the state of California, and the court considered only the question of the right to assess the federal franchise. The question presented is very different from that of a description of land in an assessment, of such a nature that it could apply to either of two parcels equally within the jurisdiction of the assessor, and the authorities cited on that proposition are not applicable in this controversy. In the absence of any showing to the contrary, the presumption that the assessing authorities in assessing plaintiff's franchise have included only property within their jurisdiction obtains, and sufficiently identifies the particular franchise assessed.

From what we have said it follows that the assessment must be held valid.

The judgment is reversed.

We concur: SLOSS, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

SHAW, J., deems himself disqualified to act in this case by reason of relationship to one of the attorneys of record.

160 Cal. 129

POSTAL TELEGRAPH-CABLE CO. v. LOS ANGELES COUNTY. (L. A. 2,559.)

(Supreme Court of California. June 5, 1911.)

1. TELEGRAPHS AND TELEPHONES (§ 10*)—FRANCHISES—STATUTES.

The provisions in the general municipal corporation act of 1883 (St. 1883, p. 93), governing the powers of councils of cities and towns existing under the act, as to the regulation of streets therein, do not apply to a city existing under a special charter containing no such provisions, and do not impliedly suspend the operation in such city of Civ. Code, § 536, empowering telegraph companies to erect lines over public highways.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 10.*]

2. TELEGRAPHS AND TELEPHONES (§ 10*)—FRANCHISES—STATUTES.

Under Const. art. 11, §§ 6, 8, as originally enacted, declaring that charters of cities shall be subject to and controlled by the general laws, etc., the Los Angeles freeholders' charter of 1889 (St. 1889, p. 455) does not impair the effect of Civ. Code, § 536, empowering telegraph corporations to construct lines over public highways, which is a general law.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 10.*]

3. TELEGRAPHS AND TELEPHONES (§ 10*)—RIGHTS IN STREETS—FRANCHISES.

Neither the franchise act of 1893 (St. 1893, p. 288), nor any subsequent act, affects Civ. Code, § 536, empowering telegraph corporations to erect lines over public highways, so far as it relates to a telegraph company which installed in a city its system prior to the act of 1893.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 10.*]

In Bank. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by the Postal Telegraph-Cable Company against Los Angeles County. From a judgment for plaintiff, defendant appeals. Reversed.

J. D. Fredericks, Dist. Atty., and Hartley Shaw, Chief Deputy, for appellant. Hunsaker & Britt, for respondent.

ANGELLOTTI, J. This, like the action of Western Union Tel. Co. v. County of Los Angeles, L. A. No. 2,446, 116 Pac. 564, is an action to recover taxes paid by plaintiff under protest for the fiscal year ending June 30, 1907, upon an assessment upon its "right to occupy the streets of the city of Los Angeles," the assessment valuation being \$30,000, and the tax thereon \$330. Plaintiff had judgment, and defendant appeals from such judgment.

There is no material difference between this case and the Western Union Telegraph Company Case just referred to. This plaintiff, a telegraph company organized in the year 1886 under the laws of the state of New York, accepted the terms of Act Cong. July 24, 1866, c. 230, 14 Stat. 221, on April 16, 1886, and did not construct its system in the city of Los Angeles until the year 1889, at which time that city had become organized under its freeholders' charter approved by the state Legislature January 31, 1889. Stats. 1889, p. 455. This difference, however, is not material. There was no express repeal of section 536 of the Civil Code until the year 1905, when that section was repealed and immediately re-enacted with express provision for telephone companies, and we have found no statute enacted prior to the construction of plaintiff's system in the city of Los Angeles that can be held to have impliedly repealed or suspended the effect of that section so far as that city is concerned.

[1] Provisions of the general municipal corporation act of 1883 (St. 1883, p. 93), relating to the powers of boards of trustees and city

councils of towns and cities existing thereunder in regard to the control and regulation of streets therein, referred to by amici curiæ, cannot be given such effect. Howsoever they may be construed, they were never applicable to the city of Los Angeles, for that city was never organized under the general municipal corporation act. Up to the time of the going into effect of its freeholders' charter it existed under a special legislative charter, containing no such provisions as those in the general municipal corporation act that are so referred to.

[2] It is immaterial, also, in this case what construction be given to certain provisions of the freeholders' charter as they existed at the time of its approval in 1889. However they be construed, they could not impair the effect of section 536 of the Civil Code, which was a general law. See section 6, art. 11, Const.; section 8, art. 11, Const., as amended in 1887; *Davies v. City of Los Angeles*, 86 Cal. 37, 24 Pac. 771; *Banaz v. Smith*, 133 Cal. 102, 104, 65 Pac. 309. It is to be borne in mind that the "municipal affairs" amendment of section 6 of article 11 of the Constitution was not adopted until the year 1896.

[3] Nor is it necessary in this case to consider the effect on section 536 of the Civil Code of the so-called franchise act of 1893 (St. 1893, p. 288), or any subsequent act, as the system of plaintiff was installed in the city of Los Angeles during the year 1889.

In view of the considerations stated above, this case is governed by the case of *Western Union Tel. Co. v. County of Los Angeles*, L. A. No. 2,446, 116 Pac. 564.

The judgment is reversed.

We concur: SLOSS, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

SHAW, J., deems himself disqualified to act in this case by reason of relationship to one of the attorneys of record.

159 Cal. 366

BOHN v. BOHN. (L. A. 2,846.)

(Supreme Court of California. Jan. 30, 1911.)
APPEAL AND ERROR (§ 373*)—UNDERTAKING ON APPEAL.

Under Code Civ. Proc. §§ 941a, 941b, an appeal to the District Court of Appeal from a superior court was properly taken without any undertaking by the mere filing of a notice of appeal; an undertaking under section 940 not being necessary.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 373.*]

In Bank. Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Samuel Bohn against John L. Bohn. From a judgment in favor of plaintiff and from an order refusing a change of venue, defendant appealed, and the appeals were dismissed by the District Court of Ap-

peal. Application for an order that the cause be heard by the Supreme Court. Motion to dismiss the appeals denied, and the cause transferred to the District Court of Appeal for determination on the merits.

See, also, *infra*.

Winslow P. Hyatt, for appellant. Williams & Rutan, for respondent.

PER CURIAM. The application for an order that this cause be heard and determined by the Supreme Court is granted, and it is accordingly ordered that the same be transferred from the District Court of Appeal of Second district to the Supreme Court for hearing and determination.

As the decision of the District Court was not upon the merits and the argument is set forth in the briefs, the matter may as well be summarily disposed of and the case again transferred to the District Court. There were two appeals, one from the judgment, the other from an order refusing a change of venue. The District Court dismissed both appeals upon the ground that the undertaking required by section 940, Code of Civil Procedure, to make an appeal effectual was fatally defective. The appeals were taken in June, 1910, by filing in the clerk's office a notice of appeal in due form. Under sections 941a and 941b, Code of Civil Procedure, the appeals were well taken without any undertaking and by the mere filing of the notice as stated. *Mitchell v. California, etc., Co.*, 154 Cal. 731, 99 Pac. 202; *Estate of McPhee*, 154 Cal. 385, 97 Pac. 878. The decision of the District Court was clearly erroneous.

Appellant states in his application that because of occupation in other cases he was unable to prepare a petition to the District Court for a rehearing, in the time limited. The District Court evidently overlooked the decisions above cited, and its order was inadvertently made. There is no occasion for further delay to allow the motion to be formally presented. It must be denied.

It is ordered that the motion to dismiss the appeals be denied, and that the cause be transferred to the District Court of Appeal for the Second district, for hearing and determination on the merits.

16 Cal. App. 179

BOHN v. BOHN. (Civ. 881.)

(District Court of Appeal, Second District, California, May 6, 1911. Rehearing Denied by Supreme Court July 5, 1911.)

1. VENUE (§ 84*)—CHANGE OF PLACE OF TRIAL—NOTICE—WAIVER.

Where plaintiff's counsel appeared and resisted defendant's motion for a change of venue without asking for time to present counter affidavits or claiming that he desired to contest the statements of defendant's affidavits, he waived the written notice under Code Civ. Proc. § 1005, providing for service of written notice

of motion, it being assumed that the section is applicable to a motion for a change of venue.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 146, 148; Dec. Dig. § 84.*]

2. VENUE (§ 63*)—CHANGE OF VENUE.

Where the county wherein an action is commenced is not the proper county, as disclosed by an affidavit of merits, accompanied by a demand in writing for a change of venue, filed with demurrer or answer, the court must order the change whether or not notice in writing of the time of the presentation of the application for a change has been served on plaintiff.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 63.*]

3. VENUE (§ 63*)—CHANGE OF VENUE—"MOTION."

An application to change the place of trial of an action commenced in the wrong county is not a motion within Code Civ. Proc. § 1005, providing for service of written notice of a motion, though under section 1010 the action of the court on a demand for a change of venue is an order, and though the application made on the demand is designated a motion, but the motion goes on the calendar to be called for hearing in the regular order of business.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 63.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4609, 4610.]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Samuel Bohn against John L. Bohn. From a default judgment, and from an order refusing to change the place of trial, defendant appeals. Reversed, and cause remanded.

See, also, 116 Pac supra.

Winslow P. Hyatt, for appellant. R. Y. Williams and Williams & Rutan, for respondent.

ALLEN, P. J. Plaintiff on the 19th of April, 1910, filed his complaint against defendant, alleging ownership of and right of possession to each of 28 head of cattle in defendant's pasture in Los Angeles county, Cal.; further alleging wrongful detention thereof by defendant, with demand, and a prayer for judgment for the possession, or the value if the same could not be had. Process was regularly served upon defendant, and within due time, to wit, on the 22d day of April, 1910, defendant filed a demurrer to the complaint, and at the same time filed an affidavit setting forth that defendant was at the time of the commencement of the action and at the date of the filing of the affidavit, and for many years previous thereto had been, a resident of Los Angeles county; filed in addition thereto an affidavit of merits, with a demand in writing that the action be transferred from the superior court of Orange county to the superior court of Los Angeles county. A copy of these affidavits and demand were upon the same day served upon counsel for plaintiff. The clerk of the superior court of Orange county placed said motion upon the regular law and motion calendar for hearing Friday, April 29, 1910, at

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

which date defendant presented the motion for change of place of trial. Plaintiff's counsel, being present, objected on the ground of insufficiency of the notice, and at the same time filed a counter affidavit showing that counsel for defendant was a resident of Los Angeles county and counsel for plaintiff of Orange county at the time of the serving of the copy of the motion. The court proceeded to hear the motion for change of place of trial and denied the same, and on the same date overruled the demurrer of defendant to the complaint. Thereafter, on the 3d day of June, 1910, the court entered a judgment against defendant by default. From this judgment and from an order refusing to change the place of trial defendant appeals.

The motion for change of place of trial was denied because 10 days' notice had not been given plaintiff's counsel of the time and place of hearing the motion. This upon the authority of section 1005 of the Code of Civil Procedure, which provides: "When a written notice of a motion is necessary, it must be given, if the court is held in the county in which at least one of the attorneys of each party has his office, five days before the time appointed for the hearing; otherwise, ten days." Assuming, without deciding, that a written notice is necessary upon an application for change of place of trial, or any notice other than that shown to have been given in this case, nevertheless, it appears that at the time specified in the motion plaintiff's counsel appeared and resisted the application.

[1] We think this was a waiver of written notice, were such required. This effect has been given an appearance and contest to a notice for the vacation of a judgment in *Acock v. Halsey*, 90 Cal. 220, 27 Pac. 193, in which case it is said the object of giving the notice was fully accomplished without giving it, citing authorities in support of such proposition. It may be conceded that if in the opinion of the court the time between the service of the copy of the motion and affidavits and the date of the application for hearing was insufficient in order to afford plaintiff opportunity to file counter affidavits, the court could have continued the hearing for a reasonable time within which plaintiff might have been given an opportunity to present counter affidavits, if he so desired. Plaintiff asked for no such time, made no claim that he desired to contest the statements made in the affidavits filed by defendant, but relied solely upon the technical proposition that the full time provided by section 1005 had not elapsed. We think, under the circumstances of this case, and upon the authorities cited, that if any irregularity existed in the notice it was waived by the appearance and conduct of plaintiff's counsel at the hearing. The affidavits being uncontested, defendant possessed the right to have

the cause transferred for trial and the superior court of Orange county had no jurisdiction or authority, in the absence of a counter showing, to deny the transfer or to proceed further with the case.

The court erred in denying the order for change of place of trial, and in overruling the demurrer and rendering a judgment.

The judgment and order are reversed and cause remanded.

SHAW, J. [2, 3] I concur in the judgment. Where the county wherein the action is commenced is not the proper county for the trial thereof, and such fact is made to appear by an affidavit of merits, accompanied by a demand in writing that the place of trial be changed to the proper county, filed with the demurrer or answer, it is the duty of the court to make the order for change as demanded, regardless of whether or not a notice in writing of the time when the application will be presented has been served upon plaintiff. The right to such change of the place of trial is not limited to cases in which notice in writing of the time when the matter will be presented for hearing is served upon opposing counsel. Under the provision of section 1010, Code of Civil Procedure, the action of the court upon the demand is an order, and the application made upon the demand is designated a motion, but it is not a motion as to the making of which notice in writing is required to be given to plaintiff, within the meaning of section 1005, Code of Civil Procedure. Like a demurrer filed, it goes upon the calendar to be called for hearing in the regular order of business.

I concur: JAMES, J.

16 Cal. App. 280

McKERNAN v. LOS ANGELES GAS & ELECTRIC CO. (Civ. 972.)

(District Court of Appeal, Second District, California. May 17, 1911. Rehearing Denied by Supreme Court July 15, 1911.)

1. TRIAL (§ 165*)—NONSUIT—EVIDENCE.

The court, in passing on a motion for nonsuit at the close of plaintiff's case, must assume the truth of plaintiff's testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

2. MUNICIPAL CORPORATIONS (§ 706*)—LAW OF THE ROAD—INJURIES TO TRAVELERS—CONTRIBUTORY NEGLIGENCE.

Whether a person, struck by a vehicle not on the right side of the street as required by the law of the road, was guilty of contributory negligence *held* for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

3. JURY (§ 85*)—APPEAL AND ERROR (§ 968*)—DISCRETION OF COURT—CHALLENGES TO JURORS.

The court, in passing on challenges of jurors, has considerable discretion, and unless prejudice results to the party complaining of the improper allowance of challenges, appellate courts will not review the rulings.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 405; Dec. Dig. § 85;* Appeal and Error, Cent. Dig. § 3843; Dec. Dig. § 968.*]

4. APPEAL AND ERROR (§ 1045*)—HARMLESS ERROR—ERRONEOUS RULINGS ON CHALLENGES TO JURORS.

The error of the court in excusing jurors on the mere statement that they were customers of defendant, a gas and electric company, is not prejudicial to defendant where it was not thereby prevented from securing a jury of qualified and impartial men.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4124-4127; Dec. Dig. § 1045.*]

5. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—INSTRUCTIONS.

Where, in an action for personal injuries the evidence showed that \$100 had been paid to physicians by plaintiff, but there was no evidence that any additional charge for medical attendance had been incurred, the error in a charge directing the jury, in computing the damages, to consider any medical expenses incurred, though not paid, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by Michael McKernan against the Los Angeles Gas & Electric Company. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Wm. A. Cheney and Le Roy M. Edwards, for appellant. Frank L. Perry, for respondent.

JAMES, J. Plaintiff sued to recover damages for personal injuries alleged to have been caused by the negligent acts of defendant. Trial before a jury was had, resulting in a verdict in favor of plaintiff for the sum of \$2,750, upon which verdict judgment was entered. Defendant appeals from the judgment and from an order denying its motion for a new trial.

Errors assigned: First, that the court should have granted the motion of defendant for a judgment of nonsuit at the conclusion of the introduction of testimony for plaintiff; second, that challenges for cause interposed by plaintiff as to certain jurors, were improperly allowed; third, that the court erred in giving an instruction to the jury on the question as to what damages might be recovered against defendant.

Plaintiff on the 9th day of April, 1907, was a laborer engaged in working upon the streets of the city of Los Angeles. On the evening of that day after quitting his work he rode on the wagon of one Bachman, a teamster, to the corner of Ninth and Los Angeles streets. Bachman drove westerly along Ninth street, and as he neared the corner of Los Angeles street he drew his team and wagon close to the curb on the north side of Ninth street and stopped the team in order to allow plaintiff to alight. Plaintiff had been sitting on the driver's seat with Bachman and on the left-hand side of the seat, and he proceeded to climb down over the front wheel of the wagon. Before doing so, he testified, he looked down Ninth street and saw no car or vehicle approaching; that after he stepped upon the ground he was suddenly struck by the wheel of a wagon then being driven by an employé of defendant, and was thrown down, one wheel of the wagon passing over his shoulder, breaking the collar bone and causing other bruises and injuries. Bachman, the driver of the wagon upon which plaintiff had been riding, testified that as plaintiff was in the act of alighting he (Bachman) saw the wagon of defendant coming diagonally across the street. Noting that plaintiff was clear of his wagon, he let off the brake and started to drive on. That when he looked again plaintiff was lying upon the ground bleeding from the cuts and bruises which he had received.

[1] Taking this testimony to be true, as the trial court was obliged to assume it to be at the time of the making of the motion for judgment of nonsuit, it did not show that plaintiff was guilty of contributory negligence as a matter of law.

[2] Upon this evidence it became a question of fact for the jury to determine as to whether or not plaintiff had acted, under all of the circumstances of his position and the

surrounding conditions, as a reasonable man might have acted when similarly placed. Plaintiff, even though the wagon of defendant had been seen by him to be approaching, would have been justified in alighting at the place where he did alight, observing ordinary precautions in so doing to escape injury. The testimony of Bachman tended to show that the wagon of defendant was not traveling on the right side of the street in its west-bound course, as the law of the road would require, but that it came diagonally from the opposite side of the street below the point of intersection of Los Angeles street with Ninth street. The trial court committed no error in denying the motion for judgment of nonsuit.

Certain members of the jury panel, when called and examined for cause, stated that they were customers of the defendant, and upon objection being made by plaintiff, they were excused. Appellant's counsel argue that the examination of the jurors did not show that the relation of debtor and creditor existed between defendant and these jurors, and that error was therefore committed in allowing the challenges. Defendant made no examination of the jurors at all to determine the fact as to whether as a result of their business dealings with defendant they at that time actually owed money to defendant for gas furnished to them by it. By the answers made to the questions asked of them, these jurors disclosed the fact that their relations as customers or patrons of defendant then existed and had not been terminated.

[3] In passing upon challenges interposed to jurors for cause, considerable latitude of discretion is allowed the trial court, and unless it is made clearly to appear that prejudice has been worked to the complaining party by reason of error committed in improperly allowing such challenges, appellate courts will not review the rulings. *Grady v. Early*, 18 Cal. 110; *Lawlor v. Linforth*, 72 Cal. 205, 13 Pac. 496.

[4] Conceding that the trial court was not justified in excusing the jurors upon the mere statement that they were consumers of gas furnished by the defendant, still it cannot be said, on the record as it is presented, that the rulings prejudiced defendant at all, or that it was thereby prevented from securing a jury of qualified and impartial men.

[5] But one instruction given to the jury is complained of. By instruction No. 18 the jury were told that if they found a verdict in favor of plaintiff, in computing the amount of damages they might consider "any medical expenses incurred, although not paid." The evidence showed that \$100 had been paid to physicians by the plaintiff, and there was no evidence that any additional charge for medical attendance had been incurred. It cannot be assumed that the jury made allowance on account of any charge which was not shown by the evidence to have been in-

curred, for they were very fully instructed as to their duty to consider in arriving at a verdict only such facts as were established by the evidence in the case. Upon the authority of the decision in the case of *Melone v. Sierra Railway Co.*, 151 Cal. 114, 91 Pac. 522, it was not prejudicial error for the court to give the instruction in the form it was given.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

16 Cal. App. 277

PEOPLE v. MESEROS. (Cr. 318.)

(District Court of Appeal, First District, California, May 15, 1911. Rehearing Denied June 14, 1911. Denied by Supreme Court July 14, 1911.)

1. CRIMINAL LAW (§ 112*)—VENUE—EMBEZZLEMENT.

Where one, obtaining in one county the possession of a pay check to cash the same, took it to another county, where he cashed it and converted the proceeds to his own use without returning to the former county, the venue of the charge of embezzlement of the proceeds was in the latter county, though he conceived the intent in the former county to appropriate the check to his own use.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 223; Dec. Dig. § 112.*]

2. INDICTMENT AND INFORMATION (§ 175*)—VARIANCE—VENUE.

The venue of an offense must be proved as charged.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 544-547; Dec. Dig. § 175.*]

3. EMBEZZLEMENT (§ 35*)—ISSUES, PROOF AND VARIANCE.

Proof of the embezzlement of a check does not support a charge of embezzlement of money.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 55-59; Dec. Dig. § 35.*]

Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Spuros Meseros was convicted of embezzlement and he appeals. Reversed.

W. R. Dunn, for appellant. Attorney General Webb, for the People.

HALL, J. Defendant was convicted of the crime of embezzlement and moved for a new trial, which being denied and judgment rendered, he took an appeal to this court from the judgment and order denying his motion for a new trial.

It is charged in the information that defendant, as the servant and agent of Michael Eftimakis, at the county of Alameda, on the 7th day of July, 1910, came into the possession of \$88.60 in lawful money of the United States of the personal property of said Eftimakis, and then and there at said county of Alameda did fraudulently embezzle and appropriate the same to his own use. The defendant introduced no evidence at the trial.

The testimony of the prosecution tended to

prove without conflict that defendant was given by the prosecutor two pay checks, issued by the Southern Pacific Railroad Company, for the purpose of having them cashed. The checks were each for the sum of \$44.30. Defendant, by direction of the prosecutor, indorsed each of the checks by signing the name of the payee thereon. He then took them to San Francisco, where he disposed of each of them. He transferred each of them to a different storekeeper in payment for articles that he purchased for his own use, and secured a balance in cash upon each transaction. Each check was disposed of by defendant in San Francisco, and whatever money he received upon the checks was received in San Francisco. He was subsequently arrested on this charge in San Francisco; and there is not one word of evidence in the record that he ever returned to Alameda county until taken there in custody of the arresting officer; and certainly there is no evidence in the record that tends to show that he ever took any of the money into Alameda county or embezzled any of the money in said county.

[1] Under this state of the evidence appellant contends that the evidence is insufficient to support the charge made in the information, for the reason that the evidence shows that the money was both received and embezzled in San Francisco and not in Alameda county. This contention must be sustained.

[2] The venue must be proved as charged. *People v. Parks*, 44 Cal. 105; *People v. Roach*, 48 Cal. 382; *People v. Bevans*, 52 Cal. 470; *People v. Murphy*, 51 Cal. 376; *People v. Aleck*, 61 Cal. 138. There is in the record no evidence of either the receipt or appropriation of any money in Alameda county. True, the pay checks were intrusted to defendant in Alameda county, and it may be that he conceived the intent in Alameda county to appropriate the checks to his own use. But he was not charged with the embezzlement of checks, but with the embezzlement of money.

[3] Proof of the embezzlement or larceny of a check will not support a charge of embezzlement or larceny of money. *Carr v. State*, 104 Ala. 43, 16 South. 155; *State v. Hanley*, 70 Conn. 265, 39 Atl. 148; *State v. Mispagel*, 207 Mo. 557, 106 S. W. 513; *Lancaster v. State*, 9 Tex. App. 393; *Goodhue v. People*, 94 Ill. 37. See, also, *State v. Bacon*, 170 Mo. 161, 70 S. W. 473; *Com. v. Howe*, 132 Mass. 250; *Com. v. Gately*, 126 Mass. 52.

The cases of *People v. Whalen*, 154 Cal. 472, 98 Pac. 194, and *People v. Leavens*, 12 Cal. App. 185, 106 Pac. 1103, relied on by respondent, are not in point. In the first of these cases, Whalen, by false pretenses, obtained from the prosecutor, at Sacramento, a check drawn on a New York bank. It is perfectly apparent from the reading of the opinion in

the case, that the court was of the opinion that the evidence justified the conclusion that the check was in due course cashed and the money returned to the defendant at Sacramento. But however that may be, some of the criminal acts, to wit, the false pretenses, were committed at Sacramento. The case in no wise justifies the contention that checks are money.

The Leavens Case was one of obtaining money by false pretenses, in which the defendant procured a check by false pretenses at San Francisco, drawn on a bank at San Francisco, and cashed it at said bank.

The judgment and order are reversed.

We concur: LENNON, P. J.; KERRIGAN, J.

16 Cal. App. 267

**FIRST NAT. BANK OF REDLANDS v.
CONSOLIDATED LUMBER CO.**
(Civ. 885.)

(District Court of Appeal, Second District, California. May 15, 1911. Rehearing Denied by Supreme Court July 14, 1911.)

1. GUARANTY (§ 35*)—LIABILITY—"CONTINGENT LIABILITY"—"ABSOLUTE LIABILITY."

The liability incurred by a corporation, transferring a note payable to it and guaranteeing payment thereof at maturity, or at any time thereafter, waiving demand, notice of nonpayment, and protest, is an "absolute," and not a "contingent," liability, created at the date of the making of the guaranty, though the right of the transferee to enforce it depends on the default of the maker; for a contingent liability is dependent on the happening of the event which creates the liability, while the right to enforce an absolute liability may be contingent on the happening of an event.

[Ed. Note.—For other cases, see Guaranty, Dec. Dig. § 35.*]

For other definitions, see Words and Phrases, vol. 2, p. 1501.]

2. LIMITATION OF ACTIONS (§ 58*)—STOCKHOLDERS' LIABILITY—ENFORCEMENT.

Under Code Civ. Proc. § 359, requiring the bringing of actions to enforce stockholders' liability within three years after the liability is created, an action against a stockholder of a corporation, guaranteeing the payment of a note at maturity, is barred in three years from the date of the guaranty; the liability of the corporation being created at that time.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 327; Dec. Dig. § 58.*]

Appeal from Superior Court, San Bernardino County; F. E. Densmore, Judge.

Action by First National Bank of Redlands against the Consolidated Lumber Company. From a judgment for plaintiff, defendant appeals on a bill of exceptions. Reversed.

W. W. Middlecoff and Horace S. Wilson, for appellant. Halsey W. Allen, for respondent.

SHAW, J. The Newport Lumber Company, a corporation, owned a negotiable promissory note, dated August 16, 1905, which by its terms was payable on February 16, 1906.

On August 31, 1905, the corporation sold and transferred the note to plaintiff, and at the same time, and in consideration of plaintiff purchasing the same, executed and indorsed upon the back of said note a guaranty of the payment thereof as follows: "For value received, we hereby guarantee the payment of the within note at maturity, or at any time thereafter, with interest at the rate of eight per cent. per annum until paid, waiving demand, notice of nonpayment and protest." At the time of the execution of this contract of guaranty, defendant was a stockholder of said corporation, Newport Lumber Company. The makers of the note failing to pay the same in full, plaintiff, on February 13, 1909, instituted this action to recover upon the statutory liability of defendant by reason of said contract of guaranty made by said Newport Lumber Company, of which defendant was a stockholder. Plaintiff obtained a judgment, and defendant appeals therefrom upon a bill of exceptions.

The only point involved on the appeal is whether or not the action was barred by the statute of limitations, as declared in section 359, Code of Civil Procedure, which provides that actions against stockholders of a corporation to enforce a liability created by law shall be brought within three years after the liability is created. The question presented for determination is the time when the liability incurred by the Newport Lumber Company, under the terms of the written instrument, was created; appellant insisting that it was at the time of the purchase of the note, on August 31, 1905, in which case the action was barred (section 359, Code Civ. Proc.), while respondent contends that it was created at the time of the maturity of the note. At a former hearing of this appeal, the court accepted the latter view, but upon further consideration we are not satisfied with the conclusion then reached.

[1] It is quite true that the liability incurred by the Newport Lumber Company was not enforceable until the maturity of the note and default made by the makers thereof. It cannot, however, be said that the liability was not created until such time. Liability does not depend for its existence upon the fact that it is immediately enforceable. It may exist without the right of immediate enforcement. *White v. Green*, 105 Iowa, 176, 74 N. W. 928; *Hunt v. Ward*, 99 Cal. 615, 34 Pac. 335, 37 Am. St. Rep. 87. In the latter case it is said: "A liability may be absolute or contingent; it may be unconditional or limited; it may be presently enforceable by action, or there may be time given for its performance; but, whatever its character, it is created by the consummation of the contract, act, or omission by which the liability is incurred." Under the terms of the contract, the liability incurred by the Newport Lumber Company was absolute, al-

though the right of the plaintiff to enforce such liability depended upon a contingency, namely, the default of the makers of the note; but this fact did not render the liability contingent. There is a marked distinction between a contingent liability and the right contingent upon the happening of an event to enforce an existing liability. In the one case there is no liability until the happening of the event, the occurrence of which creates the liability, while in the other the liability exists, but the right to enforce it depends upon the contingency. Here there was an existing indebtedness in a sum specified in the note, which the makers promised to pay to the holder thereof. By its contract of guaranty, the corporation agreed that it would pay this indebtedness when the same was due, if the makers of the note failed to pay it.

[2] It follows, we think, that the liability was created on August 31, 1905, at the time when the corporation by contract obligated itself to make the payment. If this be true, the cause of action to enforce defendant's statutory liability as a stockholder of the Newport Lumber Company was barred in three years from said date.

The judgment is reversed.

We concur: ALLEN, P. J.; JAMES, J.

16 Cal. App. 183

BENNETT v. POTTER. (Civ. 899.)

(District Court of Appeal, Second District, California. May 6, 1911. Rehearing Denied June 5, 1911; Denied by Supreme Court July 5, 1911.)

1. APPEAL AND ERROR (§ 338*)—TIME FOR APPEAL FROM JUDGMENT.

Appeal from the judgment, which Code Civ. Proc. § 939, allows to be taken within six months after entry of judgment, is too late; notice thereof being subsequent to such period.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 338.*]

2. APPEAL AND ERROR (§ 867*)—SCOPE OF REVIEW—APPEAL FROM DENIAL OF NEW TRIAL.

Whether the complaint states a cause of action, or the findings support the judgment, cannot be considered on appeal from an order denying a motion for new trial, but only on appeal from the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476-3486; Dec. Dig. § 867.*]

3. APPEAL AND ERROR (§ 1050*)—PREJUDICIAL ERROR—ADMISSION OF EVIDENCE.

The cause of action made by the complaint being for breach of a contract of purchase of an automobile for \$3,650, defendant having refused to accept and pay for it, though title had passed to him, under Civ. Code, § 1141, by plaintiff offering it to him, with intent to pass the title, and that plaintiff had retained possession of it as a depository, as required by section 1503, in which case the measure of damages is, under section 3310, the contract price, and the defense being merely an alleged effective countermand of the order, which the court found against, admission of plaintiff's evidence of a sale by him, just before the trial, of the auto-

mobile for \$1,800, not made with notice to defendant, as required by sections 3002, 3049, in case of sale to enforce the lien for the price, and of which sale defendant had no notice before the trial, was prejudicial error; no issue as to the value of the machine at the time of the sale having been tendered, and the result of its admission being to compel defendant to accept, in lieu of damages for conversion, the price obtained at such sale.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

On rehearing. Modified and affirmed.

For former opinion, see 113 Pac. 885.

JAMES, J. The complaint in this action contained three counts. At the trial plaintiff elected to proceed upon the third count, which stated a cause of action for breach of contract, consisting in the refusal of defendant to accept and pay for a certain automobile purchased by the latter from the plaintiff. Judgment was in favor of plaintiff and against defendant for the sum of \$1,775 and interest. Defendant appealed from the judgment and from an order denying her motion for a new trial.

[1] The appeal from the judgment was taken too late. Notice of appeal was filed more than seven months after judgment was entered; hence that appeal should be dismissed. Code Civ. Proc. § 939; Robinson v. Eberhart, 148 Cal. 496, 83 Pac. 452.

[2] The appeal from the order denying defendant's motion for a new trial presents for review the matter as to the sufficiency of the evidence to sustain the findings, and the further question as to whether or not the court erred in the admission of certain testimony which was objected to by defendant. The complaint must be treated as sufficiently stating a cause of action, and the findings cannot be examined for the purpose of determining whether or not they support the judgment. Those questions could only be considered on the appeal from the judgment. Swift v. Occidental M. Co., 141 Cal. 165, 74 Pac. 700; Sharp v. Bowie, 142 Cal. 467, 76 Pac. 62; Coburn v. California Portland Cement Co., 144 Cal. 82, 77 Pac. 771; Jenson v. Will & Finck Co., 150 Cal. 413, 89 Pac. 113.

[3] Plaintiff in his third cause of action—the one upon which the trial was had—alleged that defendant, on December 26, 1906, purchased from him an automobile for the price of \$3,650; that a written agreement of purchase was executed by defendant. This agreement was set out in full in plaintiff's complaint. It recited that defendant agreed to purchase the automobile for the price stated, as soon as plaintiff had received the machine and had it ready for delivery. The agreement contained the further statement that \$75 was then paid by defendant as first payment, and that the balance of the purchase price was to be paid in two installments, \$425 to be paid on January 1, 1907, and the remainder thereof upon notice being

given to defendant that the automobile was ready for delivery.

Plaintiff alleged that the automobile was received by him from the factory, and that he notified defendant that it was at his place of business and "delivered in accordance with the agreement of sale," and that defendant had paid no part of the purchase price, except the sum of \$75. He further alleged that he had continued to hold possession of the automobile for defendant's use and benefit, and subject to her order, and that at no time after its arrival could defendant not have had the free and unrestricted use of the said automobile. The trial court found all of these allegations to be true. Plaintiff's cause of action, therefore, was one for damages for breach of contract, where the vendee had refused to accept and pay for personal property purchased, title to which had passed to such vendee. "Title is transferred by an executory agreement for the sale or exchange of personal property only when the buyer has accepted the thing, or when the seller has completed it, prepared it for delivery, and offered it to the buyer, with intent to transfer the title thereto, in the manner prescribed by the chapter upon offer of performance." Civ. Code, § 1141. Plaintiff here alleged a delivery of the automobile, and the court found that delivery had been made according to the agreement. Plaintiff elected to treat the title as having passed. He not only affirmed that fact by alleging delivery, but alleged further that he had held possession of the automobile and stored it for defendant's use and benefit, and that she could at any time after its arrival at his business place have had the "full and unrestricted use thereof."

Over the objection of defendant, the trial court allowed plaintiff to show that a few days before the trial of the action he had sold the automobile for the price of \$1,800, which he asserted was the best price obtainable in the then market. In arriving at the amount of judgment to be entered against the defendant, credit for the sum of \$1,800 was allowed against the remaining balance of the contract price. In the decision rendered prior to rehearing granted in this cause, it was said that the admission of evidence showing that plaintiff had sold the automobile a few days prior to the trial did not seem to be prejudicial to the rights of defendant. A further examination of the question has led us to the conclusion that the error was prejudicial. Under the cause of action stated in the third count of plaintiff's complaint, the matter of the value of the automobile was immaterial. The measure of plaintiff's damage in the case made by him is stated in section 3310, Civil Code, as follows: "The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is vested in him, is deemed to be the contract price." Another section of the same

Code determines the obligation of the vendor with respect to property which is treated by him as belonging to the vendee, as was the automobile in this case. Section 1503 provides as follows: "The person offering a thing, other than money, by way of performance, must, if he means to treat it as belonging to the creditor, retain it as a depository for hire, until the creditor accepts it, or until he has given reasonable notice to the creditor that he will retain it no longer, and, if with reasonable diligence he can find a suitable depository therefor, until he has deposited it with such person."

It is true that plaintiff might have sold the automobile to satisfy his vendor's lien thereon, but he did not proceed as vendors in such cases are required to proceed. Property subject to a vendor's lien must be sold in the same manner as pledged property is sold, and reasonable notice must be given to the vendee of the time and place of the sale. Sections 3049 and 3002, Civil Code. Defendant was given no notice before trial by the plaintiff that the automobile had been sold, and no issue as to its value at the time of such sale had been tendered to him, and which he might have been prepared to meet, had it been so properly tendered. If the automobile belonged to defendant and title thereto had passed, as alleged by plaintiff and found by the court, then the act of the plaintiff in selling it amounted to a conversion of defendant's property, damages for which might be recovered.

Allegations appearing in plaintiff's complaint, to the effect that the automobile had no market value, tendered no issue material to the cause of action stated against defendant. Defendant rested her defense upon the claim that she had made an effective countermand of the order for the purchase of the automobile. She had the right to assume that in the event the case went against her on that issue, as it did, that she could rely on the assertion of plaintiff, expressed in his complaint, that he held the automobile subject to her order, and that if she was required to pay the price she might have the thing contracted for. She could assume, too, properly, that if any sale of the automobile was contemplated to be made by the plaintiff to satisfy his vendor's lien that she would be given a notice of the time and place of sale, as the Code sections require. As the effect of the admission of the testimony, showing sale of the property had just before the trial, would be to compel defendant to accept, in lieu of damages for conversion, the price claimed to have been obtained for the automobile, and which the court credited her with, it cannot be said that the error in admitting that evidence was without prejudice. The court did not find that the sale was made with defendant's consent.

The findings are sustained by the evidence, but because of the error complained of, made on the admission of testimony, the order

denying defendant's motion for a new trial must be reversed.

The appeal from the judgment is dismissed. The order denying defendant's motion for a new trial is reversed.

We concur: ALLEN, P. J.; SHAW, J.

16 Cal. App. 262

**WEST RIVERSIDE 350-INCH WATER CO.
v. ROGERS et al. (Civ. 981.)**

(District Court of Appeal, Second District,
California. May 15, 1911.)

RECEIVERS (§ 55*)—COMPENSATION—LIABILITIES OF PARTIES.

Where the canal furnished by defendant, under obligation to furnish a canal suitable to carry the quantity of water to which plaintiff had a prior right, was ample and safely carried more than that quantity, the court, at the suit of plaintiff, was without authority to appoint a receiver to repair the canal, and the costs of the receiver appointed were properly charged to plaintiff.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 94, 400; Dec. Dig. § 55.*]

Appeal from Superior Court, Riverside County; George H. Hutton, Judge.

Action by West Riverside 350-Inch Water Company against C. W. Rogers and another. From a judgment charging the expense of a receivership to plaintiff, it appeals. Affirmed.

Collier, Carnahan & Craig, for appellant.
Lafayette Gill and Purington & Adair, for respondents.

JAMES, J. Appeal by plaintiff from a judgment entered in favor of defendants. The North Riverside & Jurupa Canal, located in the county of Riverside, is an aqueduct used for the purpose of supplying a large number of persons with water for domestic and irrigating purposes. Plaintiff at the time of the commencement of this action was engaged in furnishing water to its stockholders and other patrons, and was the owner of a right, by way of perpetual easement, to have 350 miner's inches of water, measured under 4-inch pressure at the point of delivery, conveyed through said canal. The canal at its upper extremity consisted of a wooden flume about 2,000 feet in length, which crossed the Santa Ana river from the point of intake. The water was conducted into the flume by siphons and again emptied by siphons from the flume into a concrete conduit, which latter formed a channel for its conveyance to the distributing systems of the owners of the water. At the time this action was commenced, defendant Rogers was the owner of at least that portion of the canal which was constructed as a flume, subject to the right of the plaintiff as mentioned, and also subject to another easement termed the "Salazar water right." Whether Rogers owned the entire conduit or not does not appear,

and it is immaterial, as plaintiff's cause of complaint concerns only the flume and its accessory siphons.

The conditions prompting plaintiff to commence this action, as alleged in its complaint and found by the court, were briefly as follows: Two of the siphons at the easterly end of the flume and two at the westerly end thereof had become filled with sand and debris, so that no water could be conducted through the same. There remained but two siphons, one at either end of the flume, which were available for the purpose for which they were constructed. At that time defendants were pumping into the aqueduct about 150 miner's inches of water, and another water owner, under the Salazar water right, was pumping 75 inches of water into the flume. Plaintiff was entitled to have 360 inches of water carried in the canal at its starting point, so that, allowing for evaporation and shortage by waste, it might have delivered through the aqueduct the 350 inches, as was provided by the grant to it of the right of way. Plaintiff was then pumping 272 inches of water into the canal. Because of the impaired condition of the siphons, the water in the flume could not find ready exit, and the effect was to cause it to be collected therein to a greater depth and of a greater weight than it would have collected, had the siphons at the westerly end been freed from the obstructions. The flume was old, and plaintiff could not pump into it the full amount of water which it was entitled to have carried, in addition to the quantity already conducted therethrough, without running the risk of causing the flume to break. Such a break would have entailed great expense, and would have deprived all of the users of water who derived their supply from that source of water until repairs could be made. Defendant Rogers had refused to repair the conduit or clear the siphons, and he had also refused to stop pumping operations long enough to allow plaintiff to make the repairs necessary then to be made. Upon this state of facts, plaintiff asked, first, for a restraining order requiring defendant to cease pumping water until further order of court; and, second, that a receiver be appointed and directed to clear the siphons and flume, so that plaintiff's 350 inches of water could be safely carried therein; and further that the expense of the work and costs of the proceeding be made a charge against the flume and siphons. After the filing of the complaint, upon ex parte application, a restraining order was issued by the court, and a receiver appointed. The receiver was directed by the order of appointment to do the work of clearing the siphons, and this he did within a few days, and was discharged. The restraining order was vacated at the same time. The issue presented to the trial court for determination was as to the right of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

plaintiff to have the expense of the receivership made a charge against the property of defendant. The court found, in accordance with the allegations contained in defendant's answer, that plaintiff had refused, prior to the commencement of the action, to pay its proportion of the expense of maintaining the conduit, as was required of it under the terms of the conveyance of the right of way, and that therefore, agreeable to the maxim that he who seeks equity must do equity, no relief should be awarded to it. Judgment was accordingly entered for defendants.

On behalf of appellant it is argued that the equitable rule referred to was improperly invoked in bar of a recovery by the plaintiff for various reasons assigned, chief among them being: That no account of charges for maintenance had been furnished by defendant Rogers to appellant prior to the commencement of the action; that no claim on behalf of Rogers on that account existed as a fact; that, if such charge did exist, the matter of the adjustment thereof would not constitute a condition precedent to the right of plaintiff to have the canal kept in such a condition of repair as to make it possible to have the full 350 inches of water owned by plaintiff delivered through the same, without danger of the flume giving way.

Any inquiry as to the validity of these contentions is rendered unnecessary, when certain facts set out clearly in the complaint, and which are admitted by the answer to be true and so found by the court, are taken into consideration. We refer to the facts alleged by plaintiff in its complaint, in paragraph 6 thereof: "That there is at present flowing in said flume 75 miner's inches of Salazar water, hereinabove described; that the said C. W. Rogers and said Rogers Development Company are pumping about 150 inches of water and discharging it into said flume; that this plaintiff is entitled to pump and to discharge through said flume 360 inches of water, and has a prior right to so discharge said water over and above either the said Salazar Company or the said Rogers Development Company and C. W. Rogers." The flume, according to plaintiff's allegations, was safely carrying at the time of the commencement of this action 150 inches of the Rogers water, 75 inches of the Salazar water, and 272 inches of water of the plaintiff, making a total of 497 inches then being conducted through it. Plaintiff's only complaint was that more water could not be pumped into the flume, without causing damage. It is alleged, admitted, and determined that plaintiff had the prior right over all persons using the canal to have its 350 inches of water carried in the flume and conduit. The flume could safely have carried all of plaintiff's water, and also all of the Salazar water. The query then suggests itself, What was

the remedy to which plaintiff was entitled, if any, under these conditions?

Plaintiff had no concern to so act as to preserve the safe carrying capacity in the canal for the water then being conducted through it by defendant Rogers and by the Salazar right holders. The obligation of defendant Rogers was to furnish a canal suitable for the carrying of the quantity of water which plaintiff was entitled to have carried under the terms of the grant made to it. If the safe carrying capacity of the canal was ample to secure to plaintiff all that it was entitled to, then it could not say to Rogers, "You must make the canal sufficiently safe to enable it to carry, not only our water, but also the Salazar water and your own." If damage to plaintiff's right was threatened, which was of such a nature as to warrant equitable interference, that interference would only go to the length and extent of enjoining defendant from carrying such an excess in quantity of water over the 350 inches as would make danger of damage and great loss imminent. The facts stated in plaintiff's complaint seem sufficient to entitle it to this precise relief, but by the act of the receiver the cause for complaint was removed, so that it no longer existed at the time the trial was had. Under the showing made by the complaint, the court was not authorized to appoint the receiver, and the costs of the receivership were chargeable against the plaintiff alone. The judgment of the court on the facts as alleged and found was therefore right. That this judgment was prompted by the finding made by the court, that plaintiff could not recover because it had failed to make payment of the amounts of money due from it on account of expenses of the maintenance of the canal, is not material.

It follows, under this view of the case, that the judgment should be affirmed, and it is so ordered.

We concur: ALLEN, P. J.; SHAW, J.

16 Cal. App. 270

Ex parte McLAUGHLIN. (Cr. 200.)

(District Court of Appeal, Second District, California, May 15, 1911.)

1. VAGRANCY (§ 1*)—ELEMENTS OF OFFENSE—"VISIBLE OR LAWFUL BUSINESS."

The words "visible or lawful business" in Pen. Code, § 647, subd. 6, defining as a vagrant "Every person who wanders about the streets at late or unusual hours of the night without any visible or lawful business," are used in the sense of good and sufficient reason, and refer to the reason why he is roaming the street, rather than to any business or avocation in life from which support is derived.

[Ed. Note.—For other cases, see Vagrancy, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 8, pp. 7267-7269.]

2. CRIMINAL LAW (§ 211*)—AFFIDAVIT OF COMPLAINT.

The affidavit of complaint for being a vagrant under Pen. Code, § 647, subd. 6, must negative the existence of a reason or necessity for the person being on the street at a late hour at night.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 425; Dec. Dig. § 211.*]

Application of Frank McLaughlin for writ of habeas corpus. Granted, and petitioner discharged.

S. Wyman Smith and Wm. B. Ogden, for petitioner.

PER CURIAM. Petitioner was arrested, tried, and convicted of the crime of vagrancy. The affidavit of complaint upon which the warrant of arrest was issued, and upon which he was tried, charged that the defendant at Bakersfield, etc., "did then and there have no visible means of livelihood, and then and there did wander about the streets of the said city of Bakersfield at late and unusual hours of the night." The question presented, therefore, is, Does such a complaint state a public offense?

[1] By subdivision 6 of section 647, Penal Code, one of the definitions of a vagrant is: "Every person who wanders about the streets at late or unusual hours of the night without any visible or lawful business." As we construe this subdivision, the words "visible or lawful business" must be held as referring to the reason why such person is roaming the streets, rather than any business or avocation in life from which support is derived. In other words, the offense is complete under subdivision 6 if, without good or sufficient reason, one roams at late or unusual hours of the night, and he is a vagrant without reference to his means of livelihood or vocation.

[2] This affidavit of complaint does not negative the fact that a reason or necessity existed which called him upon the street at a late hour of the night, but merely that he was so roaming, and for aught that appears in the affidavit of complaint, he may have had a legitimate and proper reason for being upon the streets at the time complained of.

We are of opinion that no offense is stated under the purview of this section, and the prisoner should be discharged; and it is so ordered.

16 Cal. App. 188

STRAIT v. WILKINS et al. (Civ. 971.)

(District Court of Appeal, Second District, California. May 6, 1911.)

1. EXCHANGE OF PROPERTY (§ 3*)—FRAUDULENT REPRESENTATIONS—STATEMENT OF VALUE—RELIANCE ON STATEMENT.

Where each party to a trade of real estate put excessive values on his own lands as understood by both, the representations of one as to the value of his lands was not relied on by the other in the sense required to make a state-

ment of value one of fact, which may be a fraudulent representation.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. § 3; Dec. Dig. § 3.*]

2. EXCHANGE OF PROPERTY (§ 3*)—FRAUDULENT REPRESENTATIONS—STATEMENT OF PRICE—OPPORTUNITY.

The rule that a statement of value by a party to a trade may be one of fact, constituting a fraudulent representation, has no application where each party has equal opportunity to determine value.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. § 3; Dec. Dig. § 3.*]

3. EXCHANGE OF PROPERTY (§ 3*)—FRAUDULENT REPRESENTATION—"CONSIDERABLE TIME."

Statement of one trading property that the mortgage thereon had a "considerable time" to run was not false; it not being due for six months.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. § 3; Dec. Dig. § 3.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1444-1447; vol. 8, p. 7612.]

4. EXCHANGE OF PROPERTY (§ 3*)—FRAUDULENT REPRESENTATIONS—OPINION.

Statement of one trading property, on which was a mortgage, that the mortgage could be renewed indefinitely could be but an expression of opinion, and not a fraudulent representation.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. § 3; Dec. Dig. § 3.*]

5. VENDOR AND PURCHASER (§ 345*)—ACTION FOR VENDOR'S REFUSAL TO PERFORM—DEFENSES—OWNERSHIP.

Whether or not the property defendant contracted to sell was hers or community property is immaterial, in an action for breach of her contract to sell it, as a married woman, like any one else, could contract to sell property not her own, and failing to perform would be liable for a breach.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1036-1038; Dec. Dig. § 345.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by J. H. Strait against Mary Wilkins and her husband. From a judgment for defendants and from an order denying a new trial, plaintiff appeals. Reversed and remanded for further proceedings.

Eugene C. Campbell, for appellant. John E. Daly, for respondents.

ALLEN, P. J. Action to recover damages for breach of contract to convey real property.

The case presented by the record is somewhat unique. Plaintiff, the owner of certain premises at Redlands, entered into an agreement in writing, on June 19, 1907, with defendant Mary Wilkins to exchange the same at an agreed value of \$6,500 for other property at Covina, the agreed value of which was fixed at \$10,500. In such agreement defendant agreed to assume a mortgage of \$3,000 on the Redlands property, and plaintiff agreed to pay defendant \$500 in cash and execute a mortgage to defendant for \$6,500 on the Covina property. De-

defendant, on June 28th, gave notice of the repudiation of the contract, on the ground that the Covina property was community property, over which she had no control, and further that the written instrument was insufficient in form to constitute a valid agreement of sale and transfer. Thereupon this action for damages, on account of defendant's failure and refusal to carry out the contract, was commenced. Plaintiff, with the evident purpose of enhancing damages, alleged that his property at Redlands was of the market value of \$5,000 only at the time of making the contract, while the property of defendant so agreed to be exchanged was of the value of \$12,000. Defendant, having the matter of damages in view, alleged that plaintiff's property at the time of the transfer was of the value of \$6,500, while her property at Covina was worth only \$9,500. By a separate defense, defendant alleges that the property of plaintiff was only worth \$6,000; that plaintiff represented to her that the mortgage of \$3,000 had a considerable time to run before maturity; and that the holder would extend the time of payment as long as defendant might desire. She alleges that plaintiff's representations as to the value of \$6,500, the fact that the mortgage had a considerable time to run, and that the mortgagee would renew, were statements false, and by plaintiff known to be false when made. The trial court found the value of plaintiff's property to be \$5,000, in contradiction of defendant's admission, and that the representations as to the value and statements as to the mortgage were untrue, and known by plaintiff to be untrue when made, and that defendant relied upon such representations in making the exchange. Judgment was rendered in favor of defendant, from which judgment and an order denying a new trial, plaintiff appeals.

The findings of the court as to the false character of the representations in relation to value, and the reliance of defendant thereon, are sufficient to sustain the judgment under the rule that, "wherever a party states a matter which might otherwise be only an opinion, and does not state it as the mere expression of his own opinion, but affirms it as an existing fact material to the transaction, so that the other party may reasonably treat it as a fact and rely and act upon it as such, then the statement clearly becomes an affirmation of fact within the meaning of the general rule, and may be a fraudulent misrepresentation." This is approved in *Crandall v. Parks*, 152 Cal. 776, 93 Pac. 1018. The question, therefore, for determination upon this appeal is as to the sufficiency of the evidence to support these findings.

[1] It appears from the bill of exceptions that at and before the execution of the written contract defendant and her husband were at Redlands; that they each examined the property of plaintiff; that defendant made independent inquiry as to value, and

was advised that the price fixed by plaintiff was in excess of what other property in the vicinity was worth. Defendant further stated that she was putting in her property at Covina for \$2,500 in excess of its market value; that when plaintiff questioned the value of \$10,500 placed by her upon the Covina property the defendant replied to him that it was worth that sum, if his property was worth \$6,500. In other words, as testified by the husband of defendant, the values were made the basis of the trade; plaintiff not believing that defendant's property was worth the price asked for it in the trade. A case is presented where each party fixed excessive values upon the property sought to be included in the trade—a fact understood by all. It is evident that defendant did not rely upon plaintiff's representations in the sense required to render a statement of value one of fact.

[2] The wholesome rule heretofore referred to in relation to such statements comprehends instances where opportunity is not at hand to ascertain value otherwise than from statements. It was never intended to establish a rule that, where parties have an equal opportunity to determine value, one might neglect the opportunity and, if subsequently to his interest, avoid a contract, merely because an inflated value was fixed by the other party to the exchange. To apply such rule generally in the ordinary affairs of life, when opportunity exists to ascertain the truth, would be to encourage, rather than to prevent or punish, fraud.

[3] As to the findings in relation to the statements with reference to the mortgage, it clearly appears that no false statement was made. It was stated that a considerable time elapsed. This was true. The mortgage was not due for six months, which, in the ordinary affairs of life, may be said to be a very considerable time. In addition, the mortgage was of record. Defendant admits that immediately after signing the paper (whether before delivery or not does not appear) she sent a messenger to the recorder's office to ascertain the exact time of maturity, and it appears that she sought to make a contract with a local bank for a loan to take up the mortgage when due.

[4] The statement that the mortgage could be renewed indefinitely could not in the nature of things amount to more than an expression of opinion. Defendant must be held to know that a stranger could not control the action of the mortgagee with reference to his contract of mortgage. It is obvious from a reading of the record that the matter of fraudulent representations is an afterthought, urged by defendant after she had determined that a right of repudiation avoiding damages did not exist, simply because the Covina property was that of the community. We are of opinion that there is no evidence in the record tending to show that the contract was made in reliance upon any

statement of fact thereafter found to be false. [5] This action being one for damages, it is immaterial as to the character of the property agreed to be conveyed by defendant. Although a married woman, she might contract to sell property, whether of her own or of some one else, and if she is unable to comply, and neglects and refuses so to do, is liable in damages for the breach.

In our opinion the trial court erred in denying the motion for a new trial, and such order is reversed and cause remanded for further proceedings.

We concur: JAMES, J.; SHAW, J.

16 Cal. App. 284

FRESNO HOME PACKING CO. v. HANNON. (Civ. 940.)

(District Court of Appeal, Second District, California. May 23, 1911.)

1. ATTACHMENT (§ 349*)—BOND TO PREVENT—ACTION ON—COMPLAINT—SUFFICIENCY.

In an action on a bond to prevent attachment levy, allegation that on delivery of the bond to the sheriff he refrained from levying the attachment and accepted the bond in lieu of levy sufficiently shows that the bond induced the sheriff to withhold levy, though another bond for the same purpose was previously given.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1257-1271; Dec. Dig. § 349.*]

2. ATTACHMENT (§ 350*)—BOND TO PREVENT—ACTION ON—PROOF REQUIRED.

One suing on a bond given to prevent attachment levy need not show that when the bond was given defendant in attachment had property within the county subject to levy.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 350.*]

3. ATTACHMENT (§ 333*)—BOND TO PREVENT—CONSIDERATION.

A sheriff's act in refraining from levying under an attachment writ is sufficient consideration for a bond to prevent the attachment, and it will be presumed when defendant gives such bond that some benefit accrues to him sufficient as a consideration to support the contract of his sureties.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 333.*]

4. ATTACHMENT (§ 353*)—LIABILITY OF SURETIES.

In a suit on a bond to prevent attachment, which expressly makes the undertaking joint and several, dismissal as to one surety does not affect plaintiff's right to judgment against the other.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 353.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by the Fresno Home Packing Company against Franke A. Hannon. Judgment for plaintiff, and defendant appeals. Affirmed.

McNutt & Hannon, for appellant. Haas, Garrett & Dunnigan, for respondent.

JAMES, J. A judgment for the recovery of the principal sum of \$1,104.15 was entered

against defendant, from which judgment he appeals.

The action was one brought upon an undertaking executed by defendant and one John Hickson, as sureties, and given for the purpose of preventing a levy being made under a writ of attachment issued in an action wherein the plaintiff here was the plaintiff and the Hickson-Hannon-Burns Company was defendant. Defendant Hannon, after being duly served with summons, made no appearance in this action, and the judgment taken was entered upon his default.

The contentions of appellant are: First, that the complaint shows that an undertaking had been given to prevent a levy being made under the writ of attachment prior to the time that the undertaking upon which appellant became surety was furnished to the sheriff, and that therefore the second undertaking was void and of no effect, because the levying of the writ had already been stayed; second, that no consideration for the giving of the second undertaking is shown, for the reason that it does not appear that the Hickson-Hannon-Burns Company had at the time such undertaking was executed any property upon which the writ of attachment might have been levied; third, that the undertaking was not sufficient in form, under the provisions of section 540 of the Code of Civil Procedure, to create any liability against appellant; fourth, that because the plaintiff herein elected to dismiss the action as against appellant's cosurety he thereby discharged also the obligation of appellant, for the reason that the undertaking was joint, and not several.

[1] An examination of the complaint shows very clearly that but one undertaking to prevent the writ of attachment being levied was given, and that that undertaking was the one executed by appellant and Hickson as sureties. If the contention of appellant be conceded, to wit, that it is alleged that the Hickson-Hannon-Burns Company gave an undertaking to prevent the levying of an attachment prior to the giving of the undertaking executed by appellant, still it is sufficiently shown by the allegations of the complaint that the sheriff, in consideration of the giving of the last-mentioned undertaking, refrained from executing the writ. The allegation referred to is as follows: "That upon the delivery of said undertaking to said sheriff of Los Angeles county, the said sheriff of Los Angeles county refrained from levying the said attachment and enforcing the said writ of attachment, and accepted said bond in lieu of the levy of said attachment."

[2] It was not necessary for the plaintiff to allege that, at the time the undertaking was given, the Hickson-Hannon-Burns Company had property within the county of Los

Angeles subject to being levied upon under the writ of attachment.

[3] The act of the officer in refraining from enforcing the writ, or attempting to make a levy, was a sufficient consideration for the giving of the bond, and it will be presumed, where the defendant in such a case furnishes an undertaking to prevent the execution of a writ, that some benefit accrues to him sufficient as a consideration to support the contract of his sureties.

[4] The recitals in the undertaking were entirely sufficient to show the purposes for which it was given, and the obligation assumed by the sureties. In express terms the undertaking was made joint and several, and therefore the dismissal of the action as to the defendant Hickson in no way impaired the right of the plaintiff to a judgment against this appellant.

The judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

16 Cal. App. 271

PEOPLE v. FISHER. (Cr. 191.)

(District Court of Appeal, Second District, California. May 15, 1911.)

1. INDICTMENT AND INFORMATION (§ 125*)—DUPLICITY.

An information is not bad as charging more than one offense, through using language which may seem to describe the offense of embezzlement, not under one section alone of the Penal Code, but under several of them.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.*]

2. INDICTMENT AND INFORMATION (§ 110*)—LANGUAGE OF STATUTE—INFORMATION.

An information charging embezzlement in the language of the statute, or substantially so, is sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.*]

3. CRIMINAL LAW (§ 811*)—INDORSEMENTS ON WRITTEN INSTRUCTIONS.

Though the written instructions went to the jury with the words "charge of the court" at the head thereof, and the words "requested by defendant and given," on a later page, at the head of some of them, the jury could not well be given the impression that the former heading applied only to the instructions preceding the second heading, and so have attached more importance to them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1969-1972; Dec. Dig. § 811.*]

4. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—REPETITION.

The court having given the general instructions that each material allegation of the information must be proved, beyond a reasonable doubt, before there could be a conviction properly refused instructions treating each of such allegations separately, and presenting in that form the same injunction to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

5. EMBEZZLEMENT (§ 11*)—DEMAND FOR RETURN OF PROPERTY.

Where one received property on the statement that he had a customer therefor and would return it or its price, the next day and never did either, but failed to reappear, and immediately left the state, demand for return of the property, or the price, was not necessary for prosecution for embezzlement.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 9, 10; Dec. Dig. § 11.*]

6. CRIMINAL LAW (§ 351*)—EVIDENCE—FLIGHT—CRIMINAL LAW.

Flight of one accused of embezzlement may not only be considered as a circumstance tending to show a consciousness of guilt, but, he having taken the property with him, is evidence of his intent to commit the crime, and of the crime itself.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 779; Dec. Dig. § 351.*]

7. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—DUTY OF JURORS—AGREEING ON VERDICT.

The general instructions are enough; and it is not error to refuse to instruct that each individual juror should not, in order that an agreement may be reached while a reasonable doubt of defendant's guilt remains, vote for a conviction, merely because a majority of the others have determined on that verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from Superior Court, Los Angeles County; George R. Davis, Judge.

Allen R. Fisher was convicted of embezzlement, denied a new trial, and appeals. Affirmed.

Paul W. Schenck, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of the crime of embezzlement, and appeals from the judgment and from an order denying his motion for a new trial.

On June 3, 1910, the Diamond Credit Company, a copartnership, intrusted the defendant with two diamond rings. Defendant had sold a ring for the copartners on a prior date. He stated to Alexander Lippert, one of the proprietors of the business, that he had a customer for another ring. He selected two from the stock, and promised that he would either return the rings, or the price agreed upon, the following day. It was understood that a commission of 10 per cent. would be paid to defendant in the event a sale was made of either or both of the rings. Defendant did not return the property on the following day, or at all; neither did he appear himself at the place of business of complainants at any time subsequent to the day when he received the rings. Inquiry was made among people with whom he had been in the habit of associating, but no trace of defendant was secured for some time. In August following he was located at Detroit, Mich., and brought back under extradition warrant to Los Angeles for trial.

[1] The information as filed by the district attorney did not charge more than one of-

fense, as contended for by defendant, and it did state facts sufficient to constitute the offense of embezzlement as defined by section 508 of the Penal Code. In chapter 6 of the Penal Code are grouped several sections, all dealing with the subject of embezzlement; they all define one and the same crime or offense. If, perchance, language is used which may seem to describe the crime under several of these sections, the information will not be held bad, if it is complete in its charge under either of the sections. The situation is no different than it would be where a number of different acts are described in a single section, in which case the commission of any one of such acts will constitute the crime. It has been held that different crimes are not charged, where the information embraces a description of the several acts included in the terms of a section. *People v. Gosset*, 93 Cal. 641, 29 Pac. 246, *People v. Thompson*, 111 Cal. 242, 43 Pac. 748; *People v. Gusti*, 113 Cal. 177, 45 Pac. 263.

[2] An information which charges the offense of embezzlement in the language of the statute, or substantially in such language, is sufficient. *People v. Ward*, 134 Cal. 301, 66 Pac. 372; *People v. Gordon*, 133 Cal. 328, 65 Pac. 746, 85 Am. St. Rep. 174. Tested by the measure given in these authorities, the information in this case was not subject to the objection made to it by appellant.

[3] Defendant complains of the giving of several instructions, and also of the refusal of the court to give others requested by him to be given. It is first pointed out in the printed argument that the jury might have been misled because some of the instructions given were headed, "Charge of the court," while others were indorsed, "Requested by defendant and given." The latter sentence, excepting the last word thereof, was written upon the instructions by defendant's counsel, and the instructions went to the court bearing that indorsement. The trial judge added the word "given" in the blank left thereon, and signed his name in the usual manner. Assuming (what the record does not show to be a fact) that the written instructions were given to the jury upon their retirement to the jury room, it cannot be said that the defendant was prejudiced by the act of the court in allowing the words quoted to appear upon the instructions. Counsel for defendant suggests that the jury would be likely to attach more importance to those portions of the instructions under the head, "Charge of the court," than they would to those marked with the phrase, "Requested by defendant and given." An examination of the clerk's transcript shows that the heading, "Charge of the court," appeared at the top of the first sheet of the instructions and under the title of the case; it was a general heading to all of the instructions given. The jury examining the papers, if they did examine them, could not well be given the im-

pression that the term last quoted was intended to apply only to those instructions of the court which did not bear upon them the words "Requested by defendant and given."

[4] It was not error for the court, after giving the general instructions in which the jury were told that each material allegation of the information must be proved beyond a reasonable doubt before the defendant could be convicted, to refuse to give instructions which treated all of the allegations separately, and presented in that form the same injunction to the jury as had been fully covered by the general instructions. Instructions which iterate and reiterate features of a charge of the court to the jury necessarily, by reason of their number, tend to confuse the jury, and the giving of them cannot serve any useful legal purpose. It is little wonder that the criticism is so often heard that jurors disregard instructions of the court, when it is considered how often the charge given them is composed of such a mass and number of instructions as to make its proper analysis a matter of almost impossibility to a jury of laymen. Brevity in the giving of instructions cannot be too much commended.

[5] Under the circumstances of this case, it was not error for the court to refuse to instruct the jury that, before the defendant could be convicted of embezzlement, it would be necessary for the prosecution to show that prior to the filing of the complaint demand had been made upon defendant to either return the rings, or the money agreed as the purchase price thereof. The defendant failed to bring back the jewelry, as he had promised to do, and it appears that he left the state almost immediately thereafter. His action in taking the property out of the state in the manner he did and retaining it, at the same time attempting to place himself beyond the reach of any inquiry from the owners of the property, rendered a demand unnecessary, and furnished very satisfactory evidence of the embezzlement. *People v. Ward*, 134 Cal. 301, 66 Pac. 372. The effect of these acts, under all of the circumstances of the case, tended to show that the intent of defendant was to keep, not only his person, but also the diamond rings, out of the reach of the complainants. Evidence of the embezzlement was, therefore, clear and sufficient.

[6] The instruction included in the charge of the court to the jury, as to the effect to be given evidence of flight of an accused person, was substantially the same as that approved in the case of *People v. Giancoli*, 74 Cal. 642, 16 Pac. 510. By the instruction here complained of, the jury were told that the flight of defendant could be considered as a circumstance tending to show a consciousness of guilt. The jury might properly have been told that proof that defendant fled from the state, carrying the property of complainants with him, was evidence of the intent of the accused to commit the crime charged, and of the embezzlement itself.

[7] Defendant offered an instruction to the effect that each individual juror should not vote for a verdict of guilty, merely because a majority or all of the remaining jurors determined upon that verdict, in order that an agreement might be reached, and while a reasonable doubt of defendant's guilt was entertained. This subject was fully covered in the general instructions of the court, and, as was said in the case of *People v. Rodley*, 131 Cal. 259, 63 Pac. 358: "They (the jury) should not be lectured by the court to make them strong and steadfast in their individual opinions; neither should they be exhorted to reach an agreement; and while it is probably true that each juror must decide the matter for himself, yet he should do so only after a consideration of the case with his fellow jurors, and he should not hesitate to sacrifice his views or opinions of the case when convinced that they are erroneous, even though in so doing he defer to the views or opinions of others." Cited, also, in *People v. Perry*, 144 Cal. 748, 78 Pac. 284.

It was clearly shown that the defendant was a sales agent for the complainants in dealing with the rings. The amount of his commission had been agreed upon as being 10 per cent. of the selling price. On the evidence offered on behalf of the prosecution, no question could arise as to the fiduciary capacity occupied by defendant toward complainants in the transaction. The testimony of the complainants was nowhere contradicted by any evidence, and the defendant introduced no witnesses to testify in his behalf; neither did he himself testify in contradiction of anything stated by the witnesses for the people. No prejudicial error appears to have been made by the court in its rulings on the admission of testimony, and other errors assigned are not such as to require particular notice. The defendant was properly convicted on the case made out against him, and the trial court saw to it that he had the benefit of all the rights to which the law entitled him.

The judgment and order are, therefore, affirmed.

We concur: ALLEN, P. J.; SHAW, J.

16 Cal. App. 256

SEGERSTROM v. SCOTT. (Civ. 786.)
(District Court of Appeal, Third District, California. May 12, 1911.)

1. APPEAL AND ERROR (§ 529*)—RECORD—JUDGMENT ROLL.

An amended answer, filed without leave of court after the time within which plaintiff is authorized to file a demurrer to the original answer, cannot be treated as a pleading in the case and a part of the judgment roll, on appeal from the judgment on the judgment roll alone.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2389-2393; Dec. Dig. § 529.*]

2. APPEAL AND ERROR (§ 934*)—RECORD—PRESUMPTIONS.

Where there was no bill of exceptions or other like record, disclosing that an amended answer was filed without leave of court after the time within which plaintiff could demur to the original answer, the court on appeal must, as against the extrajudicial declaration of counsel for plaintiff that it was so filed, presume that the amended answer was properly filed, and thus presume in favor of the validity of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781; Dec. Dig. § 934.*]

3. JUDGMENT (§ 279*)—RECORD—"JUDGMENT ROLL."

An order granting leave to amend an answer is no part of the judgment roll, within Code Civ. Proc. § 670, subd. 2, declaring what shall constitute the judgment roll, and it need not be entered thereon.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 546-551; Dec. Dig. § 279.*]

For other definitions, see Words and Phrases, vol. 4, p. 3847; vol. 8, p. 7697.]

4. APPEAL AND ERROR (§ 545*)—RECORD—JUDGMENT ROLL.

Under Code Civ. Proc. § 950, defining what papers may be used on appeal from a judgment, the papers which may be used on an appeal from a judgment are a copy of the notice of appeal, of the judgment roll and bill of exceptions or statement of the case, but where there is no bill or statement, but the appeal is on the judgment roll alone, the orders of the court allowing or refusing amendments to pleadings are not a part of the record which the court on appeal may review.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 545.*]

5. APPEAL AND ERROR (§ 662*)—QUESTIONS REVIEWABLE—AMENDED PLEADINGS—PRESUMPTIONS.

A declaration in an amended answer that the same is filed by leave of court, first had and obtained, must be accepted as a verity by the court on appeal, in the absence of an affirmative showing to the contrary, nothing appearing in the judgment roll on which the appeal is taken inconsistent with such declaration.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 662.*]

6. PUBLIC LANDS (§ 144*)—STATE LANDS—RIGHT TO PURCHASE.

An amended answer in a contest to determine conflicting claims to the right to purchase state land, which alleges that on a designated date defendant was a female citizen of the United States and a resident of the state, of lawful age, and was entitled to purchase and hold real estate in her own name, shows her qualifications to purchase and hold the real estate at that time, which was the date of her application to purchase.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 144.*]

7. PUBLIC LANDS (§ 144*)—STATE LANDS—RIGHT TO PURCHASE.

A female applying for the purchase of state lands must show by her affidavit, and not merely state the fact, that she is entitled to purchase and hold real estate.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 144.*]

8. APPEAL AND ERROR (§ 934*)—JUDGMENT—VALIDITY—PRESUMPTIONS.

Every presumption is in favor of the validity of the judgment appealed from, and any

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

condition of facts consistent with its validity presumptively exists.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781; Dec. Dig. § 934.*]

9. APPEAL AND ERROR (§ 934*)—JUDGMENT—VALIDITY—PRESUMPTIONS.

The court on an appeal from a judgment on the judgment roll alone must make all intendments in support of the judgment, and all proceedings necessary to its validity will be presumed to have been regularly taken, and any matters which might have been presented to the trial court which would have authorized the judgment will be presumed to have been presented, in the absence of anything in the record to the contrary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781; Dec. Dig. § 934.*]

Appeal from Superior Court, Calaveras County; A. I. McSorley, Judge.

Action by Eric J. Segerstrom against M. J. Scott. From a judgment for defendant, plaintiff appeals. Affirmed.

C. H. Segerstrom, for appellant. Will A. Dower, for respondent.

HART, J. This is an appeal from the judgment on the judgment roll alone. The action was instituted, under section 3495 of the Political Code, for the purpose of determining the conflicting claims of the parties to the right to purchase from the state the lands described in the pleadings.

It appears from the complaint that, on the 25th day of November, 1908, the "defendant filed with the surveyor general of the state of California her application, numbered 3501, Sacramento Land District, to purchase of said state, under the provisions of sections 3494 and 3495 of the Political Code, the land" described in said complaint. It also likewise appears that on the 19th day of March, 1909, the plaintiff filed with said surveyor general an application to purchase the same land. Upon the hearing of the contest, the court below found in favor of the defendant upon all the essential issues of fact, and, accordingly, rendered and caused to be entered a judgment establishing defendant's superior right to purchase the land in dispute.

The single question involved in the attack upon the judgment is based upon the contention that the defendant, in her answer, failed to state facts sufficient to constitute an affirmative defense, upon which, if properly pleaded, her right to purchase the land in controversy must necessarily and solely rest. It is, therefore, claimed that the judgment in favor of defendant is without support.

It appears that, in the original answer, the defendant, being a female, pleaded no facts disclosing that she is and was, at the time of filing her application with the surveyor general for the contested land, "entitled to purchase and hold real estate in her own name,"

a showing which, in the case of a female applicant, section 3496 of the Political Code requires to be made, in the form of an affidavit, before the surveyor general, when such application is filed with that official, and which, manifestly, must also be made in her pleading in a contest of this character in order to state either a cause of action in her own behalf or an affirmative defense against the claim of one contesting her right to purchase state lands.

The plaintiff did not demur to the answer but, after the time within which he might have done so, the defendant filed an amended answer to whose averments, as they appeared in the original answer, she added others disclosing that she was qualified and "entitled to purchase and hold real estate in her own name."

It is asserted that the amended answer was filed without leave or permission of the court, and that, having been so filed after the time within which the plaintiff might have interposed a demurrer thereto, it cannot be considered as any part of the pleadings and, therefore, does not legally constitute a part of the judgment roll. See *Tingley v. Times-Mirror Company*, 151 Cal. 1, 89 Pac. 1097. That case, inquiring into the meaning of section 472 of the Code of Civil Procedure, by which it is provided that, under certain circumstances therein indicated, "any pleading may be amended once by the party of course," etc., holds that "this right to amend, while applying to the pleadings of both parties, has its limitations as to the time within which either party may exercise it under the section, and such time is not extended in behalf of the defendant beyond final joinder on the issues of fact in the case."

[1] And it is undoubtedly true that if there were any evidence before this court, authenticated in the proper way, that the defendant, without leave or authority from the court so to do, filed her amended answer after the time within which the plaintiff was authorized, if he so elected, to file a demurrer to the original answer, said amended answer could not be considered nor treated as a pleading in the case, nor, per consequence, a part of the judgment roll.

[2] But the appeal here, as seen, is from the judgment on the judgment roll alone, and there being no bill of exceptions or other like record disclosing that, as charged by the appellant, the amended answer was filed, under the circumstances as stated, without permission from the court to file it, the declaration of counsel that it was so filed is entirely extrajudicial, and, of course, cannot prevail or even be considered as against the presumptions in favor of the judgment.

The answer, in the vital particular in which it was amended, reads: "That, on the 25th day of November, 1908, said defendant

was a female citizen of the United States, and a resident of the state of California, of lawful age, and was entitled to purchase and hold real estate in her own name." In the consideration of the record we are confined to the judgment roll in the absence of a bill of exceptions or a statement of the case or the stenographer's transcript of the proceedings had at the trial.

[3] An order granting leave to a party to amend his answer is no part of the judgment roll and is not, therefore, required to be entered thereon. Subdivision 2, § 670, Code Civ. Proc.; *Livermore v. Webb*, 56 Cal. 492.

[4] The papers which may be used on an appeal from a final judgment are a copy of the notice of appeal, of the judgment roll, and of any bill of exceptions or statement in the case upon which the appellant relies (section 950, Code Civ. Proc.), but where, as here, there is no bill of exceptions or statement of the case, or other like record, the appeal being upon the judgment roll alone, the orders of the court, allowing or refusing amendments to the answer, do not, as before stated, constitute any part of the record which an appellate court may review.

[5] The amended answer itself declares that the same was filed by leave of the court "first had and obtained," and there is nothing appearing on the judgment roll inconsistent with this statement of the amended answer. In the absence of an affirmative showing to the contrary, this declaration of the amended answer must be accepted as verity, and even if it contained no such declaration, and there was no proper affirmative showing that it was not true, this court would be compelled to indulge the presumption that the amended answer was duly filed, or filed with the trial court's permission. *Riverside County v. Stockman*, 124 Cal. 222, 56 Pac. 1027.

The court found that at the time defendant made her application to the surveyor general for the land described in the pleadings, she was of about the age of 30 years, and, in fact, possessed all the qualifications entitling her to purchase and hold real estate. The court further found that the affidavit accompanying her application to the surveyor general to purchase said land contained a statement disclosing her qualifications in that respect.

[6] The averments of the amended answer are sufficient to show defendant's qualifications to purchase and hold real estate. *Price v. Beaver*, 73 Cal. 630, 15 Pac. 356; *Henshall v. Marsh*, 151 Cal. 302, 90 Pac. 693; *Dean v. Dunn*, 9 Cal. App. 358, 99 Pac. 380.

[7] The law requires that a female applying for the purchase of state lands shall show by her affidavit, and not merely state the fact, that she is entitled to purchase and hold real estate, and the presumption

from the findings is that her affidavit fully met this requirement.

[8] "Every presumption is in favor of the validity of the judgment, and any condition of facts consistent with the validity of the judgment will be presumed to have existed, rather than one which will defeat the judgment." *Canadian, etc., Co. v. Clarita, etc., Co.*, 140 Cal. 674, 74 Pac. 301, and cases cited.

[9] Indeed, as to the entire proceedings in the trial court culminating in the judgment from which the appeal here is prosecuted upon the judgment roll alone, every presumption and every intendment is in favor of the regularity of such proceedings. "Upon an appeal from a judgment, upon the judgment roll alone, all intendments will be made in support of the judgment, and all proceedings necessary to its validity will be presumed to have been regularly taken, and any matters which might have been presented to the court below which would have authorized the judgment will be presumed to have been thus presented, if the record shows nothing to the contrary." *Von Schmidt v. Von Schmidt*, 104 Cal. 550, 38 Pac. 361. See, also, *Johnston v. Callaban*, 146 Cal. 214, 79 Pac. 870; *Galvin v. Palmer*, 134 Cal. 427, 66 Pac. 572; *Butler v. Soule*, 124 Cal. 73, 56 Pac. 601; *In re Eichhoff*, 101 Cal. 605, 36 Pac. 11; *Eichhoff v. Eichhoff*, 107 Cal. 42, 40 Pac. 24, 48 Am. St. Rep. 110; *Siehler v. Look*, 93 Cal. 601, 29 Pac. 220.

Neither the case of *Tingley v. Times-Mirror Company*, supra, nor that of *Wood v. Brush*, 72 Cal. 224, 13 Pac. 627, is authority for the proposition that this court may review an objection to a judgment where there is no showing whatever in the record on appeal that the objection is or may be well taken. In the first-mentioned case there was, in addition to the judgment roll, a bill of exceptions. In the last-mentioned case the judgment itself recited that the court denied the application for leave to file a proposed supplemental answer.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

16 Cal. App. 103

O'BRIEN v. O'BRIEN et al. (Civ. 847.)
(District Court of Appeal, Third District, California. April 26, 1911.)

1. VENUE (§ 68*)—CHANGE OF VENUE—RESISTANCE—EVIDENCE.

On an application for a change of the place of trial on the ground that defendant was a resident of another county to which the venue was sought to be changed, plaintiff's affidavits in resistance held not to contradict defendant's declaration that at the commencement of the action he was a nonresident of the county where the suit was brought, and resided in the county to which the change was sought.

[Ed. Note.—For other cases, see *venue*, Cent. Dig. § 121; Dec. Dig. § 68.*]

2. DOMICILE (§ 2*)—RESIDENCE—"LIVE"—"RESIDENCE."

Statement of a witness that he lived at a certain street and number in a specified city was not inconsistent with his "residence" in another county, since a person may "live" in one place, and have a legal residence in another.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. § 2; Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4189-4191; vol. 7, pp. 6151-6161; vol. 8, p. 7788.]

3. VENUE (§ 68*)—CHANGE OF VENUE—AFFIDAVITS.

Affidavits in resistance of an application for a change of venue reciting that the affiant was "certain" that defendant had gone to another county on business matters for a limited time, but not to establish a residence there, and that she was "convinced" that his legal residence was still in the county where the suit was brought, without stating the facts by which she became "certain" or had been "convinced" of such fact, were insufficient.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 121; Dec. Dig. § 68.*]

4. VENUE (§ 66*)—CHANGE OF VENUE—AFFIDAVIT—"RESIDED AND NOW RESIDES."

Where defendant applied for a change of venue because of his alleged residence in another county, and made affidavit that at the time of the commencement of the action he "resided and now resides" in such other county to which the venue was sought to be changed, such averment, though in a sense involving a legal conclusion, should be regarded in case of an affidavit made by the defendant himself as a statement of a probative fact when made without qualification or facts to support the same, and as carrying with it all the essentials of a legal residence, though such would not be the effect of a similar averment in an affidavit made by a party other than the defendant.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 112; Dec. Dig. § 66.*]

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by Elizabeth A. O'Brien, as special administratrix of the estate of Joseph A. O'Brien, deceased, against Charles F. O'Brien individually and as surviving partner of a previously existing firm doing business under the name of Charles F. O'Brien & Co. From an order denying defendant's motion for a change of place of trial, plaintiff appeals. Reversed.

Frank James, E. C. Chapman, and Frank W. Taft, for appellants. Lent & Humphrey, for respondent.

HART, J. This is an appeal from an order denying defendant's motion for a change of the place of trial from the city and county of San Francisco to the county of Los Angeles. The suit by the plaintiff is for an accounting of the partnership transactions between the defendant and the deceased and for a judgment for one-half of such net profits accruing from the business conducted by defendant and said deceased as such accounting may disclose.

[1] It appears from the complaint that the

defendant and the deceased, Joseph A. O'Brien, in the year 1907 established themselves into a copartnership for the purpose of conducting the business of selling, for a commission, lands and suburban properties situated in the neighborhood of the city of San Francisco; that said partners were to share equally in the profits of said business; that, up to the time of his death, the deceased carried out and performed each and all the terms of the agreement upon which said partnership was to be conducted, "and thereby became entitled to receive as a member of said partnership, and as his proportionate share of the net profits arising from the conduct of said business one-half of such net profits."

On the 29th day of December, 1908, Joseph A. O'Brien died in the city of San Francisco, leaving a last will and testament, "in and by which he named the said Charles F. O'Brien as executor of said will with the request that he be not required to give a bond as such executor." The complaint shows that defendant, in due time, qualified as such executor and that letters testamentary were issued to him. It is alleged that defendant, after the death of Joseph A. O'Brien, continued in the possession of said partnership business and the property thereof. It is charged that defendant, in the execution of his duties as such executor, willfully failed to account in his inventory filed by him in the matter of said estate for the interest of the deceased in said partnership, and that he did not at any time have such interest appraised; that for the neglect so charged the defendant, after due proceedings, was on the 8th day of October 1909, suspended by the court as such executor, and that on the 22d day of October, 1909, the court appointed plaintiff as special administratrix of said estate, "with full power to take charge and management of and enter upon and preserve said estate and the property thereof from damage, waste, and injury and for such purpose and all necessary purposes to commence, maintain, and defend suits or other legal proceedings."

The complaint alleges that plaintiff is the widow of the said Joseph A. O'Brien, deceased; that no children were born to their marriage; and that she is the sole legatee and devisee under his said will of all property and estate of which he died seised or possessed. The complaint was filed on the 30th day of October, 1909. On the 18th day of November, 1909, the defendant served on plaintiff and filed a general demurrer to the complaint, a demand for a change of the place of trial of said action, a notice of motion to change the place of trial and an affidavit of merits. The notice stated that the motion would be made upon the affidavit of the defendant and upon the papers and pleadings on file in said action, and upon the ground that the defendant, neither at the time of the commencement of

said action resided "nor now resides, in the said city and county of San Francisco; and that the defendant, at the time of the commencement of said action resided and now resides in the county of Los Angeles, in said state." The affidavit of merits filed by defendant declares, among other things, "that at the time of the commencement of said action he resided and now resides in the county of Los Angeles, state of California; that affiant neither at the time of the commencement of the action resided, nor now resides, in said city and county of San Francisco," etc.

In rebuttal of the affidavit filed by plaintiff in resistance to the motion, which we shall later examine, and in corroboration of the allegations contained in his affidavit of merits of his residence in Los Angeles at the time of the commencement of this action, the defendant, at the hearing of the motion, introduced in evidence a petition, verified by the plaintiff on the 4th day of June, 1909, praying for the removal of defendant as executor of the estate of the deceased, and in which, inter alia, she alleges, upon information and belief, that the defendant "moved from the city and county of San Francisco, state of California, to the city of Los Angeles, and is engaged in business in the said city of Los Angeles, state of California, and in Mexico," etc. The court, as the basis of its order removing defendant from the office of executor of the will of deceased, made findings of fact from the proof adduced in said proceedings for removal, and said findings were, by defendant, introduced at the hearing on this motion. Among other findings, the court made the following: "That the said Charles F. O'Brien has moved from the city and county of San Francisco, state of California, to the city of Los Angeles, state of California, and is engaged in business in said city of Los Angeles, county of Los Angeles, state of California, and in Mexico." The order made suspending the defendant from the position of executor was made on the 8th day of October, 1909, 22 days prior to the institution of this suit.

[1] The affidavit filed by the plaintiff in resistance to the motion, after reciting in detail the history of the alleged mismanagement of the estate by defendant and the proceedings leading to the order removing him as executor of the last will of deceased, alleges: "During the proceedings taken in the matter of said estate and particularly on the 29th day of January, 1909, the said Charles F. O'Brien appeared in Department 9 of this court before Judge Coffey, and testified under oath as follows: 'What is your name?' A. 'Charles F. O'Brien.' The Court: 'Mr. O'Brien, where do you live?' A. Why, at this time I live at 1560 Sacramento street.' And at various times after, until very recently, the said Charles F. O'Brien has testified that his residence is in the city and county of San Francisco." It is further alleged in said affidavit that during the life-

time of the deceased, and after his death, "the principal business carried on by the partnership of O'Brien & Garrett (of which firm defendant and deceased were members) was the sale of lands situate in the Yaqui valley, Mexico, and said firm of O'Brien & Garrett acted as agents of David Richardson & Co. for the sale of said lands, the principal place of business of said company being in Los Angeles, and said Joseph O'Brien, and Charles F. O'Brien made many and varied trips to the city of Los Angeles in connection with the said business, but throughout said time both kept and maintained their residence in the city and county of San Francisco. * * * I am certain that Charles F. O'Brien has gone to Los Angeles on business matters for a limited time, as he has often done heretofore, but has not gone there to establish a residence nor to abandon his local residence in San Francisco, and his purpose in going to said city of Los Angeles is to avoid the trial of this action in said city and county of San Francisco, and to annoy, harass, and inconvenience me as plaintiff herein, and to prevent me from prosecuting this action. * * * The said Charles F. O'Brien repeatedly told me that if I crossed him in any way in this estate that he would see that I never received a cent, and I would lose any property that I might have, and I am convinced that his residence is still in the city and county of San Francisco and that he is pretending that his residence is in Los Angeles, in pursuance of the threats aforesaid and for the purpose of harassing and annoying me and causing me great expense."

Briefly, the foregoing is a recapitulation of all the statements contained in the affidavit of plaintiff that can be construed to bear, either directly or indirectly, upon the question at issue on this motion, and in our judgment they do not contradict in the slightest degree the unqualified declaration of the defendant in his affidavit of merits that he was, at the time of the commencement of this action, and is now, a resident of the city of Los Angeles. The rule as to the conflict of evidence upon the question of defendant's residence cannot, therefore, be invoked here. All the evidence worthy of the name, is one way, and, obviously, under such circumstances, there can be no conflict.

[2] The only part of plaintiff's affidavit that may be said to tend to support her contention upon the question of defendant's residence is where it is made to appear that defendant, about nine months prior to the date of the commencement of this action, testified, "At this time I lived at 1560 Sacramento street," from which testimony it might reasonably be inferred that he meant to say that in January, 1909, he resided on a street of that name in the city of San Francisco, although he did not say so in direct terms. A person may "live" at a place and still not be a "resident" thereof in the legal sense of that term. But, assuming that he intended to

say that, at the time he answered the question then propounded to him, he was a resident of San Francisco, which is by no means clear, or let it even be assumed that, in point of fact, he did reside there then, still there is nothing in his testimony then given, nor would there be in the fact of his residence there then, inconsistent with the statement in his affidavit of merits that, on the 30th day of October, 1909, when this action was instituted, he was a resident of the county of Los Angeles.

[3] The averments of plaintiff's affidavit, "I am *certain* that Charles F. O'Brien has gone to Los Angeles on business matters for a limited time, * * * but has not gone there to establish a residence nor to abandon his local residence in San Francisco," and "I am *convinced* that his residence is still in the city and county of San Francisco," etc., involve the statement of no fact, but are mere conclusions of the affiant. She does not set forth any facts by which she has become *certain* or has been *convinced* that defendant's residence is or was, when this action was brought, in the city of San Francisco. It was for her to present facts that would produce certainty in the mind of the court to which the application for the change was made, and convince it that the defendant resided within its jurisdiction when the complaint was filed. It might transpire that facts that would convince affiant that the defendant was a resident of San Francisco might not be of sufficient probative value to so convince the court. And, of course, it was for the court and not for the affiant to be convinced of the truth of the ultimate fact submitted for determination by this motion, hence the necessity and importance of disclosing by her affidavit, if she has not so disclosed them, all the facts which she declares had made it certain to her defendant was, at the time of the commencement of this action, a resident of San Francisco. If she has set forth in her affidavit all the facts available to her on the proposition, then, as stated, while, looking at them from her point of view, they may possess much power of persuasion in the direction to which they are addressed, they are not, in our opinion, of such a character as to overcome or even to directly contradict defendant's unqualified declaration that he then resided in the city of Los Angeles. They, in other words, fall far short of showing that defendant resided in San Francisco at the time referred to.

Moreover, defendant's affidavit of merits is to some extent corroborated, as has been seen, by the statement contained in plaintiff's petition, verified by her on the 4th day of June, 1909—a little over four months prior to the institution of this action—praying that defendant be ousted as executor of her deceased husband's will, that, on her information and belief, defendant had moved from the city and county of San Francisco to the city of Los Angeles, and had engaged

in business in said last-mentioned city. This, it may be here observed, was one of the grounds upon which she based her prayer for the removal of defendant from the office of executor of the last will of deceased, the petition alleging that by reason of his absence from the city of San Francisco, he was unable to properly attend to his duties as such executor, "all of which is to the serious damage and detriment of said estate and the property thereof." And the court (presided over in that proceeding by a judge other than the judge who heard and determined this motion) found, on the 8th day of October, 1909, in said proceeding to remove defendant, as already seen, that "the said Charles F. O'Brien, has moved from the city and county of San Francisco, state of California, to the city of Los Angeles, state of California, and is engaged in business in said city of Los Angeles," etc. The foregoing, as we have already shown, was made only 22 days antedating the day on which this action was begun.

It is not clear whether, by said allegation in plaintiff's petition to oust defendant from the office of executor and by the finding of the court as to the fact involved in said allegation, it was intended by the plaintiff to declare and by the court to find that defendant had then established his residence in the city of Los Angeles. Of course, a person may *move* to a place for temporary purposes and may *engage in business* there without establishing a legal residence at such place or an intention to do so; yet, vernacularly, the phrase "moved to the city of Los Angeles" would be accepted as carrying with it an intention to take up a permanent abode in said city, and we have little doubt that such was the meaning plaintiff intended to convey by the use of that language in her petition to remove the defendant. At any rate, whatever may be the real import of the allegation and finding referred to, if they are entitled to any weight at all in the consideration of the question here, it is in support of defendant's contention that he was a resident of the county of Los Angeles when this action was begun.

[4] It is true that the defendant merely declares, in his affidavit, "that at the time of the commencement of said action he resided and now resides in the county of Los Angeles, state of California; that affiant neither at the time of the commencement of the said action resided, nor now resides, in said city of San Francisco." These allegations may, in a sense, involve a legal conclusion, the proposition whether he "resided and resides" in the City of Los Angeles and not in the city of San Francisco being the very question at issue and submitted by this motion for the court's decision. But we think that, on a motion of this character, in the case of the defendant's affidavit, wherein, without qualification, he states his residence to be at a certain place, without giv-

ing other facts to support the statement, such allegation should be construed to be and treated as the statement of a probative fact—that is, that it is intended to and does carry with it all the essentials of a legal residence. The defendant himself knows better than any other person whether he has established a legal residence in a particular city or a county. He knows or must be assumed to know what his intention is with respect to becoming or not becoming a resident, in the legal sense, of a place to which he “moves.” The defendant here knows much better than any other person could know whether, in going to Los Angeles and establishing himself in business there, his intention was then to make or not to make that city his permanent place of residence. Therefore, as stated, when he deposed that, at the time this action was commenced, he *resided* and still *resides* in Los Angeles, it must be assumed that he thus deposed with full knowledge of the legal import of those terms or of all the requisites of a legal residence, and that he intended that his affidavit should be so construed and understood. Indeed, there can be no doubt but that he intended that his affidavit should be so understood and that it should be accepted as bearing such meaning. Viewed in this light, his affidavit is sufficient to make, in his behalf, upon the question of residence, a *prima facie* showing, which, unless overthrown in a proper way by a countershowning on behalf of plaintiff, must stand as the basis of the order on this motion. As declared, the plaintiff has signally failed to overcome the showing made by defendant.

It is true that we held in the case of *Bernou v. Bernou*, 114 Pac. 1000, that the affidavit of a party, other than the defendant, filed in behalf of the latter on his motion for a change of venue, and in which it was merely alleged that the affiant “of his personal knowledge knows that defendant has been and is a bona fide resident of the city of San Francisco,” without alleging the facts upon which he based such “knowledge,” was without any probative value whatsoever. And to that proposition we still adhere. But, in our opinion, there should be much more required in an affidavit made by a party other than the defendant himself, and used as a basis for a motion of the character of the one involved here than in an affidavit to be used for the same purpose, made by the defendant, whether the affidavit of such other party is for or against the defendant. The affidavit of a party other than the defendant himself should, to be of any value as proof addressed to the question of residence, on a motion of this kind, state some fact or facts by which the court may be aided in forming some conclusion of its own upon the question of defendant’s residence. In other words, the mere declaration by an affiant, other

than the defendant himself, that the latter “resides” in or is a “resident” of a county other than that in which the action has been instituted would constitute a conclusion of the witness as well as of law, pure and simple, for he could know nothing of the defendant’s intention with respect to the establishment of his place of residence, except from extrinsic circumstances, upon which alone he must base his conclusion as to the question whether the defendant has or has not become a resident, in the legal sense, of the particular place referred to in his affidavit. With the circumstances by which such affiant has arrived at his conclusion the court should be made acquainted and itself thus afforded an opportunity to pass upon their weight and value as proof of the fact to be decided. As we stated, when referring to the affidavit of plaintiff, a fact or circumstance which might appear to the lay mind to possess much force, might, under judicial scrutiny, be found to be of no probative significance whatsoever.

However, we are, as declared, of the opinion that the court below made a mistake in denying the motion on the showing disclosed here, and the order appealed from must therefore be reversed, and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

16 Cal. App. 193

O'BRIEN v. O'BRIEN et al. (Civ. 848.)

(District Court of Appeal, Third District, California. May 9, 1911.)

1. PARTNERSHIP (§ 258*)—DISSOLUTION—ADMINISTRATRIX OF SURVIVING PARTNER—ACTION—NATURE—PARTIES.

Where the special administratrix of a deceased partner sued the surviving partners alleging that one of them as executor of the deceased partner had failed to inventory his deceased partner’s interest as a part of the assets of the estate, and for this had been removed, also that plaintiff had been refused any information with reference to her decedent’s interest in the firm and prayed an accounting as to all the dealings and transactions of the partnership, and that the net profits of the business be ascertained, and the amounts that had been paid to the several partners and all moneys due and paid to or to become due and payable to the firm be disclosed, the action was for an accounting of the partnership business as to which both surviving partners were necessary parties.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 564-598; Dec. Dig. § 258.*]

2. VENUE (§ 22*)—CODEFENDANTS—RESIDENCE OF PARTIES.

That a resident surviving partner properly joined in an action by the administratrix of the deceased partner for an accounting, united with his nonresident codefendant in an application for a change of venue, and by affidavit averred that he, the resident defendant, was not in possession of the property or assets of the firm, and was but a nominal party with no substantial interest in the defense of the action, did not affect plaintiff’s right to have the ac-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep’t Indexes

tion tried at the place where the resident defendant resided.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 22.*]

3. PARTNERSHIP (§ 258*)—ACCOUNTING—SURVIVING PARTNERS—NOMINAL PARTIES.

Where, in a suit against surviving partners for an accounting, the complaint averred facts showing that the nonresident defendant was the party chiefly delinquent, but also showed that the resident defendant had been connected with his codefendant in the management and control of the business since the death of plaintiff's decedent, and was withholding from plaintiff the information sought, and was in some degree responsible for the surviving partner's failure to account to her or to her testator in his lifetime for his interest in the concern, he was an actual and not a mere nominal defendant.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 564-598; Dec. Dig. § 258.*]

4. VENUE (§ 72*)—CHANGE OF VENUE—MERITS.

The court will not go into the merits of the action on a motion for a change in the place of trial.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 127; Dec. Dig. § 72.*]

5. VENUE (§ 22*)—RESIDENCE OF CODEFENDANT.

Where one of two codefendants resided in the county of plaintiff's residence, she was entitled to a trial in that county under Code Civ. Proc. § 395, providing that plaintiff may have the cause tried in the county where either of the defendants resides.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 35-37; Dec. Dig. § 22.*]

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by Elizabeth A. O'Brien, administratrix of Joseph A. O'Brien, deceased, against Charles F. O'Brien and another, as survivors of the firm of O'Brien & Garrett. From an order denying defendants' motion for a change of place of trial, they appeal. Affirmed.

Jordan, Rowe & Brann, for appellant Garrett. Frank James, E. C. Chapman, and Frank W. Taft, for appellant O'Brien. Lent & Humphrey, for respondent.

CHIPMAN, P. J. The purpose of this appeal is to review the order of the trial court denying defendants' motion for a change of the place of trial. The complaint is quite a voluminous document and only such of its averments will be stated as will show the nature of the action and serve to disclose the reasons for denying defendants' motion.

It is alleged that in his lifetime plaintiff's testate, Joseph A. O'Brien, and defendants, Charles F. O'Brien and William T. Garrett, were partners, under the firm name of O'Brien & Garrett, doing business in the city of San Francisco as agents for the sale of land located in the republic of Mexico; that on December 28, 1908, the said Joseph died testate, naming defendant his brother Charles as executor of his last will; that he duly

qualified as such executor, but, because of certain neglect of duty, he was removed from his office as executor, and plaintiff, who was sole devisee and widow of Joseph, was appointed special administratrix of the estate of deceased; that Charles, while such executor, had failed to account to said estate with respect to Joseph's partnership interest in said firm, and had failed to mention it in his inventory of said estate; that neither of defendants, as surviving partners, ever accounted to said executor of said estate and neither has accounted to plaintiff, although she has demanded of them that such accounting be made since her appointment as special administratrix of said estate; that ever since the death of said Joseph the "defendants continued in the possession of said partnership and partnership property and undertook the settlement of said partnership business." The complaint then sets forth with some particularity the nature, extent and value of the business transacted, the profits of which amounted, as she avers, to over \$25,000, and that there remains due to her testate, as a member of said firm, a large amount of money, the exact amount she is and has been unable to ascertain, "because of the incomplete condition of the accounts of said firm, and of the failure and refusal of defendant Charles F. O'Brien and of said William T. Garrett to furnish to plaintiff information with reference to the accounts of said partners with said firm, and as to the amounts to which the estate of plaintiff's husband, Joseph A. O'Brien, is entitled, as the share of said Joseph A. O'Brien in the net profits of said business, as is hereinafter more particularly set forth; that said defendants, as surviving partners of the partnership of O'Brien & Garrett, ever since the death of said Joseph A. O'Brien, continued to transact the business of said partnership for the purpose of settling its affairs and concluding its affairs with the exception of collecting outstanding commissions"; that about the ——— day of March, 1909, and since the death of said Joseph A. O'Brien, the defendants have collected, on account of said partnership business, including collections prior to the death of said Joseph, as plaintiff is informed, more than \$42,500, and there remains due said partnership about the sum of \$25,000, "the exact amount of which plaintiff is unable to state, as the books of said partnership are in the possession of and under the absolute control of said Charles F. O'Brien"; that the said Charles F., ever since the death of said Joseph, "has been and still is acting as the managing partner of said partnership and has all the books and accounts of said partnership"; that the said partners were to share equally the expenses and earnings of said partnership; that "all the commissions and profits collected or paid to said firm were received by the said Charles

F. O'Brien, as representing said firm, upon the understanding and agreement between the members thereof that after paying the expenses of conducting said business the net profits would be divided among said partners in equal proportions as provided in said agreement of partnership"; that of the amount of net profits as aforesaid payable to the said Joseph and to his estate none thereof has been paid except the sum of about \$1,800; that since the death of Joseph, the said defendant Charles F. O'Brien has had the principal charge of said business and the control of the receipts and expenditures, relating to transactions both before and since the death of Joseph; that he has kept the books in a negligent and incomplete manner and so as not to fully show the moneys received on account of said firm, or the amounts to which it is entitled and that it is not possible from said books to ascertain the true condition of the partnership affairs and that an accounting is necessary to ascertain the respective rights and interests of the members; that the said defendant Charles is misusing said funds and diverting them to his own personal gain in fraud of plaintiff's rights, and he denies that plaintiff has any rights in or to any of said partnership property.

An accounting is prayed for of all the dealings and transactions of the said copartnership, and, among other things, that the net profits of said business be ascertained and the amounts that have been paid to the several partners "and all moneys due and paid to, or to become due and payable to, the said firm."

[1] It seems to us too plain to require the citation of authorities that the action is for an accounting of the partnership business among the members of a copartnership, presumably dissolved by the death of one of the partners, and that enough facts are sufficiently averred to show that both Charles F. O'Brien and William T. Garrett are necessary parties.

[2] Appellant contends that the complaint shows on its face that defendant Garrett is united in interest with the plaintiff, and, if made a party at all, should have been made a coplaintiff or, if having refused his consent to be joined as a plaintiff, he should then and then only have been made a defendant, as provided in section 382 of the Code of Civil Procedure, and that he has been made a defendant for the purpose of enabling plaintiff to name the place of trial and prevent defendants from causing the place of trial to be changed to the place of residence of defendant Charles F. O'Brien. Furthermore, it is claimed that Garrett is only a nominal defendant. Defendant Garrett joined in the demand for a change of venue and in the general demurrer to the complaint, and he made an affidavit in which he stated that "affiant is not in possession of the property or assets of said alleged copartnership, is a

nominal party only to said action, and has no substantial interest in the defense thereof." He also says: "That affiant has a good and substantial defense on the merits to said action and to the whole of plaintiff's demand therein alleged." The fact that Garrett joined in the demand did not affect plaintiff's right to have the cause tried at his place of residence. *Hearne v. De Young*, 111 Cal. 373, 43 Pac. 1108; *Hellman v. Logan*, 148 Cal. 58, 82 Pac. 848.

[3] There are some averments of the complaint showing that defendant O'Brien is the party chiefly delinquent, but there are averments showing also that defendant Garrett has been connected with defendant O'Brien in the management and control of the business since the death of plaintiff's testate, and is withholding from plaintiff the information she seeks, and in some degree at least is responsible for the failure to account to her or to her testate in his lifetime. In his affidavit Garrett declares that he has a good defense "to the whole of plaintiff's demand therein alleged," which would carry with it the defeat of plaintiff's action if successful. His declaration that he "is a nominal party only" is not conclusive.

[4] The court will not go into the merits of the action on a motion to change the place of trial. *McKenzie v. Barling*, 101 Cal. 459, 462, 36 Pac. 8. Appellant's claim that Garrett was joined as defendant "for no other purpose than to block if possible the right of O'Brien to secure a transfer of the trial to the county of his residence," has not so much support, as the converse claim of plaintiff, that Garrett has come to his codefendant's relief for the purpose of depriving her of a right claimed by her. We think Garrett was properly joined as a defendant.

Such being our view of the nature of the action and of the parties necessary thereto, the correctness of the order denying the motion to change the place of trial from San Francisco to Los Angeles is easily disposed of.

[5] Defendant Charles F. O'Brien deposed that he was at the commencement of the action a resident of Los Angeles, and that his codefendant was then a resident of San Francisco. It has been decided by the Supreme Court that, under section 395 of the Code of Civil Procedure, the plaintiff has the right to have the cause tried in the county where either of the defendants resides. *Hearne v. De Young*, 111 Cal. 373, 43 Pac. 1108; *Greenleaf v. Jacks*, 133 Cal. 506, 65 Pac. 1039; *Greenleaf v. Jacks*, 135 Cal. 154, 67 Pac. 717; *Hellman v. Logan*, 148 Cal. 58, 82 Pac. 848.

In the case of the same plaintiff as here versus Charles F. O'Brien, No. 847, 116 Pac. 692, recently before this court, the order denying the motion to change the venue was reversed on the ground that the defendant, without substantial conflict, showed his residence to be in Los Angeles at the commence-

ment of the suit. The evidence on the issue was not materially different from that submitted on the motion in the present case. But in that case Charles F. O'Brien was the sole defendant, and the partnership alleged was that of Charles F. O'Brien & Co., composed of Thomas A. O'Brien and Charles F. O'Brien engaged in the business of selling lands located in the neighborhood of San Francisco. Here the partnership is composed of three persons, under a different firm name and engaged in selling lands located in Mexico. The question of the residence of Charles F. O'Brien is immaterial inasmuch as it is conceded that his codefendant resides in the city and county of San Francisco, where the action was brought.

The order is affirmed.

We concur: HART, J.; BURNETT, J.

16 Cal. App. 253

SNELL v. CLARK CONST. CO. (Civ. 833.)
(District Court of Appeal, Third District, California. May 12, 1911. Rehearing Denied by Supreme Court July 11, 1911.)

MECHANICS' LIENS (§ 115*)—MATERIALS FURNISHED SUBCONTRACTOR.

One who has furnished material to a subcontractor is entitled to a mechanic's lien, the owner having notice thereof, and not having paid the contractor, though the contractor had fully paid the subcontractor.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 150-159; Dec. Dig. § 115.*]

Appeal from Superior Court, City and County of San Francisco; J. J. Van Nostrand, Judge.

In the matter of the submission of controversy between E. L. Snell, as plaintiff, and the Clark Construction Company, as defendant. From an adverse judgment, defendant appeals. Affirmed.

Frohman & Jacobs, for appellant. J. J. Webb, for respondent.

BURNETT, J. The controversy was submitted to the superior court on a statement of agreed facts, except as to one matter, concerning which, on conflicting evidence, the court found against appellant. Daisy Hamburger, as owner, caused a residence to be erected by Clark Construction Company, as contractor, on a lot in San Francisco. No question was raised as to the validity of this contract. The said contractor sublet the plastering and lathing to Ira M. McKenzie, on an agreement that the latter should furnish all the material and perform all the labor required for the sum of \$1,300. McKenzie completed the plastering, and he was paid therefor in full by the Clark Construction Company. The said E. L. Snell furnished to said McKenzie, for use on said building, and which were actually used in its construc-

tion, plasterer's supplies amounting to \$202.50. Not having been paid, a claim of lien therefor was duly filed and recorded in the office of the county recorder. The said Daisy Hamburger fully paid to said Clark Construction Company all moneys due on their contract when the same became due, excepting only that she withheld from said company a sufficient amount to satisfy the lien of said Snell, and said amount was deposited in court under stipulation to abide the judgment in the matter under submission, it being agreed that, "if on the ultimate decision of this controversy said amount is awarded to said Snell, said Clark Construction Company will have to lose the amount so awarded, and the question to be decided is whether, under the circumstances, said Clark Construction Company should bear said loss or said Snell should lose the benefit of his lien aforesaid."

Counsel use a little different form of expression to state the proposition, but the question involved may be put in the language of respondent: "Is a lien by a materialman who furnishes materials to a subcontractor chargeable to the owner of the building in which said materials were used, where the owner has not fully paid the contractor and has notice of the materialman's lien, although the contractor has fully paid his subcontractor pursuant to the agreement, made and entered into by and between said contractor and subcontractor, without notice of the claims of the materialman?"

We are treated to an interesting and learned discussion of the subject by both parties; but it is conceded that the question has been decided by the Second District Court of Appeal, in the case of Los Angeles Pressed Brick Company v. Los Angeles Pacific Boulevard & Development Company, 7 Cal. App. 460, 94 Pac. 775, in which cause a rehearing was denied by the Supreme Court. Therein it is directly held that, notwithstanding the payment by the contractor to his subcontractor, in accordance with the terms of their agreement, yet the materialman was entitled to payment for materials furnished, since the owner had funds in his possession due the contractor. We agree with the conclusion reached in said decision, and the case, as we understand the situation, has not been overruled. The evils suggested by appellant as likely to ensue from this view of the law are more imaginary than real. In most cases the contractor will know whether he can safely trust the subcontractor. At any rate, he can easily protect himself from a loss in this manner, as declared in the aforesaid decision, "by exacting of the subcontractor a contract which would require him to show that his labor and material bills were paid before the money was paid to him, or provide that the contractor might see that the

sums paid to the subcontractor were applied to the payment of such bills."

Appellant complains that the aforesaid decision "touches only the surface of the problem and that it is not a well-considered case," but we understand this to be not altogether an uncommon complaint on the part of dissatisfied attorneys; and be it also said, to their credit, that when the decision is favorable they are just as likely to pronounce it faultless, and to exclaim, "Most rightful judge! Most learned judge!" We do not agree with appellant, and, in addition, it would seem that the question should be deemed *stare decisis*.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

16 Cal. App. 287

KRITZER v. TRACY ENGINEERING CO.
et al. (Civ. 973.)

(District Court of Appeal, Second District, California. May 23, 1911.)

1. APPEAL AND ERROR (§ 931*)—PRESUMPTION—WAIVER OF FINDINGS.

In the absence of affirmative showing to the contrary by bill of exceptions or in other appropriate manner, it will be presumed that findings, not having been made by the trial court, were waived, as permitted by Code Civ. Proc. § 634.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. § 931.*]

2. JUDGMENT (§ 279*)—JUDGMENT ROLL.

A minute entry made by the clerk is, under Code Civ. Proc. § 670, enumerating the constituents of the judgment roll, no part thereof, it relating neither to an order striking out pleading, nor one made on demurrer.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 546-551; Dec. Dig. § 279.*]

3. JUDGMENT (§ 525*)—RECITALS OF JUDGMENT—CONCLUSIVENESS.

The recital of the judgment that findings of fact were waived by failure of defendant to appear and participate in the trial is conclusive, in the absence of a showing to the contrary.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 982½; Dec. Dig. § 525.*]

4. APPEAL AND ERROR (§ 883*)—REVIEW—CONSENT JUDGMENT.

One cannot complain that the judgment was against law because of the overruling of a demurrer, where it was overruled by consent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3611; Dec. Dig. § 883.*]

5. MECHANICS' LIENS (§ 161*)—COMPENSATION FOR WORK—TRAVELING EXPENSES.

The amount paid by one for his transportation to and from the place of work is part of the compensation agreed to be paid him, as regards his right to a lien therefor, the agreement of his employer, the contractor, having been to pay him a certain amount per month and such traveling expenses.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 280-283; Dec. Dig. § 161.*]

6. BANKRUPTCY (§ 209*)—FORECLOSURE—NECESSARY PARTIES—TRUSTEE OF BANKRUPT.

The action being one merely to foreclose an existing lien, no personal judgment being demanded of defendant, presence of its trustee in bankruptcy, though after the filing of its answer it was adjudged a bankrupt, was not necessary to a complete determination of the controversy, within Code Civ. Proc. § 389, providing that, when such a determination cannot be had without the presence of other parties, the court must order them to be brought in.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 209.*]

7. MECHANICS' LIENS (§ 149*)—FILING CLAIM—AMOUNTS DUE ON SEPARATE PROPERTIES.

Code Civ. Proc. § 1188, providing that, where a claim for mechanic's lien is filed against more than one piece of property it shall designate the amount due claimant on each of such properties, has no application where there is but a single improvement on both pieces of property done for a gross sum, and the work done by claimant, an employé of the contractor, was under a single contract for superintending the entire work.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 256-259; Dec. Dig. § 149.*]

8. MECHANICS' LIENS (§ 149*)—FILING CLAIM—AMOUNT DUE ON SEPARATE PROPERTIES.

Code Civ. Proc. § 1188, requires a claim for mechanics' lien against more than one piece of property to designate the amount due claimant on each piece only as against other lien claimants, so that it is unnecessary where there is but one such claimant.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 256-259; Dec. Dig. § 149.*]

9. MECHANICS' LIENS (§ 107*)—PERSONS ENTITLED TO LIENS—FOREMEN.

A foreman is entitled to a mechanic's lien under Code Civ. Proc. § 1183, as a person who performs labor in the improvement.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 139; Dec. Dig. § 107.*]

Appeal from Superior Court, San Bernardino County; George H. Hutton, Judge.

Action by W. H. Kritzer against the Tracy Engineering Company and others. Judgment for plaintiff. Defendant Orange Blossom Mining & Milling Company appeals. Affirmed.

Sidney J. Parsons and Charles L. Allison, for appellant. Cryer & Tuttle and R. E. Bledsoe, for respondent.

SHAW, J. Action to foreclose a mechanic's lien.

Judgment went for plaintiff, from which the defendant Orange Blossom Mining & Milling Company appeals upon the judgment roll alone. It appears from the complaint: That at the times in question the Orange Blossom Mining & Milling Company owned ten contiguous mining claims consolidated and operated as one mine, known as the Orange Blossom Mine, and also owned a mill-site located at Bagdad Station, nine miles distant from said mine. That defendant entered into a contract with the Tracy Engineering Company, whereby the latter, for the gross sum of money therein specified, agreed

to erect and construct a power plant upon said millsite and erect and construct, upon the mining claim known and designated as the Orange Blossom Claim, a stamp mill and install certain mining machinery, appurtenances, and fixtures, together with a transmission line extending from the power plant at Bagdad Station to the power house and improvements to be constructed upon the Orange Blossom Mining Claim, and to furnish the materials and labor necessary in the construction and completion of said work. That said Tracy Engineering Company employed plaintiff to act as foreman of the construction work so unperformed and agreed to be performed by it, under the terms of which employment plaintiff was to render services as foreman and superintendent in the construction of said work and improvements, and in consideration for such services the Tracy Engineering Company promised and agreed to pay plaintiff therefor the sum of \$200 per month while so employed, together with his traveling expenses from the city of New York to Bagdad, Cal., and return therefrom to New York upon the completion of the plant. That plaintiff entered upon said work, and between the 24th day of March, 1908, and the 24th day of November, 1908, performed the work and labor of superintending the erection, construction, and installation of said improvement so agreed to be constructed and installed by the Tracy Engineering Company, and in the capacity of such foreman and superintendent performed eight months' labor thereon, which said work and labor actually entered into the construction of said improvements so made upon said millsite and mining properties, and that the reasonable value of the labor and services so done and performed was the amount so agreed upon, to wit, \$200 per month and his traveling expenses to and from New York City, amounting to the sum of \$226.08, and making a total of \$1,826.08 due to him for such work and labor so performed, upon which there was paid the sum of \$201.81 and no more; that said work and improvements were fully completed and possession thereof delivered to the defendant Orange Blossom Mining & Milling Company on November 22, 1908, followed by sufficient allegations of the filing of a duly verified claim of lien in form and containing a statement of the matters and things required by statute.

[1] 1. Appellant assigns as error the fact that the court made no findings, and it insists that they were not waived. We cannot presume that mere absence of findings constitutes error. Every intendment goes to support the judgment, and, since findings of fact may be waived (section 634, Code Civ. Proc.), then, in the absence of some affirmative showing to the contrary, by bill of exceptions or in other appropriate manner, the presumption arises that they were waived. *Mulcahy v. Glazier*, 51 Cal. 626; *Campbell v. Coburn*, 77 Cal. 36, 18 Pac. 860.

[2] Appellant directs our attention to a minute entry made by the clerk, a copy of which is brought up in the transcript. This, however, is no part of the judgment roll, for the reason that it relates neither to an order striking out pleading, nor one made on demurrer. Section 670, Civ. Code Proc. Even were it so regarded, it does not show that findings were not waived.

[3] Moreover, the judgment states that findings of fact and conclusions of law were waived by the failure of the defendant Orange Blossom Mining & Milling Company to appear and participate in the trial. This recital by the court must, in the absence of any showing to the contrary, be regarded as conclusive.

[4] 2. It is next contended that plaintiff could have no right to a lien for his traveling expenses to and from New York, and that including the amount of such expenses in his claim of lien rendered the same void. Therefore it is contended the complaint was obnoxious to the general demurrer interposed by defendant and rendered the judgment against law. As to this point it is sufficient to say that the demurrer was overruled by consent. Hence, if the judgment was erroneous by reason of being against law, defendant, having consented thereto, cannot be heard now to complain upon such ground. *Erlanger v. Southern Pac. R. R. Co.*, 109 Cal. 395, 42 Pac. 31; *Estate of Lorentz*, 124 Cal. 495, 57 Pac. 381.

[5] Neither does the record disclose any fact which renders the lien void. The complaint sets forth the contract made between plaintiff and the Tracy Engineering Company, from which it appears that the latter agreed to pay him for eight months' labor and work performed the sum of \$1,826.08; that the sum of \$201.81, and no more, had been paid thereon, leaving a balance unpaid of \$1,624.27. This sum of \$1,826.08 included the sum of \$226.08 paid by plaintiff for transportation to and from New York, but it was as much a part of the compensation agreed to be paid to him under the terms of the contract as was the \$200 per month. He claimed no lien for it as traveling expenses, but claimed a lien for the full amount on account of the labor and work performed by him pursuant to the terms of the contract, alleging said sum to be the reasonable value of the services performed, and the court so found. A different case would be presented if those who furnished the transportation were claiming, or seeking to enforce, a lien therefor.

[6] 3. Section 389, Code of Civil Procedure, provides that, "when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplemental pleadings, or a cross-complaint to be filed, and summons thereon to be issued and served." It is claimed that at the time of the trial defendant had been adjudicated

a bankrupt. Appellant insists that before proceeding with the trial, it was the duty of the court, as provided in said section 389, to make an order bringing in the trustee in bankruptcy as a party defendant. There is no pleading and nothing of record showing that defendant had been adjudicated a bankrupt, or that a trustee in bankruptcy had been appointed. Conceding, as claimed by appellant, that such fact appears from the minute entry made by the clerk, a copy of which is printed in the transcript, nevertheless, as heretofore stated, this minute entry is no part of the judgment roll, and cannot be considered upon this appeal for any purpose. Assuming as true, however, the alleged fact that defendant had been adjudicated a bankrupt subsequent to the filing of its answer, we are unable to perceive why the presence of the trustee was necessary to a complete determination of the controversy, since the action was merely to foreclose an existing lien held by plaintiff, there being no demand for a personal judgment.

[7] 4. Another alleged error assigned is the fact that the court decreed a foreclosure of the lien upon two separate and distinct pieces of property—the Orange Blossom Mine and the millsite. This contention is based upon section 1188, Code of Civil Procedure, which provided that: "In every case in which one claim is filed against two or more buildings, mining claims, or other improvements owned by the same person, the person filing such claim must at the same time designate the amount due to him on each of such buildings, mining claims, or other improvements; otherwise the lien of such claim is postponed to other liens. The lien of such claimant does not extend beyond the amount designated, as against other creditors having liens * * * upon the land upon which the same are situated." As appears here, the improvements made by the Tracy Engineering Company upon both the mine and millsite constituted one plant, and for which the defendant agreed to pay the gross sum specified in the contract for the construction of the same as a whole. The work done and performed by plaintiff was under and by virtue of one contract for the performance of labor upon the entire work, and therefore it was impossible to designate the amount due to plaintiff for work and labor performed upon each of such properties; and, hence, nothing could be due him upon each thereof. His claim was upon the entire plant covering all the improvements. *Southern Cal. Lumber Co. v. Peters*, 3 Cal. App. 478, 86 Pac. 816.

[8] Moreover, even if this was not true, and conceding the work was done upon distinct and separate properties under separate contracts, nevertheless, since there were no other lien claimants, whose rights could be affected, it was not a matter which concerned de-

fendant as owner of the property, and hence, in no event, has it a cause for complaint. *Booth v. Pendola*, 88 Cal. 36, 23 Pac. 200, 25 Pac. 1101; *Dickenson v. Bolyer*, 55 Cal. 285.

[9] 5. It is finally contended that plaintiff could have no lien upon the property for work and labor performed in the construction of the plant so contracted to be erected upon the property by the Tracy Engineering Company, for the reason that said work and labor was done and performed as foreman. The complaint states a cause of action, and, among other things, alleges that plaintiff in the capacity of foreman performed eight months' labor in the construction and installation of the power and milling plants, and that said work and labor was actually performed upon and entered into the construction of the same. Since the evidence is not before us, we must presume that it fully established the facts alleged in the complaint. This question was before the Supreme Court of Nevada (*Capron v. Strout*, 11 Nev. 310), and the court there said, Beatty, Judge, writing the opinion: "It is argued that the intention of the law was to secure those only who perform labor upon the mine with their hands; that to give it a wider construction, one that will make it include the wages of a foreman like Stuart, will make it cover the case of a general superintendent and other officers of a corporation, and thereby impair the remedy of those who are the special objects of the legislative care. * * * According to the findings, he certainly did work in the mine, though not with his hands, and it is clear that the direct tendency of his work was to develop the property. We think the foreman of work in the mine is as fully secured by the law as the miners who work under his direction." To the same effect is *Cullins v. Mining Company*, 2 Utah, 219, which is affirmed in same case, 104 U. S. 176, 26 L. Ed. 704. These cases were decided under statutes almost identical with section 1183, Code of Civil Procedure. See, also, *Palmer v. Uncas Mining Co.*, 70 Cal. 614, 11 Pac. 666; *Williams v. Hawley*, 144 Cal. 97, 77 Pac. 762; *Pendergast v. Yandes*, 124 Ind. 159, 24 N. E. 724, 8 L. R. A. 849.

Appellant directs our attention to no ground justifying a reversal of the judgment. It is therefore affirmed.

We concur: ALLEN, P. J.; JAMES, J.

16 Cal. App. 169

PEOPLE ex rel. ESCALLE v. TOWN OF LARKSPUR. (Civ. 820.)†

(District Court of Appeal, Third District, California. May 5, 1911. Rehearing Denied by Supreme Court July 3, 1911.)

1. APPEAL AND ERROR (§ 914*)—REVIEW—PRESUMPTIONS.

Municipal Incorporation Act March 13, 1883 (St. 1883, p. 93) § 2, as amended by St.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

†For opinion on rehearing, see 116 Pac. 706.

1889, p. 371, provides that a petition for incorporation shall be presented at a regular meeting of the county board of supervisors and shall be published at least two weeks before presentation. A petition for the incorporation of a town was filed with the clerk of the board at a regular meeting and was reported to the board as having been received. The petition, together with a notice that it would be presented at the regular meeting of the board on a designated future date, was duly published, and the petition was then presented and favorably acted on. It did not appear by whom or on whose order the petition was published. *Held*, that the court on appeal in quo warranto must assume that the publication was under proper authority.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3698-3698; Dec. Dig. § 914.*]

2. MUNICIPAL CORPORATIONS (§ 12*)—INCORPORATION—HEARING OF PETITION—ADJOURNMENT—STATUTES.

The provision in Municipal Incorporation Act March 13, 1883 (St. 1883, p. 93) § 2, as amended by St. 1889, p. 371, providing that the board of supervisors may adjourn the hearing of a petition for incorporation from time to time, not exceeding two months, is not mandatory, and an adjournment from day to day because of unavoidable circumstances is a mere continuation of the regular meeting, and the action of the board receiving a petition on November 4th in continuing the hearing from time to time until January 13th, at which time the board granted the petition, did not invalidate the proceedings; the adjournment not being for an unreasonable period and being presumptively for a good cause.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 22; Dec. Dig. § 12.*]

3. MUNICIPAL CORPORATIONS (§ 12*)—INCORPORATION—ELECTIONS—IRREGULARITIES.

Where a majority of the electors entitled to vote voted for the incorporation of a town, a violation of the statute regulating elections did not invalidate the election, in the absence of a statutory provision expressly declaring that a failure to comply with the statute shall render the election void.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 28; Dec. Dig. § 12.*]

4. ELECTIONS (§ 291*)—VALIDITY—BURDEN OF PROOF.

Where the statute regulating elections has been violated because of a shortening of the hours of election fixed by statute, the presumption is that the violation affected the result, and the party seeking to uphold the election must show affirmatively that it has not.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 286; Dec. Dig. § 291.*]

5. QUO WARRANTO (§ 61*)—JUDGMENT—CONCLUSIVENESS.

Where, in quo warranto to test the legality of the incorporation of a town, the court, at the instance of both parties, inquired into the facts as to the validity of the election resulting in favor of incorporation, and determined them, both parties must abide by the determination supported by the evidence.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 72; Dec. Dig. § 61.*]

Appeal from Superior Court, Marin County; Thos. J. Lennon, Judge.

Quo warranto by the State, on the relation of J. Escalle, against the Town of Lark-

spur. From a judgment for defendant, plaintiff appeals. Affirmed.

U. S. Webb, Atty. Gen., and Henry B. Lister, for appellant. Lucius L. Solomons, for respondent.

CHIPMAN, P. J. This is an action in quo warranto calling upon the corporation of the town of Larkspur to show cause for the exercise of the franchise under which it is acting, failing in which that an ouster be decreed. The defendant had judgment, from which plaintiff appeals.

It is alleged in the amended complaint: That the town of Larkspur is and has been, since March 2, 1908, a de facto (but not a de jure) municipal corporation, claimed to be a legally organized municipal corporation, by virtue of certain proceedings taken under the municipal incorporation act approved March 13, 1883 (St. 1883, p. 93), and amendments thereto, and by virtue of certain articles or an order of incorporation issued by the board of supervisors of the county of Marin and filed in the office of the Secretary of State, and that certain trustees have been elected and are now pretending to be the officers of said de facto municipal corporation and ever since said 2d day of March, 1908, "have usurped and intruded upon and municipally exercised the following franchise, to wit: That of assessing, levying, and collecting municipal taxes and exercising municipal and governmental control over the following described premises and real estate lying and being in the county of Marin, state of California, bounded and described as follows." Then follow the boundaries of the territory included within the limits of the said town. That the "same is now and during all said times was within the jurisdiction of and subject to be governed by the board of supervisors of said Marin county, and was in truth and in fact not incorporated for municipal purposes, and the said territory is in truth and in fact not municipal territory."

It is not necessary to set out the averments of the complaint and answer. The court, in its findings, deals with the issues in a way to make clear the controverted questions.

The court found: (1) That the facts alleged in the complaint relating to the claim of defendant to be a de facto corporation and exercising municipal franchises as such were true. (2) That the board of supervisors, on March 2, 1908, passed an order declaring the territory, described in the complaint, to be a municipal corporation. (3) And on said day said order was filed in the office of the Secretary of State. (4) That relator was at all times a qualified elector in said territory. (5) That on October 7, 1907, a petition for the incorporation of said municipal corporation was filed with the clerk

of the board, at a regular meeting and "by said clerk reported at said meeting to said board of supervisors as having been received." But (6) the said petition, at the time it was so filed, had not been published in any newspaper. (7) That on October 10, 1907, said petition was published in a newspaper published in said county, together with a notice that the same would be presented to the board at its regular meeting to be held November 4, 1907, and the said publication of said petition and notice was made continuously for more than two weeks next preceding said last-named date. (8) That on said last-named date said petition was presented to said board at a regular meeting held on said day "and was received by them and the hearing thereof continued from time to time; and on the 6th day of January, 1908, the said day being the regular monthly meeting of the said board of supervisors, the said petition was again taken up and considered and continued from time to time until the 13th day of January, 1908, the said board in the meantime adjourned its regular monthly meeting from day to day to and including the said 13th day of January, 1908, on which said day said board of supervisors granted said petition and made an order of election in the words and figures following, to wit." Then follows a very full recital of the proceedings had up to that time, which need not be stated, as the legality of the procedure is questioned only in a few particulars which will be shown. It is recited that the petition "was duly published for two weeks before the time at which the same was presented as aforesaid, in the Tocsin of San Rafael, a newspaper published and printed in said Marin county, together with a notice stating the time of the meeting at which the same would be presented, to wit, the said 4th day of November, 1907. And whereas, upon such petition being so presented this board proceeded to hear the same and did adjourn such meeting from time to time and upon the final hearing thereof, to wit, at the regular meeting of this board on the 13th day of January, 1908, did," etc. It was also ordered that the clerk give notice of an election to be held February 27, 1908, prescribing the purpose of the election and the form and substance of the notice, said election to be conducted in accordance with the general election laws of the state and directing that the polls "shall be open at six o'clock of the morning of February 27, 1908, and shall be kept open until five o'clock of the same day when the polls shall be closed." (9) That said board provided that the polls should be opened as in said order stated. (10) That the polls did in fact close at 5 p. m., in accordance with the notice of election, without other reason than that the order so provided. (11) That the polls did not open at 6 o'clock a. m. and in fact were not open until the hour of 8:30 o'clock a. m. and remained

open only 8½ hours instead of 12 hours as provided by law. (12) That the regular printed ballots did not arrive at the polls until 8:30 o'clock a. m., and that prior thereto 12 votes were cast by ballots entirely written by hand, and all said 12 votes were marked "for incorporation" and counted as valid ballots for incorporation. (13) That in said territory there were 297 persons whose names were duly enrolled upon the great register, "all of whom had at some time lived in said territory prior to the 28th day of December, 1908." Out of said 297, there were 276 "who were still living and whose names had not been canceled or erased from said register at the time of said election." (14) That the total vote cast was 147, of which there were 10 not voting on the question of incorporation. Of these 147 there were 36 ballots cast against incorporation and 101 for incorporation; but of these latter 12 were cast upon ballots written wholly by hand, as hereinabove set forth. (15) That the said board thereafter held an official canvass of the ballots, and made a finding that 147 votes had been cast and that 101 of said votes were for incorporation and 65 against incorporation, and upon said finding declared the said town of Larkspur and the said territory to be duly incorporated, and said order was subsequently filed with the Secretary of State. (16) That, between the hours of 6 o'clock a. m. and 8:30 o'clock a. m. on the day of the election, "a number of the qualified electors of the district appeared at the polls and demanded the right to vote and were refused because there were no ballots with which to vote." (17) That, between the hours of 5 o'clock p. m. and 6 o'clock p. m. of said day, "a number of qualified electors appeared at the polls for the purpose of casting their ballots and found the same closed. That all of said electors worked outside the territory hereinabove set forth, and some of them would have voted against incorporation." (18) That the following-named persons whose names appeared on the great register as above set forth were dead at the time of the election, naming four. That 17, naming them, had removed their residence from the said district prior to the election and their names had been canceled upon the great register. That 85, naming them, "had removed their residence from the said district prior to said election, never having returned thereto, but having left with the intention of abandoning their respective residences in said district, and have ever since resided outside thereof." That 10, naming them, legally qualified to vote at said election, refrained from voting thereat by reason of indifference or physical inability to attend at the polls, but were not in any way prevented from voting by reason of the hours of opening and closing the said polls. (19) That on March 2, 1908, at the regular meeting of the board, an order was

unanimously adopted by said board declaring that a majority of the ballots at said election had been cast in favor of incorporation and that said territory was duly incorporated as a municipal corporation of the sixth class. (20) "That if the polls had been opened at 6 o'clock a. m. and closed at 6 o'clock p. m. and remained open during said interval on the day of said election, and all who were residents of the territory named for the said period of 60 days and who wished to vote had voted, the result of said election would have been in favor of the incorporation of the said territory by a majority of the ballots cast." (21) "That the total number of those who appeared at the polls between the hours of 6 o'clock a. m. and 8:30 o'clock a. m. and demanded the right to vote and were refused and did not vote at said election, added to the total number of those who appeared thereat between the hours of 5 o'clock and 6 o'clock p. m., and were unable to vote did not exceed in the aggregate thirty persons."

As conclusions of law the court found that defendant was entitled to judgment that said town of Larkspur "is a municipal incorporation of the sixth class lawfully exercising the functions imposed by law upon such municipal incorporations."

Plaintiff excepted to the decision on the ground of the insufficiency of evidence to sustain the findings of fact, and the plaintiff now specifies all that portion of the eighteenth finding which states "that certain named persons had removed from the district prior to said election, to wit, the following persons," specifying certain 41 names. The bill of exceptions states: "The following testimony was taken in connection with that portion of the eighteenth finding of fact by the plaintiff hereinafter excepted to." No testimony or other evidence is brought up except such as bore upon these 41 names. The only other specification is "that the findings of fact do not support the conclusions of law nor do they support the judgment." Let us, then, notice the points made in the briefs.

[1] 1. It is contended that after the petition was presented to the board it was too late to have publication made of the hearing. It appears from the findings that it was filed with the clerk on October 7, 1907, at a regular meeting of the board, and was reported to the board by the clerk as having been received. It does not appear by whose order or request it was published; but the court found that it was duly published, together with a notice that it would be presented at the regular meeting of the board to be held November 4, 1907, and it was then presented. Section 2 of the act of 1883, as amended by the act of 1889 (Stats. 1889, p. 371), provides, among other things, that: "Such petition shall be presented at a regular meeting of such board, and shall be published for at least two weeks before the same is to be presented. * * * When such petition

is presented, the board of supervisors shall hear the same, and may adjourn such hearing from time to time, not exceeding two months in all," etc. In *People v. Town of Linden*, 107 Cal. 94, 40 Pac. 115, it was held that the publication of the petition by the petitioners was warranted by the statute. The record does not show by whom or upon whose order the petition was published. It was received by the clerk, and the board was so advised; but it was not presented to the board for action until after its due publication. We must assume that the publication was under proper authority, and, as it was not presented to the board for action until after due publication, we find no such irregularity in the proceeding as would invalidate the action of the board.

[2] 2. It is next contended that the board lost jurisdiction by failure to act upon the petition within two months from the time of its presentation, as required by section 2 of the act of 1883 as amended in 1889 (Stats. 1889, p. 371). The findings are that the petition was received by the board November 4, 1907, and the hearing thereof continued from time to time; and on the 6th day of January, 1908, at a regular monthly meeting, it came up again for hearing "and was taken up and considered and continued from time to time until the 12th day of January, 1908. The said board in the meantime adjourned its said regular monthly meeting from day to day to and including the said 13th day of January, 1908, on which said day said board granted the said petition," etc. The statute reads: "May adjourn such hearing from time to time not exceeding two months." The final hearing was had and the order made two months and one week after the 4th day of November, when the petition was presented. We do not regard the statute as mandatory. Unavoidable circumstances may have arisen making it imperative to adjourn the hearing from day to day. Such an adjournment was a continuation of the regular meeting. It is stated by respondent that "the action of the supervisors in adjourning the hearing was evidently done out of abundance of caution by reason of the fact that so-called legal holidays were being declared from day to day by the Governor at that time." The adjournment was not for an unreasonable period, and we must presume it was for good cause.

[3] 3. The validity of the election is challenged because the notice of election and the election itself did not comply with the law. The findings show a violation of the statute, but did it necessarily invalidate the election? Let us see what facts are found. There were 276 registered voters. Of these, 119 were eliminated by the court's findings, the correctness of which is not challenged, except as to 41 whom we shall show that the court was authorized to include among the 119. There were thus 157 registered voters qualified to vote. Of these, 10, through no fault of the

board, did not appear at the polls, leaving 147 voters. Of these latter, 101 voted for incorporation, and 36 voted against incorporation, making a majority of 65 for incorporation. If we take from these the 12 written ballots, the majority is reduced to 53. The court found that there were not to exceed 30 who were deprived of their votes by reason of the short hours of the election. Deducting these, on the assumption that they would have voted against incorporation, we still have 23 majority. Again, there were 147 electors who voted. After deducting the 12 written ballots from the 101 cast for incorporation, there remained 89 for incorporation, which is a clear majority over the entire number of voters. So that, in any view of the facts, the expression at the polls showed that a majority of all the electors, who were entitled to vote, was in favor of incorporation. We are next to inquire whether, in such a case, the will of the majority is to be set aside on the ground now urged. We think the principles enunciated in the well-considered case of *Kenworthy v. Mast*, 141 Cal. 268, 74 Pac. 841, are decisive of the question.

[4] The general rule laid down in *McCrary on Elections*, § 165, is quoted approvingly, namely, that where there is no statutory provision expressly declaring that a failure, in the respect now being considered, shall render the election void, it will be regarded as directory only, and that, unless the deviation from the legal hours has affected the result, it will be disregarded, but that if such deviation is great, or even considerable, the presumption will be that it has affected the result, and the burden will be upon him who seeks to uphold the election to show affirmatively that it has not. That burden was successfully borne in the present case.

[5] 4. It is said that the finding of the board that there were 147 votes cast at the election, of which 101 were for incorporation and 65 against incorporation, "is certainly void for impossibility." Doubtless the entry was a clerical error, by confusing the majority for incorporation (65) with the vote cast against incorporation (36).

However, at the instance of both parties the court inquired into the facts and determined them, and both must abide by the result of the evidence.

5. It is urged that there is no evidence to support the eighteenth finding as to certain 41 names once on the great register. We have examined the testimony and find abundant evidence to warrant the finding. The testimony introduced by plaintiff was hardly sufficient to raise a conflict—certainly not as to most of the names.

We discover no error in the record.
The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

18 Cal. App. 169

PEOPLE ex rel. ESCALLE v. TOWN OF
LARKSPUR. (S. F. 5,448.)
(Supreme Court of California. July 6, 1911.)

In Bank. On rehearing.

For opinion on hearing in District Court of Appeal, see 116 Pac. 702.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause.

The electors of the territory claiming to be a corporation having been deprived by the misconduct of the election board of the opportunity of casting their votes which the law is intended to secure to them, the onus of proving that the result of the election would have been the same if the law had been strictly complied with was on the defendant. This proof the defendant undertook to make by showing that from the total number of registered voters within the territory affected (viz., 297) there must be deducted 4 who had died, 17 whose registry had been canceled, 86 removed from the territory, 10 who had voted but had not voted on the question of incorporation, and 10 who were indifferent and would not have voted under any circumstances, a total of 127, leaving but 170 electors to be considered, of whom 89—a majority—voted in favor of the incorporation. But conceding that the statute is not mandatory in respect to the hours during which the polls must be kept open (a proposition by no means clearly established), and that all of the 86 supposed removals were fully proven (a point vigorously contested by the appellant), and fully conceding the propriety of deducting the number of deceased electors, the number of canceled registrations, and the number of those voting but failing to vote for or against incorporation, it is still necessary to maintain that it was proper to exclude also the 10 voters who are said to have been so indifferent to the result that they would not have taken the trouble to vote if the polls had been kept open all day. For including them there would have been 180 electors to be considered, and of that number 89 is not a majority. Now there is in my opinion a very grave objection to making a precedent applicable to all special elections hereafter to be held, which, in case of a close contest, where the electors have been deprived by the misconduct of the election officers of a fair opportunity to cast their votes, will enable interested parties to give validity to the result of the canvass by inducing a small number of electors, who have not voted, to say that they would not have voted if the law had been complied with. Such a doctrine is subversive of the policy of the secret ballot, the aim of which is to take away all temptation to the use of bribery, and all effective means of coercive influence. Under its op-

eration a bribe giver can never know that the goods will be delivered, and one who is dependent upon the good will or forbearance of another for his livelihood may safely disregard the demands of his employer in casting his vote. But an elector who is willing to accept a bribe to vote either way upon a given proposition would be very likely to forego the privilege of voting in the absence of any inducement to vote in a particular way, and after the election could be very easily induced to swear that he had never desired to vote, and—what is a much more serious evil—an elector who had been deprived of the opportunity of voting against a proposal might after the election be put to the alternative of risking the support of his family, or of swearing that he had never desired to vote. To preserve the integrity of the secret ballot against such practices as the doctrine of this case will sanction is vastly more important, in my opinion, than the validation of a municipal charter brought into existence by such dubious practices. If the people of Larkspur desire a charter, they can easily secure it by complying with the law.

I concur: SLOSS, J.

16 Cal. App. 198

**LUITWEILER PUMPING ENGINE CO. v.
UKIAH WATER & IMPROVEMENT
CO. (Civ. 816.)**

(District Court of Appeal, Third District, California. May 9, 1911. Rehearing Denied by Supreme Court July 8, 1911.)

1. SALES (§ 120*) — MACHINERY — IMPLIED WARRANTY—BREACH.

Where defendant purchased a pump from plaintiff after fully explaining all the requirements and plaintiff assured defendant that the pump would operate without pulsation, jar, or water hammer in the pipes as required, and, when installed, the pump would not carry a constant load and deliver water without pulsation, but caused water hammer in the pipes and was not reasonably fit for the purpose intended, there being a breach of both an express and implied warranty contemplated by Civ. Code, §§ 1763-1766, 1770, and 1786, and, there being evidence justifying a reasonable inference that it was intended that such warranties should be regarded as a condition precedent to the sale, defendant was entitled to rescind and recover the money paid.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 294; Dec. Dig. § 120.*]

2. SALES (§ 261*)—"WARRANTY"—WHAT CONSTITUTES.

Any distinct assertion or affirmation by the seller as to the quality or character of the thing sold during negotiations which may reasonably be supposed is intended to induce the purchase and was relied on by the purchaser is a warranty, unless accompanied by an express statement that it is not intended as such.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 727-735; Dec. Dig. § 261.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7396-7405; vol. 8, p. 7833.]

3. EVIDENCE (§ 410*) — PAROL EVIDENCE — WRITTEN CONTRACT.

Where reference was required to a series of conversations and correspondence between

the parties to find all the terms of a contract for the sale of machinery, there was no written contract sufficient to preclude the admission of parol evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1846-1854; Dec. Dig. § 410.*]

4. EVIDENCE (§ 417*) — PAROL EVIDENCE — WRITTEN CONTRACT.

Whether a writing contains an entire agreement so as to exclude parol testimony is a question to be determined not merely from the face of the instrument, but from all the facts and circumstances connected with it, and is usually for the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1899; Dec. Dig. § 417.*]

5. CONTRACTS (§ 169*) — CONSTRUCTION — EXTRINSIC CIRCUMSTANCES.

While parol evidence is inadmissible to contradict or vary a written agreement, the court may look, not only to the correspondence evidencing the transaction, but to the subject-matter of the agreement and to the surrounding circumstances to be placed as nearly as practicable in the position in which the contracting parties were when they made the contract in order to ascertain their intention.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 752; Dec. Dig. § 169.*]

6. SALES (§ 126*)—BREACH OF WARRANTY—RESCISSION—TIME.

A buyer's retention of a pump and use thereof beyond the stipulated time was not a waiver of a right to rescind where the pump was retained and used at the instance of the seller or to enable the seller to remedy the defects.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 313-317; Dec. Dig. § 126.*]

7. SALES (§ 442*) — WARRANTY — BREACH — DAMAGES.

Damages recoverable for breach of warranty of machinery purchased for a specific purpose are not confined to the difference between the value of the machinery as warranted and as proved to be, but includes such consequential damages as are the immediate and probable result of the breach.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1284-1301; Dec. Dig. § 442.*]

8. SALES (§ 447*)—WARRANTY—BREACH—DAMAGES—FINDINGS.

Where, in an action for the price of pumping machinery, defendant pleaded a rescission for breach of warranty which the court sustained, and found that defendant's damage was the amount paid on the purchase price and the freight, such finding was not inconsistent with a further finding that defendant had not sustained damages in the erection and operation of the pump or otherwise, or in any other sum, since it should be construed to refer to consequential damages only.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1318; Dec. Dig. § 447.*]

9. EVIDENCE (§ 539*)—EXPERTS—COMPETENCY.

A witness, who was superintendent of defendant's waterworks, was familiar with the system, and had been directing its operation for more than two years, was properly allowed to state whether such system required a pump that would not produce water hammer in the pipes.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2349-2352; Dec. Dig. § 539.*]

10. SALES (§ 391*)—WARRANTY—BREACH—RESCISSION—RECOVERY OF PRICE PAID.

On breach of a warranty of the fitness of a pump to satisfy defendant's requirements, defendant, having rescinded and tendered a return

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes Cal.Rep. 114-117 P.—43

of the pump to plaintiff, was entitled to a return of a part of the price paid without proof of an agreement to repay.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1110-1127; Dec. Dig. § 391.*]

11. EVIDENCE (§ 151*)—STATE OF MIND—RELIANCE.

Where, during negotiations for the purchase of a pump, plaintiff produced a catalogue containing statements with reference to the operation of the pump purchased, and, after underscoring certain of the representations, wrote defendant that no written warranty was required because defendant was bound by the representations in the catalogue, evidence that defendant's president in purchasing the pump relied on the representations in the catalogue was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 440; Dec. Dig. § 151.*]

12. EVIDENCE (§ 594*)—WEIGHT—CONCLUSIVENESS.

Where defendant claimed breach of warranty in the sale of a pump, the evidence of defendant's president that he relied on the representations in plaintiff's catalogue was not conclusive of such fact, but should be considered with the other facts and circumstances in the case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2431; Dec. Dig. § 594.*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by the Luitweiler Pumping Engine Company against the Ukiah Water & Improvement Company. From an order denying plaintiff's motion for new trial, it appeals. Affirmed.

Rehearing denied in Supreme Court (116 Pac. 712).

J. E. Pemberton and Thomas & Thomas, for appellant. Robert E. Duncan, for respondent.

BURNETT, J. The action was brought to recover \$600 as a balance due on the purchase price of a pump. The defense is a breach of warranty. It is claimed that the pump was totally unfit for the purpose for which it was procured, and that the representations made concerning it by plaintiff and upon which defendant relied were false. An offer to return the pump was also pleaded and a demand was made for the return of \$1,000 which had been paid by defendant on account. Plaintiff appeals from the order denying its motion for a new trial.

There is evidence to justify the following statement of facts, which we make substantially in the language of respondent, some of which, indeed, are not disputed: The appellant was engaged in the manufacture and sale of pumps and pumping machinery, having its principal place of business in Los Angeles. S. W. Luitweiler was the president of the company. The respondent was the owner of a water system which supplies the city of Ukiah and its inhabitants with water and J. H. Brush of Santa Rosa was the president, and his son, Irving H. Brush, was the secretary and general manager of the company. One C. H. Dwinell was the agent of

appellant for the purpose of selling or soliciting orders for its pumps and pumping machinery. Early in the year 1907 Mr. Dwinell called upon Mr. J. H. Brush at Santa Rosa, and recommended the purchase of a pump from appellant. Certain correspondence was then had between Mr. Brush and the pumping company, and thereupon Mr. Luitweiler, the president thereof, paid a personal visit to Mr. Brush at Santa Rosa, and the latter explained in detail the character and situation of the plant and the workings and operation of the water system in Ukiah. Among other facts, it was stated that the water was pumped directly through the mains of the city from which the inhabitants and the city were supplied, and he exhibited to him a map and plan of the whole system. Mr. Brush also impressed upon Mr. Luitweiler the difficulties of pumping under the conditions there and told him that the Simmons Saw Company had put in one of their pumps and that it had utterly failed to do the work. He stated to Mr. Luitweiler that it was necessary to have a pump that would be steady in its operation, that would throw a stream without pulsation, and that would have no jar or vibration or water hammer in the pipes. Mr. Luitweiler had one of his catalogues with him which he exhibited to Mr. Brush, and he pointed out certain statements therein, and he underscored the same with ink, and he assured Mr. Brush that he could supply him with a pump that would meet all the requirements and he left the catalogue with him. Later there was considerable correspondence in regard to the matter; Mr. Brush and his son requesting information as to the capacity of their pumps, and also furnishing information concerning the needs of the situation at Ukiah. This correspondence was begun in February, 1907. On April 19, 1907, respondent gave an order for a certain sized pump, and it was agreed that respondent should have the privilege of testing the same for a period of 10 days after it was placed in operation. The pump was not shipped until May 29, 1907. When it arrived, it was discovered that it could not be placed in the old well of the water company so that a new well was dug within a few feet of the old where the conditions were similar. On account of the necessary delay, the pump was not put into operation until about the middle of October, 1907. In the meantime quite a number of letters passed between the parties, the pumping company insisting upon payment and the water company replying that it had not yet had time to test the pump and also insisting upon a written guaranty. On the day that the pump was first operated Mr. Brush sent to the pumping company a check for \$1,000, stating in his letter that he had seen the pump run for about two hours just before dark, but could not tell what it would do

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

when limbered up, that there were some changes to be made, and they were to send him the directions for the same, but had not done so. Mr. Brush in his testimony declares that he sent the check because he supposed the pump, when certain changes were made, would do the work and he felt safe in sending the money.

In one of the letters written by the pump company, on August 28, 1907, occurs this passage: "Mr. Dwinell writes us that you have not put the pumping engine into use, but that you are putting down a new well and having bad luck with it, and also that you have not paid us because you have no guaranty. We want to call your attention to the fact that we are bound by the statements in our catalogue and as to our guaranty you have on page 39 all facts stated in the catalogue and no other guaranty is required." Among the qualities which Mr. Luitweiler claimed the pump possessed and which were underscored in the catalogue in his conversation with Mr. Brush and referred to in his letter are the following: "It is the only pump that has a constant load. It delivers water without pulsation. Luitweiler pumps are balanced. They have no water hammer in pipes. They have no jar or vibration." When in operation, it was found that the pump would not do the work required and that it did not possess the qualities that were claimed for it. In support of this certain facts appear in the reported testimony of witnesses for defendant, and it is furthermore recited in the transcript that "the defendant produced the engineers who had charge of the operation of said Luitweiler pump, and Mr. I. H. Brush, the secretary of defendant corporation, who testified that the Luitweiler pump delivered a pulsating stream when pumping water out on the ground directly from the pump without being connected with the water mains, and that there was great jar and vibration in the pipes during the operation of said pump. The engineers further testified that in their opinion the Luitweiler pump was entirely unfit for use in the Ukiah water system, and that the faulty working of the pump and delivery of water thereby was caused by the imperfect construction of the pump." The pumping company was notified of the various defects in the pump and there was much correspondence between the two companies, the pumping company suggesting various methods to overcome the defects. The suggestions were adopted, but without success, and the water company finally demanded of appellant that it send some one of its engineers to see if he could make it work. This was declined unless the water company would send \$75 to defray his expenses, the same to be at the cost of the water company if the defect was the fault of installation, and to be at the cost of the pumping company if the defect was in the pump. Mr. Brush did not answer this letter. The water

company used the pump for about three months. Very shortly after putting it in operation, however, Mr. Brush verbally offered to return the pump and requested the money to be paid back. Later on, after the commencement of this suit, and at the suggestion of his counsel, the same offer was made again in writing. The delay and continued use of the pump were due to the hope that the difficulties might be overcome and the pump so adjusted that it would do the work.

None of the officers of the water company had ever seen one of these Luitweiler pumps, and never had an opportunity to see one. They knew nothing about its construction, and were compelled to rely and did rely upon the assurance and representations made by the pumping company and its officers that the pump would do the work demanded by the system of Ukiah, and that it had the qualities represented in the catalogue and underscored by Mr. Luitweiler. We must conclude, also, from the record that respondent's officers were acting in perfect good faith, that they made no misrepresentations, practiced no deceit, and made a genuine effort to operate the pump successfully. In accordance with the foregoing facts and inferences, which are fully warranted by the evidence, the court found: "That said defendant fully informed said plaintiff in regard to said water system, and what would be required of said pump, and the said plaintiff warranted the said defendant that said pump was reasonably fit for said purpose; that the said plaintiff further represented and warranted said defendant that said pump in operation carried a constant load in the delivery of water, and would deliver water without pulsation, and that said pump had and would have no vibration or jar; * * * that said defendant relied upon all of said representations made by said plaintiff; that said plaintiff agreed to deliver said pump to said defendant for the sum of \$1,600, and further agreed that the said defendant should have the right and privilege to test said pump before paying for the same in order to determine whether or not the said representations and warranties made by said plaintiff were true, and whether or not said pump was reasonably fit for the purpose required by said defendant; that said defendant tested the same during the month of October, 1907; that each and all of the representations and warranties hereinbefore set forth and made by said plaintiff to said defendant were false; that said pump did not and would not carry a constant load, and would not deliver water without pulsation, said pump had or caused water hammer in pipes and there was extraordinary jar and vibration when said pump was in operation; that said pump was entirely unfit for the purpose for which it was ordered, and for which it was used and to be used." Then follow the findings that defendant notified

plaintiff of the foregoing facts, and that it held said pump for plaintiff, and that prior to the testing of the pump and before it had knowledge of its defects respondent paid \$1,000 on account and that said defendant had demanded the return of said sum but that no part of it had been paid.

Is there any consideration of good morals or any provision of the statute or decision of the Supreme Court that would preclude the trial judge from reaching a conclusion from the foregoing facts that respondent was entitled to the relief claimed in its answer and counterclaim? There is certainly nothing unconscionable in the inference from the established facts that defendant should be restored to its former condition. As far as it can be avoided, the innocent should not, of course, suffer for the wrongdoing of another in whom confidence has been misplaced.

[1] Under the view of the evidence taken by the trial court, we find also a breach of warranty, both express and implied, as contemplated by sections 1763-1766 and 1770 of the Civil Code. The court was justified in concluding that there were latent defects in the pump, that it was not "reasonably fit for the purpose" for which it was bought, and especially that there was a violation of the express warranty by which the seller assured to the buyer certain facts and qualities of commanding importance to the latter. There was also reasonable ground for the inference that it was intended by the parties that these warranties should be regarded as a condition precedent to the sale, and therefore rescission was proper. Section 1786, Civ. Code.

Turning to some of the cases, we find, in *Polhemus v. Heiman*, 45 Cal. 573, that the action was brought to recover the balance of the purchase price for a large quantity of wool. It was held that there was an express warranty that the wool should not be in an unmerchantable condition by reason of dirt and burs and that the account returned by the defendant, after the wool was received, would not necessarily defeat the claim for damages, the court saying that: "If made with a knowledge of the alleged defects, it would be evidence only tending to show that the wool when accepted met the requirements of the contract, and that the present claim is an afterthought to avoid payment. If, however, the account was made in ignorance of the true condition of the wool, the defendants would not thereby be prevented from obtaining any relief which they would otherwise have been entitled to."

In *Hoult v. Baldwin*, 67 Cal. 610, 8 Pac. 440, the action was to recover the purchase price of a harvesting machine. When the machine arrived at the railway station nearest to defendant's ranch, it was carefully taken from the car and the detached parts were put together. An attempt was then made to haul it away, but before it had gone more than 40 or 50 feet from the depot, up-

on a dry, hard and level road, a part of the machinery broke so that the harvester could be moved no further. A telegram was immediately sent to the plaintiffs, notifying them of the break, and they at once forwarded a duplicate casting to take the place of the broken one. The new casting was put in place and another effort was made to haul the machinery to the ranch, but, before it had gone many feet, the new casting also broke. The defendant then declined to accept the machine, and offered to return it to the plaintiffs. The Supreme Court declared that, "Having taken the machine under a warranty, whether it be that expressed in the writing or provided by the Code or both, the defendant had the right, if there was a breach of the warranty, that is, if in any respect the machine was not what it was warranted to be, to rescind the sale by returning or offering to return it to the plaintiff."

In *Fox v. Harvester, etc., Works*, 83 Cal. 333, 23 Pac. 295, it was held that it was proper to submit to the jury whether certain representations made in reference to the working of a harvesting machine were intended as warranties; the complaint being broad enough to include such warranties.

[2] The rule, indeed, seems to be well settled that "any distinct assertion or affirmation as to the quality or character of the thing to be sold, made by the seller during the negotiations for the sale, which it may reasonably be supposed was intended to induce the purchase and was relied on by the purchaser, will be regarded as a warranty unless accompanied by an express statement that it is not intended as such." 30 Am. & Eng. Ency. of Law, p. 136. And it seems that the general tendency of the later authorities is to construe liberally in favor of the buyer language used by the seller in making affirmations respecting the quality of his goods and to treat such affirmations as warranties when such an inference is at all reasonable. *Id.* p. 138. There is a very great difference between the positive affirmation of the qualities already referred to and the mere expression of an opinion upon a matter about which the buyer is supposed to exercise his own judgment. Applying the test generally recognized by the authorities, it must be held here that the representations made by the seller were of facts upon which it may be fairly presumed the seller expected the buyer to rely and upon which a buyer would ordinarily rely, and, indeed, the evidence shows that the buyer actually did rely upon the representations. Undoubtedly, therefore, they operated to create a warranty.

The specific objections of appellant to the action of the trial court, to which some further consideration may be devoted, are as follows: (1) All previous oral conversation and negotiations are deemed merged in the written contract and therefore the conversation between the presidents of the two compa-

nies was improperly admitted in evidence. (2) If the testimony of oral statements had been admissible, they proved no warranty.

(3) No attempt at rescission of contract was made until after suit was begun, which was certainly entirely too late. (4) A purchaser relying on a warranty and a right to rescind thereunder must act promptly on discovery of the breach. (5) One cannot rescind for an immaterial breach of a warranty; i. e., one not causing any damage. The court expressly found that defendant suffered no damage whatever. (6) Incompetent expert evidence was admitted. (7) There is no evidence to support the finding that "said payment of \$1,000 was made with the understanding that the same was to be repaid to said defendant in case said representations and warranties were untrue or said pump was unfit for the purpose for which it was intended." (8) J. H. Brush was improperly allowed to testify that he relied upon the representations in plaintiff's catalogue.

[3] No doubt the rule of law as to oral negotiations is properly stated by appellant. Section 1625, Civ. Code. We think, however, it has no application here. There was no formal contract entered into between the parties. After the negotiations and correspondence to which we have already referred, the pump was finally ordered by letter. It is as plain as anything can be that you must look through the record of conversations and correspondence to find all the terms of the contract. The language of the court in *Kreuzberger v. Wingfield*, 96 Cal. 251, 31 Pac. 109, is therefore in point, wherein it is said: "The rule is, of course, a familiar and salutary one, that, when a contract has been reduced to writing, parol evidence is not admissible for the purpose of cutting down or adding to its terms, but in order for the rule to have any application, the writing must be one which, by legal construction, shows upon its face it was intended to express the whole contract between the parties." The case here in this regard is also quite similar to *Snyder v. Holt Manufacturing Co.*, 134 Cal. 324, 66 Pac. 311, wherein it is held that it was proper for the trial court to allow testimony as "to previous negotiations," they being a part of the surrounding circumstances necessary to explain the contract. Section 1647, Civ. Code.

[4] Whether the writing contains the entire agreement is a question to be determined not merely from the face of the instrument, but from all the facts and circumstances connected with it, and is usually for the jury. *Ehrsam v. Brown*, 64 Kan. 466, 67 Pac. 867.

[5] While parol evidence is not admissible to contradict or vary the written agreement, the court may look not only to the language of the correspondence evidencing that transaction, but also to the subject-matter of the agreement and the surrounding circumstances, in order to be placed, as nearly as practicable, in the position in which the contract-

ing parties were when they entered into the agreement. *Bagley, etc., Co. v. Saranac River Pulp, etc., Co.*, 135 N. Y. 626, 32 N. E. 132.

Of course no one familiar with elementary principles would for a moment contend that the foregoing rule would permit a new term to be added to a written contract containing in itself all the essentials of a complete agreement by resort to the antecedent oral negotiations of the parties.

What we have already stated covers the point as to the sufficiency of the oral testimony to establish the warranty. It may be added that, of course, the written and the oral testimony and the provisions of the statute must be considered together.

[6] The delay in the rescission of the contract has also been adverted to and was excusable for the reasons mentioned. "If the return of the machine warranted to do good work and found upon trial to be unfit for use is delayed at the request of the manufacturer, he thereby waives the right to require prompt delivery by the purchaser on discovery of the fact that it does not do the work guaranteed." *Fox v. Stockton, etc., Works*, supra. The buyer's retention and use of the article beyond the stipulated time will not operate as a waiver of the benefits of the warranty when it was at the instance of the seller or his agent or when it was for the purpose of giving the seller or his agent an opportunity to remedy defects. 30 Am. & Eng. Ency. of Law, p. 188.

Damage must, of course, be caused by the breach of the warranty to justify a recovery by the vendee. The contention of appellant as to this point is based upon the finding of the lower court "That it is not true that said defendant has sustained damages in the sum of four hundred dollars in the erection and operation of said pump or otherwise or in any other sum. And the court finds and decides that said defendant is not entitled to any damages by reason thereof." But this obviously refers to what is characterized as "consequential damages."

[7] The familiar rule is that the damages recoverable for the breach of warranty of machinery purchased for a known purpose are not confined to the difference between the machinery as warranted and as it proves to be, but include such consequential damages as are the direct, immediate, and probable result of the breach. *New York, etc., Min. Syndicate, etc., v. Fraser*, 130 U. S. 611, 9 Sup. Ct. 665, 32 L. Ed. 1031.

[8] Here the court found, as already indicated, that the damage was the amount paid on the purchase price together with the freight charges for the shipment of the pump to Ukiah. The findings are consistent as to the damages, but the court found against defendant as to its claim for injury caused by the operation of the pump.

[9] The court was justified in overruling the objection to the following question propounded to Irving Brush, the superintendent of the waterworks: "In your system is it

necessary to have a pump that will not produce any water hammer in the pipes?" He was familiar with the system, he had been directing its operation for more than two years, and he was competent to answer the question. A careful observer for that period of time of the workings of the water plant would be in a position to state what the effect would be of this concussion in the pipes and the answer and explanation of the witness show that he was capable of enlightening the jury as to this somewhat technical consideration.

[10] There was no direct evidence to sustain the finding as to the understanding about the repayment of the thousand dollars, but the finding is not necessary to support the judgment as, from the other facts found, the law requires the return of the money. Indeed, the buyer has the choice of two remedies. He may return the article and sue for damages or rescind the contract and recover the amount of the purchase price paid. He may not pursue two inconsistent remedies. If he chooses to exercise the special remedy by returning the article to the seller, he is then confined to a recovery of the purchase money paid. *Abraham v. Browder*, 114 Ala. 287, 21 South. 818.

[11] It was proper to allow Mr. Brush to state that he relied upon the representations in plaintiff's catalogue. The question involved a very important circumstance and the buyer may be asked whether in buying he relied upon his own judgment or upon the seller's representations. *Milwaukee Rice Machinery Co. v. Hamacek*, 115 Wis. 422, 91 N. W. 1010.

[12] The court, of course, would not be bound by his answer, but it should be considered with the other facts and circumstances in the case.

We perceive no prejudicial error, and the order denying plaintiff's motion for a new trial is affirmed.

We concur: **CHIPMAN, P. J.; HART, J.**

16 Cal. App. 198

**LUITWEILER PUMPING ENGINE CO. v.
UKIAH WATER & IMPROVEMENT
CO.** (Sac. 1,936.)

(Supreme Court of California. July 8, 1911.)

EVIDENCE (§ 442*)—PAROL EVIDENCE—WRITTEN CONTRACT—NEW TERM.

A new term cannot be added to a written contract containing within itself the essentials of a complete agreement by resort to the antecedent oral negotiations regarded as surrounding circumstances.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1874-1899; Dec. Dig. § 442.*]

In Bank. On petition for rehearing. Denied.

For former opinion, see 116 Pac. 707.

PER CURIAM. In denying a rehearing of this cause we wish to say that if the opinion

of the District Court of Appeal can be construed as holding that a new term can be added to a written contract containing in itself all the essentials of a complete agreement, by resort to the antecedent oral negotiations of the parties, regarded as surrounding circumstances, we do not approve that doctrine, and do not regard it as essential to sustain the judgment of affirmance.

16 Cal. App. 223

YUBA CONSOL. GOLDFIELDS v. HILTON.
(Civ. 804.)

(District Court of Appeal, Third District, California. May 10, 1911. Rehearing Denied by Supreme Court July 8, 1911.)

1. EASEMENTS (§ 36*)—EVIDENCE—PRESUMPTIONS—PRESCRIPTION.

Where a clearly marked road across plaintiff's unoccupied lands was used openly, continuously, and without hindrance or molestation for at least 20 years, and the then owner of the servient tenement was seen on the land several times, though there was no direct evidence as to whether the use was adverse, it will be presumed that the owner had knowledge of the user, and that the use was under a claim of right and adverse, and a prima facie right by prescription is thereby established.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 88-93; Dec. Dig. § 36.*]

2. WATERS AND WATER COURSES (§ 95*)—RIPARIAN RIGHTS—SHORES AND BANKS—DRIFTWOOD.

The owner of a bank of a river has an absolute ownership of the driftwood which lodges on its banks, or at least a qualified, possessory title good as against a trespasser or stranger to the title, and which is the subject of grant.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 95; Dec. Dig. § 95.*]

3. EASEMENTS (§ 5*)—CREATION AND EXISTENCE—PRESCRIPTION.

In the absence of statutory provisions to the contrary, all easements which may be acquired by grant, except that of light and air, may also be acquired by prescription, subject to the limitation that the right claimed must be reasonable.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 26; Dec. Dig. § 5.*]

4. EASEMENTS (§ 2*)—CREATION AND EXISTENCE—PRESCRIPTION—RIGHT TO TAKE DRIFTWOOD.

Under Civ. Code, § 801, subd. 5, which provides that the right of taking water, wood, minerals, and other things may attach to other lands as incidents or appurtenances, called easements, the right to take driftwood from other land may be acquired by prescription.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 3; Dec. Dig. § 2.*]

5. APPEAL AND ERROR (§ 209*)—GROUNDS OF REVIEW—EVIDENCE.

Where no objection is made to evidence, a judgment conforming thereto will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1290; Dec. Dig. § 209.*]

6. EASEMENTS (§ 36*)—PROCEEDINGS—EVIDENCE—ADMISSIBILITY.

Evidence, in an action to quiet title to land in which defendant claimed an easement of way, as to how many people were living within

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

a mile of plaintiff's land, which was unoccupied, was properly excluded as immaterial.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 88-93; Dec. Dig. § 36.*]

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action by Yuba Consolidated Goldfields, a corporation, against H. G. Hilton. Judgment for defendant, and plaintiff appeals. Affirmed.

Rehearing denied in Supreme Court, 116 Pac. 715.

A. F. Jones and W. H. Carlin, for appellant. M. T. Brittan and J. E. Ebert, for respondent.

BURNETT, J. The action was brought to quiet title to a certain tract of land known as lot 2. The court found that plaintiff was the owner of the land, but adjudged it to be subject to an easement in favor of defendant for a right of way, in width that of an ordinary farm wagon, for the purpose of hauling thereover driftwood from the north bank of the Yuba river. It was provided that said roadway was "to be used and enjoyed by means of and with a good and sufficient gate to be maintained on the line separating said lots one (1) and two (2), said gate to be kept closed except while passing through the same."

The main contention of appellant is that the evidence is insufficient to support the finding of adverse use of the roadway by defendant. Respondent has pointed out the principal part of the testimony as follows: The defendant Hilton testified that he owned lot 1 for about 15 years; that when he began living there lot 2 was owned by P. George; that there is a roadway leading from lot 1 down through lot 2 to the Yuba river; that he used the roadway for going down to the river for driftwood; that it is the only way he has of getting down to the river; that he has used the roadway for said purpose every year for said period of time; that there is a visible track or roadway, and that it has been visible all the time; that there was no interruption of his use of the road until just before plaintiff brought the present action; that the wood which he took was driftwood, which had lodged on plaintiff's land, lot No. 2, or on government land, and that he had at times used the road for getting wood off of the upper end of his own land.

Mr. Gleason testified that he was 33 years of age and had known the land ever since he could remember, and during that time the road was used for the purpose of hauling driftwood.

Mr. Grass testified that he formerly owned lot 1; that he bought it in 1886 and owned it about eight years, and sold it to defendant; that the road was there then, and that

he used it frequently every year to haul water and driftwood from the river.

The witness Ransom testified that he had known of the defendant's land for 25 years. That he at one time owned a one-half interest in it before Mr. Grass owned it. The road was in existence then, and he used it every year to haul driftwood out of the river. That it was an open road, and "you could go down there handy with a wagon and haul out a good load."

Mr. Striker testified that he knew of the existence of the road for 22 years; that the road was used by every one living on defendant's land; that defendant used the road every year for hauling driftwood out of the river, and that he also saw defendant haul water; that the road has been used by every one living on lot No. 1.

In fact, there was no dispute as to the use of the road, and no evidence offered by plaintiff in reference to it; counsel stating, in reply to a question asked by the court, that "it is not disputed that there was a single-track road cut through the brush and used for hauling driftwood, and in regard to the existence of that road, as testified to by Mr. Grass, we are not going to put on any testimony."

[1] It appears, therefore, without conflict, and it is virtually admitted by appellant, that the road was used openly, continuously, and without hindrance or molestation for a period of at least 20 years. The only question that could arise would be whether the use was in hostility or in subordination to the title of appellant. As to this there is no direct evidence, but, under the circumstances shown, it is presumed that the use was under a claim of right and adverse, and a prima facie title by prescription is thereby established. Washburn on Easements (4th Ed.) p. 156; 14 Cyc. 1147; Kripp v. Curtis, 71 Cal. 66, 11 Pac. 879; Franz v. Mendonca, 131 Cal. 209, 63 Pac. 361; Fleming v. Howard, 150 Cal. 28, 87 Pac. 908.

In the Fleming Case, supra, is quoted with approval the following from Jones on Easements, § 186: "A presumption that the use was under a claim of right and adverse arises from an undisputed use of an easement for the established period of prescription, and the burden is upon the party alleging that the use had been by virtue of a license or permission to prove that fact by affirmative evidence. * * * Where an open and uninterrupted use of an easement for a sufficient length of time to create the presumption of a grant is shown, if the other party relies on the fact that these acts or any part of them were permissive, it is incumbent on such party, by sufficient proof, to rebut such presumption of a nonappearing grant; otherwise the presumption stands as sufficient proof and establishes the right."

These facts carry, also, of course, the pre-

sumption that the owner of the servient estate had knowledge of the use of the roadway. It is asserted by appellant that "there isn't a particle of evidence in the record that P. George, who owned lot 2 for perhaps 40 years up to about 1907, ever saw this road or knew it was there." It is true that no one testified that George saw the road, although witness Striker declared he had seen George on lot No. 2 several times; George was probably the only one who could testify positively as to whether he had seen the road, and he was not put upon the stand. It may be said, also, that no one was residing on said lot No. 2, and the road was encompassed on both sides by willows; but it was clearly marked and in use for such a length of time that the inference is reasonable and urgent that George had knowledge of its use. The presumption should be indulged more readily in view of the ease with which appellant might have overcome the presumption, if in fact the owner of lot No. 2 had no knowledge of the roadway.

It is claimed by appellant that respondent could not acquire a right to the driftwood that lodged on plaintiff's premises, and that there is no finding nor decree purporting to give him such a right. Therefore it is contended that the judgment burdens plaintiff's land with an easement for a road and gate at the line fence for an utterly futile purpose.

[2] As to the driftwood, it will probably not be disputed that when it lodges upon the land plaintiff has either a qualified or an absolute ownership in it. It must be true, as stated by appellant, that the true owner, if he could trace and identify it, would be entitled to remove it, but when on the land it is in possession of the owner of said land, and this possessory title is good as against a trespasser or stranger to the title. It is admitted that the right to take this wood could be created by grant, but it is insisted that it is not subject to prescription.

[3] The rule seems to be, however, as stated in 22 American & English Encyclopedia of Law, p. 1186, that, "In the absence of statutory provisions to the contrary, all easements which may be acquired by grant may also be acquired by prescription, subject to the limitation that the right claimed must be reasonable." "An easement or servitude may be created by grant or prescription." *American Co. v. Bradford*, 27 Cal. 367; *Wagner v. Hanna*, 38 Cal. 116, 99 Am. Dec. 354.

There are certain exceptions and limitations to the foregoing doctrine an instance of which is the easement as to light and air. The courts of the United States are practically unanimous that the English doctrine does not apply here, and that the right to light and air cannot be acquired by prescription or adverse user. *Am. & Eng. Ency. of Law*, supra, p. 1187. Among the reasons assigned for this view are that this rule is not considered to be adapted to the existing con-

dition of things in the United States, and could not be applied to rapidly growing communities without working mischievous consequences to property owners, and also that in the nature of things there can be no adverse user of light or air, for the actual enjoyment of these elements by a property owner is upon his own land only, and involves no encroachment upon his neighbor's land, nor any interference with the latter's enjoyment of his own property to which he can object. The owner of the adjoining land, therefore, having submitted to no encroachment upon his own rights, cannot be presumed to have assented to such encroachment. *Id.* vol. 19, p. 119. This subject, it may be remarked, is of pressing importance generally in cities only and therein it is controlled by police and sanitary regulations. The cases cited by appellant belong to the foregoing class, and they are not controlling here. Among the various rights and easements that may be acquired by prescription, which are enumerated in volume 22, page 1187, of the American & English Encyclopedia of Law, we do not find specifically the one in question here, but there are several, not dissimilar to the one before us; for instance, the right to take ice from a pond, seaweed from a beach, and the right to dig and carry away ore.

[4] But we need not go beyond the terms of the statute, for the particular easement in controversy is expressly included in the specifications in section 801 of the Civil Code. It provides that: "The following land burdens, or servitudes upon land, may be attached to other land as incidents or appurtenances, and are then called easements. * * * 5. The right of taking water, wood, minerals and other things." We can see nothing unreasonable in the claim of respondent, and, since it is admitted that the right to take the wood could be acquired by grant, and the general rule is that what may be acquired by grant may be acquired by prescription, and, furthermore, there is nothing to show that the instance before us furnishes an exception to the rule, and as the statute expressly enumerates this as one of the easements that may be attached to other land as an appurtenance, and the evidence being sufficient, we think the court did not err in finding that defendant was entitled to this right.

While the right to take the wood was not directly put in issue or found by the court, it seems to be clearly implied in the allegations of the answer and the findings of the court. The answer was probably demurrable for uncertainty in that respect, but the averment that defendant Hilton has had the actual possession for a period of more than 14 years last past, and "has exclusively, openly, notoriously, peaceably, continuously, uninterruptedly, adversely to plaintiff and its predecessor in interest, and with knowledge and acquiescence of plaintiff and its predecessors in interest, and under a claim of right and

title thereto, used and traveled over said roadway for the purpose of going to said Yuba river on the lands of said plaintiff to gather driftwood from and on said Yuba river, and to haul the same therefrom over said roadway to his own land, as aforesaid," certainly carries with it the implication that he did haul said driftwood under a claim of right for that length of time. The same observation may be made in reference to the corresponding finding, which follows the foregoing allegation.

[5] The judgment does not limit the right to haul driftwood from the land of plaintiff, the easement being "to that certain right of way * * * for the purpose of hauling thereover driftwood," but of this appellant cannot complain as the evidence showed without objection that the road was used, also, to haul driftwood from government land and from the land of defendant.

[6] There was no error in the court's ruling sustaining an objection to the question asked of plaintiff on cross-examination, as to how many people were living within a radius of a mile of his home. This would not affect the question of the elements required to constitute title by prescription, nor change the presumption created by open, continuous, and unchallenged occupancy. As far as plaintiff's land is concerned, though, it does appear that it was unoccupied, but whether the community was thickly or sparsely settled seems immaterial.

We observe no prejudicial error, and the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

16 Cal. App. 228

YUBA CONSOL. GOLDFIELDS v. HILTON.
(Sac. 1,854.)

(Supreme Court of California. July 8, 1911.)
JUDGMENT (§ 747*)—RES JUDICATA—QUESTIONS DETERMINED.

A judgment, in an action to quiet title on a finding that plaintiff was the owner of the land, but that it was subject to an easement in favor of defendant for a right of way to haul driftwood from the bank of a river, merely establishes defendant's right of way for the purpose of hauling driftwood from the river, and determines nothing as to defendant's right to driftwood in the river, since such right was not in issue.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 747.*]

In Bank. Action by Yuba Consolidated Goldfields, a corporation, against H. G. Hilton. A judgment for defendant was affirmed on appeal by the Third appellate district (116 Pac. 712), and plaintiff petitions for an order to transfer the cause to the Supreme Court for a rehearing. Petition denied.

PER CURIAM. The petition for an order transferring this cause to the Supreme Court

for rehearing is denied. We do not, however, approve that part of the opinion of the district court of appeal concerning the right of the defendant to take driftwood from the land of the plaintiff. The judgment of the lower court merely establishes the right of the defendant to a way through plaintiff's land, for the purpose of hauling thereover driftwood from the *Yuba river*, not from plaintiff's land. It declares nothing in regard to the right or title the defendant may have, or may obtain, to such driftwood in the river. That right or title was not in issue, and it does not appear to be any concern of plaintiff, unless defendant takes driftwood to which plaintiff has a better right or title, in which case the judgment will not be an estoppel against plaintiff or in favor of defendant.

160 Cal. 238

BURR v. MACLAY RANCHO WATER
CO. (HILL et al., Interveners).
(L. A. 2,284.)

(Supreme Court of California. June 22, 1911.
Rehearing Denied July 22, 1911.)

1. APPEAL AND ERROR (§ 1040*)—RULINGS ON PLEADINGS—HARMLESS ERROR.

Where plaintiff in a suit to enjoin defendant from pumping water from its wells on its lands adjacent to plaintiff's lands for irrigation of remote lands did not claim that any underground stream existed, and the parties dealt with the case as one involving relative rights to percolating waters only, the error, if any, in overruling a demurrer to the complaint, alleging that the water-bearing strata existing under the lands of the parties were in streams or subterranean bodies and were in a state of continuity, on the ground that it was uncertain whether plaintiff claimed as an owner of land overlying the common supply of percolating water, or as a riparian owner of land on an underground stream, was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

2. TRIAL (§ 404*)—FINDINGS—CONSTRUCTION.

Findings must be construed, if possible, to support the judgment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957-962; Dec. Dig. § 404.*]

3. WATERS AND WATER COURSES (§ 107*)—UNDERGROUND PERCOLATING WATERS—FINDINGS.

The findings in a suit to enjoin defendant from pumping water from its wells on its lands adjacent to plaintiff's lands for irrigation of remote lands, that underlying the lands in controversy, including the lands of plaintiff and extending to the foot of the mountains, are water-bearing strata, that an almost impervious dike which extends across the tract arrests the progress of the water underlying plaintiff's land, that the subterranean waters are supplied by rains falling on the mountains, and find their way into the water-bearing strata and percolate through the same, that the waters in the water-bearing strata underlying the lands of plaintiff and other lands in the vicinity, including the lands in which defendant's pump is situated, are, in their natural state, under pressure from the head of the waters near the mountains, etc., show a common supply of percolating waters

lying in continuous strata saturated with water and extending under the lands of the parties, and justify relief to plaintiff.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 116, 117; Dec. Dig. § 107.*]

4. WATERS AND WATER COURSES (§ 107*)—RIGHT TO PERCOLATING WATERS—PLEADINGS—ISSUES.

Where the complaint in a suit to enjoin defendant from pumping water from its wells on its lot 192, adjacent to plaintiff's lots 153, 190, and 191, to irrigate remote lands, alleged that underlying the lands were waters in a state of continuity from their sources to and under lot 192, that the waters were supplied by rains falling on the mountains, that the waters found their way into the water-bearing strata, that under the lands of the parties the waters were in the natural state under pressure and were retained therein by a dike, and that the water pumped by defendant was taken from the water-bearing strata underlying the lands of the parties, an answer which merely denied that the waters in the strata were in streams or subterranean bodies or in any state of continuity except as percolating waters were in such continuity, and denied that the water pumped by defendant was taken from the water-bearing strata underlying the lands of plaintiff, admitted, in effect, that there were water-bearing strata underlying the lands of the parties, and that the waters were under pressure in their natural state, and established the relative rights of the parties to percolating water in continuity and under pressure in the strata under their lands, and the existence of streams or bodies of water extending from plaintiff's lands to defendant's lands was not essential to the granting of relief.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 116, 117; Dec. Dig. § 107.*]

5. WATERS AND WATER COURSES (§ 101*)—RIGHT TO PERCOLATING WATERS—CORRELATIVE RIGHTS.

The existence of a common supply of water in a state of percolation of such a character that the taking from one overlying tract will substantially diminish the quantity available in another overlying tract gives correlative rights in the common supply, and creates a right in one landowner to prevent another from taking the water to distant lands not overlying the common supply, if such taking is injurious to him.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 110, 111; Dec. Dig. § 101.*]

6. WATERS AND WATER COURSES (§ 107*)—PERCOLATING WATERS—WRONGFUL USE—EVIDENCE.

A defendant in a suit to enjoin it from pumping water from its wells on its lands adjacent to plaintiff's lands for irrigation of remote lands admitted a common supply of percolating waters under pressure, extending under the lands of the parties. Plaintiff proved that the pumping by defendant lowered the level of the water in the wells on plaintiff's lands, and the wells on plaintiff's lands obtained water from water-bearing strata admitted to exist. *Held* to support a finding of the existence of a common supply of percolating water under the lands of both parties, justifying relief.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 116, 117; Dec. Dig. § 107.*]

7. PLEADING (§ 36*)—ADMISSIONS—CONCLUSIVENESS—ESTOPPEL.

A plaintiff suing to enjoin defendant from pumping water from its wells on its lands adjacent to plaintiff's lands for irrigation of re-

remote lands, who introduced evidence, notwithstanding defendant's admission of the existence of a common supply of percolating water under pressure, extending under all the lands, to prove that the water taken by defendant came from the water-bearing strata underlying plaintiff's lands, and to prove the existence of a dike retaining the percolating waters under plaintiff's lands and under a part of defendant's lands, did not thereby estop himself from relying on the admission in support of a judgment in his favor, because it was necessary for him to prove such facts because disputed.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 81-86; Dec. Dig. § 36.*]

8. WATERS AND WATER COURSES (§ 156*)—DEEDS—RESERVATIONS—RIGHT TO PERCOLATING WATERS.

A deed of a tract of land to trustees required the trustees to deposit in a bank a specified sum as an improvement fund for the construction of dams, reservoirs, and pipe lines for storing and supplying water to the tract and for sinking artesian wells for developing a water supply. The trustees proceeded to expend the specified sum in the construction of a reservoir and wells on a lot subsequently conveyed to defendant, and in laying a system of pipe lines for carrying the water from the wells to the lots in the tract. The trustees conveyed parcels of the tract to purchasers subject to the reservation of the right to lay water pipes across the land, and of all artesian water that might be developed on the land and not used thereon. Plaintiff acquired tracts with knowledge of the wells on the land acquired by defendant, and of the claim to water from the wells thereon. *Held* that the reservations in the deeds embraced only such waters as were obtained by the expenditure of the improvement fund, in the absence of any notice of any purpose or claim of right to expend additional money and take additional water.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 174-183; Dec. Dig. § 156.*]

9. WATERS AND WATER COURSES (§ 143*)—APPROPRIATION—RIGHT OF PROPRIETOR.

One who acquires adjacent property after an appropriation of water has begun takes subject to the right the proprietor has, but the proprietor does not, because of his first taking, have any right to an additional quantity thereof.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 152; Dec. Dig. § 143.*]

10. WATERS AND WATER COURSES (§ 152*)—RIGHTS TO PERCOLATING WATERS—PRESCRIPTION.

Evidence *held* not to show a prescriptive right to take percolating waters for irrigation of remote lands.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.*]

11. WATERS AND WATER COURSES (§ 107*)—PERCOLATING WATERS—RIGHT TO USE—ESTOPPEL.

Evidence *held* to support a finding that an owner of land overlying percolating waters was not estopped by acquiescence from complaining of an adjacent owner pumping on his land such percolating waters for irrigation of remote lands.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 116, 117; Dec. Dig. § 107.*]

12. EMINENT DOMAIN (§ 28*)—PUBLIC USE—USE OF WATER.

Water pumped from wells on land overlying percolating waters, extending under adjacent

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

lands, to fulfill private contractual obligations to deliver water to land sold with a water right, is not taken for public use, but is taken for a private use.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 75; Dec. Dig. § 28.*]

13. EMINENT DOMAIN (§ 276*)—PERCOLATING WATERS—RIGHT TO USE—ESTOPPEL.

The rule that one who knowingly allows his property to be taken for public use or who sees expensive works installed and a public service begun, and who has not protested, is estopped from suing in equity and is limited to an action at law for damages, rests chiefly on the inconvenience to the public if the service begun is interrupted by injunctive relief, and it does not apply to the taking of property for private use, and as to private use the general law of estoppel controls.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 774; Dec. Dig. § 276.*]

14. EMINENT DOMAIN (§ 276*)—RIGHT TO PERCOLATING WATERS—PUBLIC USE—ESTOPPEL.

An owner of land overlying percolating waters pumped the water and supplied it as a public use to persons residing in villages. An adjacent owner of lands overlying such percolating waters was not notified that the former proposed to take any additional water for use in the villages, and he did not see the making of preparations with knowledge of any such purpose. The previous supply had apparently been sufficient, and the new wells and pumps constructed by the owner were not constructed to secure water for the villages, but to supply third persons who had purchased from the owner land with water rights. *Held*, that the adjacent owner was not estopped in equity to restrain the pumping of water from the new wells on the theory of the taking of water for a public use.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 774; Dec. Dig. § 276.*]

15. WATERS AND WATER COURSES (§ 107*)—PERCOLATING WATERS—CORRELATIVE RIGHTS.

Where, in a suit involving the right to percolating waters, the issue was whether defendant had the right to divert waters from his land to land not overlying the water-bearing strata, a decree for plaintiff should not deny to defendant any right to apply waters under his land to the use of his land over the waters, and, in view of the pleadings not raising the issue, the decree should not restrain defendant from receiving water from others from other sources.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 116, 117; Dec. Dig. § 107.*]

In Bank. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by John Burr against the MacLay Rancho Water Company; R. H. Hill and others intervening. From a judgment for plaintiff, defendant and interveners appeal. Modified and affirmed.

Cochran, Williams & Phillips and Williams, Goudge & Chandler, for appellant MacLay Rancho Water Co. Hunsaker & Britt, for other appellants. Harris & Harris and Stephens & Stephens, for respondent.

PER CURIAM. From the judgment in this action the plaintiff appealed on the judgment roll alone, and his appeal resulted in a modification of the judgment of the court

below by this court. The report of the case is to be found in 154 Cal. 428, 98 Pac. 260. The appeal now before us is that of the defendant and the interveners from the judgment, and is presented on the judgment roll, together with a bill of exceptions. The nature of the case and many of the facts appear in the opinion filed in the matter of the plaintiff's appeal, and we shall not, therefore, undertake to make a new statement of the same matters.

[1] The appellants make the point that the court erred in overruling the demurrer to the complaint. The facts stated make out a case under the theory that the plaintiff and the defendant were the owners of land overlying a subterranean supply of percolating waters, and that the doctrine of *Katz v. Walkinshaw*, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35, applies. They are not substantially different from those appearing in the complaint in the *Katz* Case which was there held to state a case for unlawful interference with a supply of percolating waters common to both parties. There is an allegation that the water-bearing strata extending under the lands of plaintiff and defendant "are in streams, or subterranean bodies or chambers, and are in a state of continuity from their sources to the said dike." This, it is urged, makes it uncertain whether plaintiff is claiming as an owner of land overlying a common supply of percolating water, or as riparian owner of land upon an underground stream or lake. There is nothing in the complaint to indicate that the plaintiff was claiming as a riparian owner upon a lake or stream. A reading of the whole complaint shows plainly enough that the pleader, notwithstanding his somewhat vague use of the word "stream," was not undertaking to set forth the existence of a defined water course, but to allege that a body of percolating water was underlying the lands of the plaintiff and a part of the land of defendant. Beyond all this, there can be no question but that the defendant was not misled by any uncertainty in this respect, since the record shows conclusively that the plaintiff did not claim that any underground stream could be shown to exist, and that the parties throughout were dealing with the case as one involving relative rights to percolating waters. Even though the demurrer might have been sustained on this ground, its overruling furnishes no ground for reversal. *Alexander v. Central, etc., Co.*, 104 Cal. 532, 38 Pac. 410; *Jager v. Cal. Bridge Co.*, 104 Cal. 542, 38 Pac. 413; *Rooney v. Gray Bros.*, 145 Cal. 753, 79 Pac. 523.

It is strongly urged by the appellants that the findings fail to show that the whole of plaintiff's lot 191, or any part of lots 153 and 190, overlie the underground basin or water-bearing strata from which the defendant pumps water, and that, if such findings are

to be construed as showing that the supply of water claimed by plaintiff as extending under said lots is the same as that from which the defendant is pumping, they are without support in the evidence. The findings state that underlying the entire tract of 20,000 acres conveyed by Maclay to Widney and others as trustees in 1885, which includes all the lands in controversy, "including the lands of plaintiff and extending to the foot of the mountains on the north, about 3 or 4 miles northerly from the lands of the plaintiff, * * * are water-bearing strata of varying depths of sand, boulders, and coarse material, and lying over each of these strata are impervious strata of clay or cement extending towards, but not entirely to, the said mountains; that at a distance of about — miles in a southerly direction from plaintiff's lands there extends across the said valley and across said 20,000-acre tract a dike which is almost or entirely impervious to water." Another finding states that the dike crosses the valley and passes through defendant's lot 192, and that it "arrests the progress of the water underlying plaintiff's land and the water underlying the northern part of lot 192." Another states that the subterranean waters extending through said water-bearing strata are supplied by the rains which fall upon the mountains to the north and east of said valley and "find their way into said water-bearing strata, and permeate the said strata" and percolate through the same underneath the "overlying stratum of clay or cement down to the said dike, by means of which the movement of said water is arrested, and the waters impounded, forming a subterranean basin wherein the said subterranean waters are retained." Also, "the waters in said water-bearing strata underlying the lands of plaintiff and other lands in the vicinity, including the lands in which defendant's pump is situated, are in their natural state under pressure from the head of the waters near said mountains, and are by nature restrained and retained in said strata by the said dike and the overlying strata."

[2] Findings are to be construed so as to support the judgment, rather than so as to overthrow it.

[3] It would require a very narrow and forced construction of these findings to hold that they do not show a common supply of percolating water, lying in continuous strata saturated with water and extending under the three lots of plaintiff and into and under that part of the defendant's lot 192 in which the defendant's wells and pumps are situated. We hold that they support the judgment in this particular.

[4] With respect to the sufficiency of the evidence, we think that, when taken in connection with the admissions made by the pleadings, the evidence is sufficient. There is, it is true, but little evidence that the water-bearing strata supplying defendant's pumps

extends under lots 190 and 153, and that evidence is altogether circumstantial. But that exact point is covered by the admissions of the pleadings. Lot 190 adjoins lot 191 on its north-westerly side. Lot 153 corners with lot 190, lying almost due north of it. The slope of the land is from the north towards lot 192 through the three lots of plaintiff. The complaint avers that underlying the lands of the plaintiff and extending to the foot of the mountains on the north are water-bearing strata; that the waters therein are in streams or subterranean bodies or chambers, and are in a state of continuity from their sources to and under lot 192; that the waters are supplied by winter rains falling upon the mountains, which waters find their way into said water-bearing strata; that under the plaintiff's lands and defendant's lot 192, where its pumps are located, said waters are in their natural state under pressure and are restrained and retained in said strata by said dike; and that the water pumped by defendant is taken from said water-bearing strata underlying said lands of plaintiff and defendant. These allegations are all admitted, either expressly or by failure to deny them, except that it is denied that the waters in said strata "are in streams, or subterranean bodies or channels (chambers), or in any state of continuity except as all other percolating waters are in such continuity," and except that it is denied that the water pumped by defendant "is taken from the water-bearing strata underlying the lands of plaintiff." The effect is that the answer admits that there are water-bearing strata underlying the lands of the plaintiff and the defendant's lot 192 and extending from the latter, under plaintiff's lots, and some three miles northerly to the mountains, that the waters therein are under pressure, in their natural state, and are in a state of continuity as percolating waters, throughout said strata under the said lands of plaintiff and defendant. It does not deny the existence of percolating water in continuity and under pressure in the strata extending under all the lands. The existence of streams or bodies of water extending from plaintiff's lands to lot 192 is not essential to plaintiff's case.

[5] Under the doctrine established in *Katz v. Walkinshaw*, supra, and subsequent cases of similar effect, the existence of a common supply of water in a state of percolation of such a character that the taking from one overlying tract will subsequently diminish the quantity available in another overlying tract gives correlative rights in the common supply and creates a right in one such landowner to prevent another from taking the water to distant lands not overlying the common supply, if such taking is injurious to him.

[6] The existence of such common supply of percolating water under pressure extending under all the lands is admitted. To prove that the water taken by defendant came from the strata common to all, the plaintiff

introduced evidence showing that the pumping complained of immediately lowered the level of the water in the wells on plaintiff's lot 191, adjoining lot 192 where the defendant was pumping. The wells on lot 191 obtained water from the water-bearing strata admitted to exist. The evidence that defendant's pumps lowered the water in plaintiff's wells, established the fact that the water pumped by defendant was taken from the water-bearing strata underlying the lands of plaintiff, which is the only material fact denied. This conclusion can be avoided only by assuming that the water-bearing strata from which water is pumped on the two lots, 191 and 192, do not extend beyond those lots, and are different strata from those common strata admitted to exist. That this would be a possible explanation of the fact that the plaintiff's wells were affected may be conceded. But it was more reasonable to infer that the water came from the admitted common water-bearing strata than from some other strata not shown to exist. The allegations of the complaint referred to the strata from which plaintiff obtained water by means of his wells on lot 191, and the admissions of the pleadings must be understood as referring to the same strata. The proof of a taking from the strata under lot 191 was evidence from which the trial court might infer a taking from the strata under the other lots. This court is bound by its conclusion. It follows that the findings are sustained by the evidence.

[7] Appellants claim that the plaintiff is estopped to claim these admissions, because, as they say, the case was tried below upon the theory that the facts admitted as above shown, were actually in issue. It may be conceded that a respondent, in whose favor the lower court has decided, may be estopped in this manner to claim the benefit of such admissions. *Spiers v. Duane*, 54 Cal. 176; *Rawlins v. Ferguson*, 133 Cal. 470, 65 Pac. 957; *Wiley v. Crocker Bank*, 141 Cal. 518, 75 Pac. 106. But we do not think that it necessarily appears that the case was tried below upon that theory. The evidence introduced by plaintiff, and which it is claimed shows that he believed that the admitted facts were really denied, was all admissible to prove that the water taken by defendant came from the water-bearing strata underlying plaintiff's lands and to prove the existence of the alleged dike. It was necessary that the plaintiff should produce evidence to prove these disputed facts. Its introduction would not authorize the adverse parties to assume, or believe, or to act upon, the theory that the defendant was giving this evidence solely to prove the admitted facts. No declaration to that effect is pointed out. The circumstance that it may also have tended in some degree to prove the admitted facts would not justify any such conclusion by the adverse parties nor raise any estoppel to prevent the plaintiff from claiming

the admission for the purpose of sustaining the judgment on appeal.

The appellants attack, also, the finding that there is a dike running through defendant's lot 192 and preventing the percolation of water beyond such dike. It will not be necessary to go at length into the evidence offered on this point. We think it sufficient to say that the finding is fully supported by the evidence of the natural conditions, together with the showing that the waters in the wells to the north and east of such supposed dike were diminished by defendant's pumping, while that of the wells lying on the other side remained unaffected thereby. The appellants concede in their reply brief "that there is some evidence showing the occurrence of a formation for a short distance, of the nature of a dike." While the exact location and extent of this dike were not clearly shown, there was evidence sufficient to justify the conclusion that it was of sufficient extent to prevent the percolation or passage of waters underlying plaintiff's lands to the lands upon which the waters pumped from block 192 were being used.

[8] The court found that the plaintiff originally acquired and now holds the title to his lands subject to a right in said trustees and the defendant, as their successor, to take from wells on lot 192 a flow of water equal to 30 miner's inches, for use on other parts of said Maclay rancho, but not subject to the taking of any larger quantity therefrom; that he had no notice of any plan of said trustees to devote the waters in said lot to use on other parts of the rancho, other than is set forth in the deed to the trustees to Maclay and the deed from the trustees to the plaintiff and his predecessors in interest; that the trustees did not take, use, or manage the wells on lot 192 in pursuance of any plan, except as shown in said deeds, that it was not the purpose of Maclay and the trustees that all the water that should be obtained from said wells was to be supplied for use on the lots in the rancho sold to interveners and others, except as manifested by said deeds; and that the trustees did not sell to purchasers of lots the right to receive water from said wells except as indicated by the deeds to the respective purchasers. It is claimed that these findings are contrary to the evidence, and that the effect of the several deeds and the acts and conduct of the trustees and purchasers of lots with water rights from them, including plaintiff, was to create an easement appurtenant to each lot to share in all the water that could by any means or at any time be obtained from lot 192, and to put a corresponding burden on lot 191 and other lots which might be affected by such taking, to suffer the consequent depletion of the percolating or other waters therein. Or, as otherwise stated by appellants, that the lots sold with the water right constitute the

proximate body of land for the benefit of which the defendant has the right to pump water from lot 192.

The deed of Maclay conveying the 20,000 acres to the trustees provided that they should deposit in bank the sum of \$20,000 as an improvement fund to be used in constructing dams, reservoirs, and pipe lines for storing and supplying water to the tract of land; also in sinking artesian wells and in such other means as should be advisable for developing and storing a water supply for said lands; also in surveying and platting the land and putting it on the market for sale. The trustees were to sell the lands in subdivisions, but the artesian wells, springs, and sources of water supply, reservoir sites, water pipes, and conduits were not to be sold except by the joint deed of all the trustees. No other provisions were made concerning water. In conveying the lots to the several purchasers, including the plaintiff, there was inserted in each deed a reservation of "the right to lay water pipes across the land," and of "all artesian water that may be developed on said land and not used thereon." The deeds to the interveners and that to plaintiff for lot 191 each also contained a specific grant of a right to a stated quantity of water; the usual description thereof being "the right to use fifty-four gallons per hour per acre on said land." Nothing was said in either of them as to the source from which this water was to come. Something over 3,000 acres were conveyed in this manner. The deed to lot 191 was made in 1886. The deeds to lot 153 and the northeasterly 20 acres of lot 190 were made in 1892 and each contained the reservation in regard to pipe lines and artesian water, but further declared that "no water right is hereby conveyed." This we understand to mean simply that the usual right to water from the defendant's system was not given. It does not constitute a reservation or limitation of the right of the grantees to use upon the lots the percolating or other water contained therein. The remainder of lot 190 was conveyed to Burr in 1893. The deed thereto did not mention water rights, but contained the aforesaid reservations concerning artesian wells and pipe lines. The deeds to the lots of plaintiff were executed by all the trustees, and were therefore effectual to convey all the waters in the land not expressly reserved in the deeds. These comprise all the written provisions relating in any way to the alleged reservation or dedication of the waters of lot 192 to the use of other lots or land.

In pursuance of the plan contemplated by the deed of trust, executed in 1885, the trustees immediately proceeded to expend the \$20,000 in the construction of a submerged dam in Pacoima creek and a reservoir on lot 192, in the boring of several wells on lot 192, in the laying of a system of pipe lines for carrying the water from the dam and

the wells to the lots in the tract which were to be sold with an agreement to deliver water thereto, and in surveying, subdividing, and marketing the land. From the wells a natural flow of 30 miner's inches of water was obtained. The dam took from another distinct source and the supply from it varied from 22 inches in midsummer to 100 inches in midwinter. This development and expenditure was completed in 1890. From that time until about 1899 the water system thus established was operated and apparently the only water taken from the wells up to that time was the natural flow thereof, which, of course, was fluctuating. In 1896 the casings of some of the wells on lot 192 were cut down to a point 16 feet below the surface, which for some time increased the artesian flow to 40 or 50 inches. Of all these things the plaintiff was informed as they took place.

Manifestly his title to his lots was acquired with knowledge of the claim to the 30 inches of water taken from the artesian wells on lot 192 by the defendant, and the lots are held by him subject to the right of the defendant to continue that taking. The judgment gives it that right and to that extent it is conceded to be correct. But the provisions in these deeds do not operate to dedicate or reserve all the water which might be obtainable from lot 192 to the use of the other lots in the tract. There was no express reservation of any water in that lot. It is only by implication from the power given and the development under it that such dedication or reservation can be established. The dedication or reservation, such as it was, extended to and embraced only such waters as were obtained by the expenditure of the improvement fund. The effect of the provision regarding that fund was exhausted, so far as any appropriation of water is concerned, when the fund was all expended. There was no notice or declaration of any purpose or claim of right to expend additional money and take additional water over and above that which was obtainable from the wells sunk and the works installed with the original fund.

We do not find anything in the extraneous facts which, either of themselves or in connection with the writings, constitutes a declaration of trust, a reservation, or a dedication of all the waters obtainable from lot 192, in favor of the other lots sold with water rights, giving a right to them to use said water thereon. There was nothing in the conduct or practice of the trustees, even if it had all been disclosed to Burr, which evinced a design to set apart for the benefit of the water system they instituted any greater quantity of water from lot 192 than the 30 inches obtained by the original artesian wells. No declaration was made, either at the time his lots were purchased or afterwards, that the trustees intended at some future time to bore more wells on lot 192, or

to take more water therefrom for the future necessities which might arise, or that the water supply in his lots was to be held by him subject to such further depletions as they might afterwards choose to make for the use of other lots in the tract. The reservation in each deed of all artesian water that might be developed on the lots and not used thereon implied an agreement that each purchaser might use such artesian water thereon, so far as necessary, and to that extent it was inconsistent with the existence of a right in the trustees to exhaust or deplete such waters by pumping on other lots to such an extent that there would not remain enough obtainable by reasonable effort from such lot for its use. That reservation clearly did not create any burden in favor of the wells on lot 192 against the adjoining lots. The appropriation of 30 inches from the supply in lot 192 had, in effect, already been made at the time his lots were purchased. The rule with respect to such an appropriation should be substantially like that regarding the appropriation from a surface stream.

[9] One who acquires adjoining property after the appropriation has begun takes subject to the right the appropriator then had, but the appropriator does not, because of his first taking, have any right to take an additional quantity thereafter. The increase of the natural flow in 1896 was an additional taking to which plaintiff was not bound to submit. It does not appear how long it continued and from the fact that a small pump was installed in 1899 it is to be inferred that the natural flow before that had fallen to at least the original 30 inches, especially as two extraordinarily dry years had intervened.

[10] The evidence does not show a prescriptive right in defendant to take the additional quantity obtained in 1896. Our conclusion is that the findings in question are sufficiently sustained by the evidence, and that the appellants have no paramount easement in the waters of lot 192 beyond the original 30 miner's inches.

[11] The appellants rely upon facts constituting, as they claim, an estoppel upon plaintiff to object to the pumping and diversion of additional water. In 1899 the defendant placed a pump in one of its wells, and from that time until 1902 pumped therefrom from 20 to 30 miner's inches of water in addition to the artesian flow therefrom, which was very small. This lowered the level of the water in the plaintiff's wells several feet, but not so as to prevent his pumps from obtaining sufficient water for his use. In 1902 defendant enlarged its pumping plant, and began taking 125 miner's inches of water. This large increase immediately lowered the water in plaintiff's wells so far that his pumps would not reach it. He had made no decided objection to the increase of 1899, although he did not consent thereto. But, when the increased pumping of 1902 began, he at once gave notice to defendant that it was injuri-

ous to him, and that he would hold defendant liable for all damages caused thereby. He had knowledge of the preparations made by the defendant and the installation of the new pumps for the purpose of increasing its taking. The defendant did not consult him about it, nor, so far as the evidence shows, rely on his consent or acquiescence, but proceeded with its work of its own motion, clearly manifesting an intention to disregard any rights of plaintiff. One of its operations on lot 192 was the sinking of a new well much deeper than any other in the vicinity. When it had reached a stratum of clay which had not been penetrated by any other well, the plaintiff said to the defendant's managers that he was anxious to see the well go through that stratum. It was obvious that he hoped that a new supply of water would be found, so that the strain on the known supply would be relieved. He testified that he did not encourage them to put in the new pumps, or to take more water from the existing supply.

The appellants on this point rely upon the rule stated in *Katz v. Walkinshaw*, supra, 141 Cal. 136, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35, in regard to an estoppel upon one who knowingly allows his property to be taken for public use, sees expensive works installed, and the public service begun therewith, without protest, and stating the rule to be that in such case he will be limited to the remedy of an action for damages. See *Barton v. Riverside W. Co.*, 155 Cal. 515, 101 Pac. 790, 23 L. R. A. (N. S.) 331.

[12] The water taken by the defendants to supply the needs of the interveners is not taken for public use. It is not offered to the public generally, or to all who may want it within a certain territory. It is taken solely to fulfill the private contractual obligations of the defendants to deliver water to certain lots which it has sold with a water right. This is a private use. *Hildreth v. Montecito*, 139 Cal. 29, 72 Pac. 395; *Barton v. Riverside*, supra, 155 Cal. 518, 101 Pac. 790, 23 L. R. A. (N. S.) 331; *Gilmer v. Lime Point*, 18 Cal. 252.

[13] The rule concerning the establishment of public service with property of another taken without previous compensation has for its basis chiefly the inconvenience to the public if the service is interrupted by the issuance of an injunction to restrain the use. It does not apply to the taking of property for private use. With respect to private uses, the general law of estoppel controls. That the necessary elements of such an estoppel are lacking here will be seen by reference to the rule as stated in *Lux v. Haggin*, 69 Cal. 266, 4 Pac. 919, 10 Pac. 674, and comparing it with the facts above related. It is unnecessary to pursue this subject, since the appellants do not seriously claim such an estoppel. For a number of years prior to 1902, the defendant furnished water

for domestic use to persons living in the villages of Pacoima and Fernando, whether as a public use or not is not clearly apparent.

[14] Conceding it to have been a public use, the facts do not bring the case within the rule stated in *Katz v. Walkinshaw*. There is no evidence that Burr was ever informed that the defendant proposed to take the additional water for use in said villages, or that he stood by and saw the preparations made with knowledge of any such purpose. The previous supply had apparently been sufficient for that purpose. The new wells and pumps were not constructed for the purpose of securing water for Pacoima and Fernando, but for the supplying of the interveners and others to whom lots had been sold with similar water rights. We do not think the facts proven show any abuse of discretion in the trial court in determining that the plaintiff was not estopped to maintain the action.

[15] It is urged that the judgment is erroneous, in that it does not allow the defendant to take water for use upon lot 192 itself. So far as that lot lies over the water supply, the defendant's rights are equal to and correlative with those of the plaintiff. Those rights were not, however, presented to the court, and it does not undertake to adjudicate them. The controversy between the parties was over the question whether the defendant had the right to divert waters from lot 192 to land beyond the dike and not overlying the water-bearing strata. Such division was the only use complained of in the complaint, and the pleadings on the part of the defendant and the interveners asserted the right to so divert the waters. At the same time the decree should not have been so broad as to deny to the defendant any right to apply the waters under lot 192 to the use of the land over those waters. Any injury resulting to the defendant in this respect may, however, be obviated by a modification of the judgment.

So, too, the decree, we think, goes beyond the issues in restraining the defendant from receiving water from any other persons from any water sources above the said dike. The pleadings afford no foundation for such restraint. The complaint alleged no threat to take water otherwise than by means of pumps installed in wells on lot 192.

Complaint is made of the provisions limiting defendant to the "natural flow from the artesian wells on lot 192, as the same existed * * * on May 9, 1904." If this clause be uncertain and indefinite, as is claimed, the ground of objection is removed by the judgment on the former appeal, whereby the decree was modified so as to permit the defendant to pump from lot 192, at the times when it is allowed to pump therefrom, a quantity of water which, added to the natural flow, will equal a flow of 30 inches. This clearly de-

fines the extent of defendant's rights arising from its use of the waters prior to increased pumping commencing in 1902.

The appellants attack findings other than those to which we have adverted, but we think the findings so questioned are either amply supported by evidence or are not essential to the maintenance of the judgment. Except so far as indicated, we find, in the particulars in which the judgment is upon this appeal open to attack, no material error in the record.

It is ordered that the judgment be further modified as follows: (1) By adding thereto, immediately preceding the date line thereof, the following: "The portions of this judgment restraining the defendant from pumping water from lot 192 are to be construed as limiting its right to pump such water for transportation to and use upon lands lying to the south and west of the dike hereinbefore referred to. Nothing in this judgment is to be construed as limiting or defining the extent of the defendant's right to pump water from said lot 192 at all times for domestic use or irrigation upon the portion of said lot lying to the north and east of said dike." (2) By striking from paragraph V of said judgment the words: "By receiving water from any other persons, from any water sources above the said dike; and," as thus modified, the judgment shall stand affirmed.

160 Cal. 30

CLARK v. CITY OF LOS ANGELES et al.
(L. A. 2,794.)

(Supreme Court of California. May 31, 1911.
On Rehearing, June 30, 1911.)

1. ELECTRICITY (§ 1½*)—ESTABLISHMENT BY MUNICIPALITY.

Los Angeles Charter, art. 1, § 2, subd. 7 (St. 1889, p. 457), as amended by Act March 12, 1909 (St. 1909, p. 1291), authorizing the city to supply the city and its inhabitants with electricity, etc., authorizes establishment, operation, and maintenance of works to supply the inhabitants with electricity for private use.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 1½.*]

2. MUNICIPAL CORPORATIONS (§ 911*)—BONDS—ELECTRIC WORKS—POWER TO ESTABLISH.

Proceedings to issue bonds to establish municipal electric works are not invalid on account of any invalidity of Los Angeles Charter, art. 1, § 2, subds. 7a, and 26 (St. 1889, p. 457), as amended by St. 1909, p. 1291, authorizing the city to sell surplus electric power to consumers outside of the city, where there is no showing that the city intends to engage in any such sale.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1899, 1901; Dec. Dig. § 911.*]

3. ELECTRICITY (§ 1½*)—ELECTRIC WORKS—PUBLIC USE.

Proposed dedication of contemplated municipal works to supply electric power to the inhabitants of a city for private use is a dedication to public use.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 1½.*]

4. FRANCHISES (§ 2*)—GRANT—CONSTRUCTION.

Grants of franchises and special privileges by the state to private persons or corporations are to be construed most strongly in favor of the public, and, where the privilege claimed is doubtful, nothing is to be taken by mere implication as against public rights.

[Ed. Note.—For other cases, see Franchises, Cent. Dig. § 2; Dec. Dig. § 2.*]

5. FRANCHISES (§ 4*)—EXCLUSIVENESS—EXTENT OF RIGHTS.

Where a grant of such franchise by the state or some municipality thereof is not by its terms made an exclusive franchise, and the city in which it is to be exercised is not, by the law or ordinance granting it, forbidden or prevented from competing, then a city may establish its own works for the same purpose and engage in the same public service within the city, although it may thereby injure, or practically destroy, the business of the holder of such franchise.

[Ed. Note.—For other cases, see Franchises, Cent. Dig. § 3; Dec. Dig. § 4.*]

6. ELECTRICITY (§ 1½*)—ESTABLISHMENT BY CITY—RIGHTS UNDER FRANCHISES.

Const. art. 11, § 19, providing that in any city where there are no municipal water or lighting plants, that any one on certain conditions may use the streets to lay conduits to supply the city and its inhabitants, etc., does not give an existing electric company an exclusive franchise so as to preclude the city from establishing a competing plant.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 1½.*]

7. CONSTITUTIONAL LAW (§ 35*)—CONSTRUCTION OF PROVISIONS.

Const. art. 1, § 22, making the provisions of the Constitution mandatory and prohibitory, refers to the effect and not to the meaning of such provisions.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 34½; Dec. Dig. § 35.*]

8. MUNICIPAL CORPORATIONS (§ 918*)—BONDS—SUBMISSION OF QUESTION.

A question submitted to the electors, whether a city shall issue bonds to acquire and construct electric works, including acquisition of lands, water rights, rights of way, etc., states but a single object.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.*]

9. MUNICIPAL CORPORATIONS (§ 918*)—ELECTRIC BONDS—PROCEEDINGS TO ISSUE.

Proceedings to issue bonds to establish municipal electric works need not state a precise location of the works.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 918.*]

10. MUNICIPAL CORPORATIONS (§ 918*)—ELECTRIC BONDS—PROCEEDINGS TO ISSUE.

A proposition to issue bonds to establish municipal electric works need not state when the bonds will mature.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.*]

11. MUNICIPAL CORPORATIONS (§ 918*)—PUBLIC WORKS—BONDS.

Under Bond Act (St. 1907, p. 609) § 1, requiring an ordinance calling an election to recite the estimated cost of the proposed improvements for which bonds are to be issued, declaration that the estimated cost of a proposed improvement is a fixed sum is sufficient.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1920; Dec. Dig. § 918.*]

12. MUNICIPAL CORPORATIONS (§ 918*)—ORDINANCES—PUBLICATION—SUFFICIENCY.

Proceedings to issue municipal bonds to establish electric works are not invalid because the title to the ordinance is not published in black face type as directed by Pol. Code, § 4459.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1920; Dec. Dig. § 918.*]

13. MUNICIPAL CORPORATIONS (§ 935*) — BONDS—IRREGULARITIES—VALIDATION.

Any irregularities in proceedings to issue municipal bonds to establish electric works, in the omission of the proposition submitted to the electors to state when the bonds will mature, or on account of insufficient statement in the ordinance of the estimated cost of the proposed improvements, or on account of failure to publish the title of the ordinance in black face type in the official publication, are validated by Act March 21, 1911 (St. 1911, p. 421), declaring that all bond issues irregularly authorized shall be valid if they have received a two-thirds vote.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1951; Dec. Dig. § 935.*]

14. MUNICIPAL CORPORATIONS (§ 918*) — BONDS—WHEN DEBT CREATED.

A vote of electors to issue bonds for municipal improvements does not ipso facto create a debt, the debt arising when the bonds are issued, and become valid obligations in the hands of the holders; that is, when they are sold and delivered to the purchaser.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1923; Dec. Dig. § 918.*]

15. MUNICIPAL CORPORATIONS (§ 907*) — BONDS—STATUTES — RETROACTIVE EFFECT — DEBT LIMIT.

A municipal charter provision that the city debt must not exceed a specified sum, does not invalidate an issue of bonds voted in excess of that amount but not issued before an amendment fixing a new limit within which the issue falls.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1895; Dec. Dig. § 907.*]

16. EVIDENCE (§ 31*) — JUDICIAL NOTICE — AMENDMENT OF MUNICIPAL CHARTERS.

An amendment of the Los Angeles charter has the effect of law, and is a matter of judicial knowledge.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 40, 41; Dec. Dig. § 31.*]

On Rehearing.**17. ELECTRICITY (§ 1½*) — ELECTRIC POWER WORKS—ESTABLISHMENT BY MUNICIPALITY.**

Acquisition by a city of works to supply electricity for motive power does not exceed the scope of municipal purposes for which cities may be organized under Const. art. 11, §§ 6, 8.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 1½.*]

18. ELECTRICITY (§ 1½*) — ELECTRIC POWER WORKS—ESTABLISHMENT OF MUNICIPALITY.

Cities have no inherent power to administer works to supply electricity to the inhabitants, the power depending upon grant from the state.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 1½.*]

19. MUNICIPAL CORPORATIONS (§ 918*) — MUNICIPAL BOND ISSUE — ACQUISITION OF WORKS—"ACQUIRE."

The word "acquire," within a proposition to issue bonds to acquire electric works, has a

broad meaning, including both purchase and construction.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.*

For other definitions, see *Words and Phrases*, vol. 1, pp. 112-114; vol. 8, p. 7562.]

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Percy H. Clark against the City of Los Angeles, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Scarborough & Bowen, for appellant. John W. Shenk, City Atty., Lester R. Hewitt, and W. B. Mathews, for respondents.

SHAW, J. This is an action by the plaintiff as a resident and taxpayer of the city of Los Angeles, against the city, the members of the city council, the mayor, clerk, and treasurer, to enjoin them from issuing and selling certain city bonds to the amount of \$3,500,000 authorized by a vote of the electors of the city at an election held for that purpose on April 19, 1910, and to declare said bonds void. A general demurrer to the complaint was sustained and thereupon judgment was given for the defendants. The plaintiff appeals.

The resolution determining that such bond issue was necessary, stated that the creation of the bonded debt was necessary for the "purpose of acquiring and constructing a certain revenue producing municipal improvement, to wit, works for generating and distributing electricity for the purpose of supplying said city and its inhabitants with light, heat and power, including the acquisition of lands, water rights, rights of way, machinery, apparatus and other property, and the construction of electric generating works, substations, transmission and distributing lines, conduits and other works necessary therefor." The ordinance calling the election stated, in the same words, the purpose for which the debt to be voted on was to be incurred. The question, as stated on the ballot, described the purpose in the same language. The vote was in favor of the proposed bond issue. The defendants intend to and will sell the bonds so authorized, unless restrained by the court.

[1] 1. The main purpose stated in the proceedings, to which the money is to be applied, is to establish, operate, and maintain electric works wherewith to supply the inhabitants of the city with electricity for private use. It is contended that the city has no power to engage in such an enterprise, or to construct or operate works for that purpose. The contention is untenable. Subdivision 7, § 2, art. 1, of the Los Angeles charter (Stats. 1889, p. 457), as amended March 12, 1909 (Stats. 1909, p. 1291), provides that: "The said corporation shall have power: (7) To provide for supplying the city and its in-

habitants with water, gas and electricity, or either or any thereof, or with other means of heat, illumination or power; and to acquire or construct and to lease or operate, and to regulate the construction or operation of conduits or of railroads, or other means of transportation, and of plants and equipments for the production or transmission of gas, electricity, heat, refrigeration or power, in any of their forms, by pipes, wires or other means; and to incur a bonded indebtedness for any of such purposes."

It is difficult to perceive how the power to supply electricity to the inhabitants of the city for their private use could be conferred in clearer or more appropriate terms. There seems to be no foundation for the argument that the power of the city to procure or produce water, gas or electricity, and supply it to the inhabitants is limited by this provision to the procuring of these substances for public uses alone, such as the watering of public streets, the flushing of public sewers, the lighting of public streets and buildings, or the running of elevators in public buildings and heating the rooms therein. The statement of the proposition, in connection with the provision above quoted, is a sufficient refutation of it. The case of *Hyatt v. Williams*, 148 Cal. 585, 84 Pac. 41, construes the provisions of the former charter of Stockton giving that city power to provide for lighting public streets, public places, and public buildings. With respect to private uses by the inhabitants or supplying light to inhabitants at all, except such as they got by going into public places and sharing the public lights, that charter was wholly silent. The decision not only fails to support appellant's position, it inferentially suggests the contrary as the proper and obvious construction of the Los Angeles charter. The decision of the District Court of Appeal for the Third district in *Cary v. Blodgett*, 10 Cal. App. 463, 102 Pac. 668, is substantially on all fours with the case at bar. The case was presented to the Supreme Court by a petition for rehearing upon this point, which was refused. It holds that the statute giving power to cities of the sixth class "to acquire, own, construct, maintain and operate street railways, telephone and telegraph lines, gas and other works for light and heat" (section 862 [St. 1906, p. 898] Mun. Cor. Act), authorized such cities to erect and operate an electric light plant, and thereby supply the inhabitants of the city with electricity for private use. It is practically a decision of this court on that point. The charter of the city of Los Angeles is much more explicit on this subject than section 862 aforesaid, and it clearly gives the city the power in question.

[2] 2. It is also suggested that the proceedings must be declared void because of the provisions of subdivisions 7a and 26, of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

section 2, art. 1, of the charter, as amended in 1909. These subdivisions authorize the city to sell surplus water or surplus electric power, belonging to the city, to other cities, or to consumers outside of the city of Los Angeles. It is argued that this, in effect, gives the city unlimited power to engage in the business of generating and supplying electricity throughout the state, as a commercial enterprise, in the same manner and to the same extent as any public service corporation or private person might do, and that this is not a municipal purpose and the exercise of it would be beyond the power of the city as a corporation for municipal purposes, within the meaning of the Constitution (article 11, § 6), citing *Low v. Marysville*, 5 Cal. 214. There is nothing in the ordinance calling the election, or in the resolution of intention preceeding it, which suggests that the city intends to engage in any such enterprise, or even that it intends to sell any surplus of electricity over and above that needed by the city and its inhabitants. If it should attempt to engage in the business solely as a commercial enterprise for profit its power in that behalf can be tested when the attempt is made. These proceedings will not estop any citizen or taxpayer from making the objection at that time. Furthermore, the secret or avowed intention to do either of these things, even if without authority, would have no effect on the validity of bonds authorized and issued solely for the legitimate purpose of supplying electricity to the city and its inhabitants. The fact that such business was suggested in a report of the board of public works made to the council before the proceedings to issue the bonds were begun, does not make it a part of the proceedings nor affect the validity thereof.

[3] 3. There is no force or merit in the proposition that the proposed dedication of the contemplated works and the product thereof to the purpose of supplying electric power to the inhabitants of the city for their private use is not a dedication to public use. No substantial distinction can be drawn in that respect between the general distribution of electricity for power and its distribution for light or heat, or between the general distribution of electricity for power in private business, and the general distribution of gas or water for private use. We deem it unnecessary to discuss the question.

[4] 4. It is alleged in the complaint that the city of Los Angeles has not heretofore supplied to its inhabitants electricity or any other substance for light, heat or power; that there are and for many years have been certain public service corporations engaged in the business of supplying gas and electricity to the city and to its inhabitants, in general, for light, heat and power for private and public uses and purposes; that these corporations have invested large sums of money in that business and now have much valuable property devoted thereto and necessary there-

for; and that they have for that purpose availed themselves of the general grant from the state contained in section 19, art. 11, of the Constitution, of the privilege of using the public streets of said city, and have, in pursuance thereof, laid and maintained in said streets mains, pipes, conduits, poles and wires for the transmission and distribution of gas and electricity to the city and its inhabitants, and now maintain and operate the same. It is earnestly insisted that the effect of the constitutional provision is to vest in these corporations a franchise which, so far as the city is concerned, is exclusive, or, at least, that it amounts to an undertaking or promise by the state, binding upon each city, respectively, that whenever any such corporation shall have accepted the offered franchise to use the streets and shall have laid therein its pipes and conduits, or erected its wires thereon, such city shall not thereafter engage in the same business therein in competition with such corporation, or use the streets for that purpose. The question is a new one in this court.

Section 19, aforesaid, is as follows: "In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

It is a general principle of construction, too well established to require discussion, that grants of franchises and special privileges by the state to private persons or corporations are to be construed most strongly in favor of the public, and that, where the privilege claimed is doubtful, nothing is to be taken by mere implication as against public rights. *Charles River B. Co. v. Warren B. Co.*, 11 Pet. 543, 547, 9 L. Ed. 773; *Helena W. Co. v. Helena*, 195 U. S. 392, 25 Sup. Ct. 40, 49 L. Ed. 245; *Knoxville W. Co. v. Knoxville*, 200 U. S. 33, 26 Sup. Ct. 224, 50 L. Ed. 353; *Mayrhofer v. Board*, 89 Cal. 112, 26 Pac. 646, 23 Am. St. Rep. 451; *Skelly v. School Dist.*, 103 Cal. 655, 37 Pac. 643; *Witter v. School Dist.*, 121 Cal. 350, 53 Pac. 905, 66 Am. St. Rep. 33. [5] It is also a settled rule founded upon the foregoing principle, and it is conceded by appellant, that where

a grant of such franchise by the state or some municipality thereof is not by its terms made an exclusive franchise, and the city in which it is to be exercised is not, by the law or ordinance granting it, forbidden or prevented from competing, then a city may establish its own works for the same purpose and engage in the same public service within the city, although it may thereby injure, or practically destroy, the business of the holder of such franchise. *Knoxville W. Co. v. Knoxville*, supra; *Helena W. Co. v. Helena*, 195 U. S. 392, 25 Sup. Ct. 40, 49 L. Ed. 245; *Joplin v. Light Co.*, 191 U. S. 156, 24 Sup. Ct. 43, 48 L. Ed. 127; *Hamilton G. Co. v. Hamilton*, 146 U. S. 268, 13 Sup. Ct. 90, 36 L. Ed. 963; *Skaneateles W. Co. v. Skaneateles*, 184 U. S. 363, 22 Sup. Ct. 400, 46 L. Ed. 585.

[6] The express grant made by section 19 is of the privilege, franchise, or easement to place in the public streets of a city the conduits necessary or convenient for the business of supplying light or power to the city and its inhabitants. It may be accepted by any person, or by any company duly incorporated to engage in that business. The section does not declare that such franchise or easement, when accepted, shall be exclusive. It implies the contrary, for it does not confine the grant to the first person or corporation to accept it and use the streets, but extends it to "any individual or any company." See *Stockton, etc., Co. v. San Joaquin Co.*, 148 Cal. 318, 83 Pac. 54, 5 L. R. A. (N. S.) 174. The debates over its passage in the constitutional convention show that it was not intended to give a monopoly to the first company, or to encourage monopolies at all, but to prevent them, so far as the right to use the streets was concerned, by conferring the right upon any competitor against an established company. *People v. Stephens*, 62 Cal. 235. It is true the right is not given in cities which are operating municipal works for the same purpose. But there is nothing in the terms of the section which would prevent a city from granting to an opposition company a right to establish such works, nor anything in the nature of a declaration, promise, or assurance that cities which have no such public works shall not establish such works and use the streets therefor after a private company has availed itself of the privilege granted. Under the rule stated, therefore, this section should not be construed to grant an exclusive franchise in the streets, or to prevent a city from establishing and operating such public waterworks or light works, notwithstanding the fact that private persons or corporations are using the streets in operating works of the same kind.

In the *Knoxville Case* the city had stipulated that it would not grant a similar franchise to any other person. Yet it was held that the city was at liberty to establish and operate municipal works, regardless of the effect thereof on the grantee of the franchise.

The other cases cited are to the same effect.

The exact point here involved was decided by the United States Circuit Court for the Southern District of California in *Madera Waterworks v. Madera* (C. C.) 185 Fed. 281, decided by Wellborn, J., on September 12, 1910. It was there held that after private capital has, in a city of this state where there are no municipal waterworks, laid its main and pipes in the streets in pursuance of the constitutional grant, and while it continues to operate such works, the city itself may install and operate similar works in competition with the private works. The opinion is elaborate and exhaustive and it satisfactorily establishes the proposition.

[7] The statement in section 22 of article 1, that the provisions of the Constitution are mandatory and prohibitory, does not require a different interpretation of section 19, art. 11. It refers to the effect, not to the meaning, of the constitutional provisions, and declares that they are imperative and paramount, according to their true meaning, ascertained by the rules of construction otherwise applicable thereto. Section 22, as is well known, was inserted because of certain previous decisions holding that the provisions of the Constitution of 1849 regarding the titles of legislative acts were directory and not mandatory. *Washington v. Page*, 4 Cal. 388; *Ex parte Newman*, 9 Cal. 523; *Pierpont v. Crouch*, 10 Cal. 315; *In re Boston M. Co.*, 51 Cal. 626. As there is no declaration, express or implied, in section 19, that cities shall not establish competing works, and use the public streets for that purpose, there is nothing on that point to which section 22, art. 1, can be applied.

It is suggested that from the fact that the right to use the streets is offered only in cities having no municipal works, an implication or inference arises that the city shall not establish municipal works after the constitutional offer to private parties has been accepted and used. The rule above stated, that nothing is to be taken by implication against public rights, that the public authorities will not be deemed to have been deprived of rights or powers unless the intent to that effect clearly appears, is a sufficient answer to this suggestion.

[8] 5. It is argued that the proceedings are void because the question voted on included two distinct and separate objects or purposes, while the law allows but one to be submitted. Conceding, for argument's sake, that the Constitution (section 18, art. 11) and the bond act (Stats. 1907, p. 609) require that each question submitted to a vote shall specify a single object or purpose only, as the thing for which the proposed indebtedness is to be incurred, we are of the opinion that the question, as submitted, does not transgress such rule. The question, as printed on the ballot, was as follows: "Shall the city of Los Angeles incur a bonded debt of \$3,500,000 for the purpose of acquiring and con-

structing a certain revenue producing municipal improvement, to wit, works for generating and distributing electricity for the purpose of supplying said city and its inhabitants with light, heat and power, including the acquisition of lands, water rights, rights of way, machinery, apparatus and other property and the construction of electric generating works, substations, transmission and distributing lines, conduits and other works necessary therefor?" This states but a single object and purpose, namely, the establishment of the municipal improvement described. In order to accomplish this purpose and secure this object many things were, of course, necessary to be done, and they are also stated in general terms in the question. But by the question stated the money obtained from the proposed bonds is not to be used for any of the physical objects mentioned in the more detailed description, unless they are necessary for the principal purpose and object, that is, the works for supplying the city and its inhabitants with electricity. The words "acquiring and constructing" do not express the dual purpose of acquiring one improvement of this kind and constructing another, with the money obtained. They indicate the single purpose of acquiring all the property that may be found necessary for the proposed works, even including water rights, and constructing works with said property. To hold that the city must submit in one question the proposition to construct the electrical works and in another question, to be voted on separately, the proposition to acquire the property necessary to be used in such construction, would be to hold that the people might by one vote authorize the construction of the plant, and by the other defeat it by refusing authority to buy the property necessary for that purpose. It is practically imperative that the question put should include in one proposition everything necessary for the improvement.

[9] There is no provision of the bond act, or of the Constitution, which requires that the question shall state the precise location of the works to be provided out of the fund voted, or that they should be within the city limits. In the nature of things the construction of waterworks would require a large part of them to be situated outside of the city limits, and the city authorities must be given a wide discretion as to the location of public works in many cases, even after the money is obtained on the bonds. The question states the purpose with sufficient detail and certainty.

[10] 6. It is objected that the proposition submitted does not state when the bonds shall become payable. We find nothing in the Constitution or act aforesaid which requires the time of maturity of the bonds to be stated in the question voted on, or to be decided by the vote of the people. Section 2 of the act provides that the city council shall determine that question, and it plain-

ly contemplates that it may be done either before or after the vote of the people is taken on the issuance of the bonds, and without action thereon by the people.

[11] 7. The objection that the council, before calling the election, did not make an estimate of the cost of the proposed improvement, is not sustained by the record. Section 1 of the bond act requires that the ordinance calling the election shall recite "the estimated cost of the proposed public improvements," and the provisions of the section authorize a bond issue when the cost of the improvement is too great to be paid out of ordinary annual revenues of the city. Both the original resolution of intention to establish the improvement and the ordinance calling the election declare that the estimated cost of the proposed improvement was \$3,500,000. This was a sufficient compliance with the statute. It will be presumed from this recital, that the council did previously make the estimate stated.

[12] 8. Another objection is that the publication of the ordinance was insufficient because it was not preceded by words in black face type describing in general terms the purport or character of the notice intended to be given, as directed by section 4459 of the Political Code. See *Derby v. Modesto*, 104 Cal. 523, 38 Pac. 900. The ordinance was preceded by its title, which clearly described its purport. We do not regard the fact that it was not printed in black face type of sufficient importance to warrant a holding that the proceedings were thereby invalidated, even if the section cited was applicable to the election notice in question, which we do not decide.

[13] With regard to the points numbered 6, 7 and 8, it may be further remarked that even if the proceedings in the particulars mentioned had been irregular as claimed, they would be validated by the act of the Legislature of March 21, 1911, chapter 234, statutes of 1911. That act expressly declares that all bond issues irregularly authorized by any municipality in the state shall be valid, notwithstanding such irregularity or defect, if they have, at the election called for that purpose, received a two-thirds vote of the electors voting thereon. *Chase v. Trout*, 146 Cal. 358, 80 Pac. 81.

[14] 9. Lastly, it is contended that the proposed bond issue is invalid because the amount thereof exceeds the limit of indebtedness allowed by the city charter. It appears that at the same election, and by the same ordinance, there was submitted to the voters of the city a proposition to issue bonds to the amount of \$3,000,000 to defray the cost of certain harbor improvements which the city proposed to make at Wilmington harbor, within the city, and that this proposition also carried. At the time of the election the charter of the city provided that the indebtedness of the city, exclusive of debts for waterworks, sewers and storm drains, "must

not exceed the sum of five million dollars." The indebtedness previously existing, exclusive of that for waterworks, sewers, and storms drains, was \$1,324,600. The bonds for the electric works would bring the indebtedness up to \$4,824,600, which is a little below the limit. But if the harbor bonds are added, the total amount would exceed the limit. As both were carried by the people at the same election, it would be difficult to say that one preceded the other, or that the people preferred one to the other, so as to determine which should be declared valid in preference to the other. There were 406 more votes in favor of the electric works' bonds, and 300 less votes against them, than upon the harbor bond proposition, in a total of 14,041. We are not prepared to say that this would suffice to make the electric works' bonds valid and the harbor bonds void. We find it unnecessary, in view of a subsequent amendment of the city charter, to determine this question.

On March 6, 1911, an amendment of the charter on this subject was submitted to the voters of the city and ratified by them, and on March 20, 1911, the same was duly approved by the Legislature. This amendment provides that for the purpose of acquiring, constructing or completing electric light and power works, and certain other specified purposes, the city may incur an indebtedness not exceeding 12 per centum of the assessed value of all taxable real and personal property within the city, in addition to 3 per cent. allowed for certain other purposes. It is stipulated by the parties, as a fact to be considered in the decision of this appeal, that the total assessed value of the taxable property within the city in the year 1910 was \$289,279,927, and that for the year 1911 it was \$332,884,924. This places the proposed bonded debt far below the limit allowed by the amendment. The vote of the electors upon a proposition to issue bonds for municipal improvements does not ipso facto create a debt against the city to the amount authorized. The indebtedness of the city is not thereby increased. The increase occurs when the bonds are issued and become valid obligations in the hands of the holders, that is when they are sold and delivered to the purchaser.

[15] The provision of the charter, prior to the amendment, was that the indebtedness "must not exceed" five million dollars. It is obvious that this provision has not been violated, since the bonds here involved have not been issued, and the city indebtedness has not been increased by reason thereof. It still remains only \$1,324,600. From this it follows that if, at the time the bonds are issued and become lawful debts, they do not raise the indebtedness above the legal limit, as then established, they will not be deemed void because of the fact that at the time the vote authorizing them was taken, the amount voted would have exceeded the then

existing limit. The authorities so declare. *Frost v. Central City*, 134 Ky. 434, 120 S. W. 367; *Austin v. Valle* (Tex. Civ. App.) 71 S. W. 414; *Dudley v. Lake*, 80 Fed. 677, 26 C. C. A. 82; *Corning v. Meade Co.*, 102 Fed. 57, 42 C. C. A. 154; *Board v. National L. I. Co.*, 94 Fed. 328, 36 C. C. A. 278; *Lake Co. v. Sutliff*, 97 Fed. 281, 38 C. C. A. 167. The effect of the amendment, therefore, is to raise the limit existing at the time the vote was taken and to make the bonds valid if, at the time they are issued, they do not then increase the debt beyond the increased amount allowed. If the case had been submitted on appeal prior to the amendment of the charter aforesaid, the condition of the record at that time, and the then existing limit, would have required a decision with respect to the amount of the respective issues that could be considered valid. [16] But the amendment of the charter has the effect of law and is a matter of judicial knowledge. The stipulation of the fact as to the assessed valuations enables us to decide the case according to the law as it now exists and thereby to avoid the necessity for further litigation concerning the validity of the bond issues. They have not been issued and are not existing debts of the city. They do not exceed the present limit of indebtedness, and hence, so far as that objection is concerned, they are valid.

This concludes all the points urged in the briefs. We find no ground for declaring the bonds invalid.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

On Rehearing.

Scarborough & Bowen, for appellant. John W. Shenk, City Atty., Lester R. Hewitt, and W. B. Mathews, for respondent. J. W. McKinley and Edward G. Kuster, amici curiæ.

PER CURIAM. A petition for rehearing has been presented by certain persons as amici curiæ, on behalf of corporations engaged in supplying electricity to the inhabitants of Los Angeles. We briefly notice the arguments therein not considered in the opinion heretofore filed.

[17] 1. It is contended that the business of supplying electricity for motive power is a private business not within the scope of municipal purposes for which, under the Constitution, municipal corporations may be organized as provided in sections 6 and 8 of article 11. We can see no ground for any distinction in this respect between the use of electricity for power and its use for heat and light, for which purposes counsel admit that cities may distribute it if authorized by law. It has come to be in common use in homes for the operation of light machines

such as sewing machines and suction cleaners, and its supply for this use is also conceded to be a proper municipal purpose. The fact that it may also be furnished to persons desiring to apply it to larger machines for manufacturing or other business purposes is no sound reason for holding such distribution to be without the scope of municipal powers. The business of supplying water for irrigation, or for the watering of stock, is a purely business purpose, as distinguished from domestic use, but it has always been recognized as a public service in which cities may engage. Electricity for power comes within the same category. The Legislature has recognized this fact, and has granted the power of eminent domain to persons and corporations proposing to supply electricity for general use for power. Code Civ. Proc. § 1238. The following from the opinion of this court in *Platt v. San Francisco*, 158 Cal. 74, 110 Pac. 307, is applicable generally to all such purposes: "There is no provision of our state Constitution which either expressly or by implication forbids the acquisition, ownership, or operation of any such public utilities by a municipality, or prohibits the granting to a municipality of the power to acquire, own, and operate them."

2. With respect to the proposition that section 19 of article 11 of the Constitution, by necessary implication, forbids the granting of power to cities to engage in such public service where there are private systems of like kind already in operation, little need be said in addition to what we have said in the previous opinion. The purpose of the section was to prevent monopolies in the use of the streets for such purposes. It does not purport to grant the right to engage in the business of furnishing water, gas, or electricity for general use. It presupposes such power or right, and it merely gives the company or person having it the privilege of using the public streets as a way for its conduits.

[18] Cities have no inherent power to engage in administering such public utilities. They obtain such power by grant from the state. There is nothing in the language of section 19, or in the object which it was intended to accomplish, namely, to prevent the giving of the exclusive use of the streets to private persons or companies, which indicates that it was intended by that section to qualify or limit the power of the Legislature to confer upon cities the power to engage in such business, or any business properly within the scope of municipal purposes.

3. In support of the proposition that the question, as stated on the ballot used at the election, included two distinct and separate purposes, the petition cites *Leavenworth v. Wilson*, 69 Kan. 74, 76 Pac. 400, *Elyria, etc., Co. v. Elyria*, 57 Ohio St. 374,

49 N. E. 335, and *Neacy v. Milwaukee*, 142 Wis. 590, 126 N. W. 8, to the effect that a proposal to issue bonds to "purchase and erect," or "to purchase or erect," public works, is a proposal for a dual purpose. These decisions merely represent one side of a conflict of authority. The following cases hold the contrary: *Farmers', etc., Co. v. Sioux Falls*, 136 Fed. 732, 69 C. C. A. 373; *Nash v. Council Bluffs (C. C.)* 174 Fed. 182; *Thomas v. Grand Junction*, 13 Colo. App. 90, 56 Pac. 665; *State v. Allen*, 178 Mo. 555, 77 S. W. 868; *State v. Allen*, 183 Mo. 283, 82 S. W. 103. In this state the more liberal rule has been followed. *People v. Counts*, 89 Cal. 15, 26 Pac. 612; *Oakland v. Thompson*, 151 Cal. 576, 91 Pac. 387. It is not correct to say that the expression, "acquiring and constructing a certain revenue producing municipal improvement," particularly described, is necessarily a statement of a dual purpose.

[19] The word "acquire" has a broad meaning, including both purchase and construction. The expression does not indicate the purpose of acquiring two systems, one by purchase, the other by construction. In connection with the context, it means the acquisition of but one system, including the purchase of such property and the erection of such structures as may be necessary to accomplish that purpose.

The petition for rehearing is denied.

(160 Cal. 257)

FIRTH v. MAROVICH et al. (L. A. 2,642.)
(Supreme Court of California. June 21, 1911.)

1. DEEDS (§ 171*)—RESTRICTIVE COVENANTS—VALIDITY.

A condition in a deed providing that no building, except a private residence costing at least \$1,500, and located not less than 20 feet from the front line of the lot, shall be erected, and that no barn, shed, or other building shall be located closer than 90 feet to such front line, is valid and enforceable by the grantor, so long as he continues to own any part of the tract for the benefit of which the restrictions were exacted.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 537-542; Dec. Dig. § 171.*]

2. DEEDS (§§ 147, 149*)—CONDITIONS—REPUGNANCY—VALIDITY—RESTRAINT ON ALIENATION.

A condition subsequent in a deed forfeiting the title to the grantor in case of breach, such as breach of a building restriction, is not repugnant to the granting clause, and does not infringe the code prohibition against restraints on alienation.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 475, 479; Dec. Dig. §§ 147, 149.*]

3. DEEDS (§ 171*)—BUILDING RESTRICTIONS—CONSTRUCTION.

Building restrictions in deeds are to be construed strictly against the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 537-542; Dec. Dig. § 171.*]

4. DEEDS (§ 171*)—BUILDING RESTRICTIONS—EFFECT.

A restriction in a deed against erection of any building, except a private residence costing

not less than \$1,500, and located not less than 20 feet from the front lot line, with customary outbuildings, and against erection of any barn, shed, or other building closer than 90 feet to the front lot line, does not permit erection of a residence built of rough boards, battened, and costing only \$800, though it was located more than 90 feet from the lot line.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 537-542; Dec. Dig. § 171.*]

5. WORDS AND PHRASES—"OUTBUILDING" OR "OUTHOUSE."

An "outbuilding" or an "outhouse" is a building adjoining or belonging to a dwelling house; "outbuilding" comprehends something used in connection with a main building.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5118, 5119-5121.]

Department 1. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by Emil Firth against Mary Lena Marovich and others. From a judgment of nonsuit and from an order denying a new trial, plaintiff appeals. Reversed.

Sheldon Borden and George H. Kelch, for appellant. R. J. Adcock and Haas, Garrett & Dunnigan, for respondents.

SLOSS, J. On January 21, 1907, the plaintiff conveyed to Charles Scherer lot 2 in Walnut Park, in the city of Los Angeles, by a grant deed containing the following provisions: "This conveyance is made and said real property is sold subject to the following conditions: That no building whatever except a private residence with the customary outbuildings, including a private stable, shall be erected, placed or permitted on said premises or any part thereof, and that such building shall be used as a private residence only, and shall cost, and be reasonably worth, not less than fifteen hundred (1,500.00) dollars, and shall be located not less than twenty (20) feet from the front or street line of said lot, namely, on Vernon avenue, and it is further agreed that no barn or shed, or other building shall be built or located closer than ninety (90) feet from the front or street line of said lot. That any breach of the foregoing conditions, or any of them, occurring after the delivery of this deed, shall have the effect of forfeiting the title of the grantee and his assigns, and thereupon the title to said real property shall revert to the grantor."

The deed was duly recorded. Subsequently Scherer conveyed the lot to the defendant Mary Lena Marovich. The purpose of this action is to compel a reconveyance to plaintiff, who claims that the title conveyed by him has become forfeited by breach of the condition above quoted. Civ. Code, § 1109. At the trial, the court, upon motion of defendant, granted a nonsuit, and plaintiff appeals from the resulting judgment and from an order denying his motion for a new trial.

The complaint alleges, in addition to the facts already stated, that, at the time of the

conveyance to Scherer, the plaintiff was, and that he is, the owner of other lots near the one in question, that said lots are in a residence district, and that their value is affected by the character of the improvements erected in their vicinity. Before and after the sale to Scherer, it is alleged the plaintiff made sales of some others of such lots by deeds containing conditions similar to those above set forth. These conditions were inserted pursuant to a general plan of building up said locality, and for the benefit of the lots and of purchasers thereof. At the time of the conveyance to Scherer, and of his conveyance to Marovich, there was no building upon lot 2, but shortly after defendant Mary Lena Marovich went into possession of said lot she erected thereon, without plaintiff's consent, a building to be used, and which ever since has been and now is used, as a dwelling, the cost and the reasonable value whereof does not exceed \$800. Said building is unsightly and a detriment to plaintiff's remaining lots. Upon learning of the nature and cost of said building, he notified the defendant Mary Lena Marovich that it must be removed, but she has refused to comply, and has persistently used said building as a dwelling. Plaintiff has also demanded a reconveyance and the possession of said lot, which demand has been refused.

The answer admits many of the allegations of the complaint. It denies that the value of other lots is affected by the character of the improvements; denies, for want of information, that plaintiff sold other lots on similar conditions, or that such conditions were inserted pursuant to a general scheme, or for the benefit of the lots sold, or of other lots. The answer expressly admits the erection by defendant Mary Lena Marovich of a building which cost and was worth not more than \$800, "to be used, and which ever since has been, and now is, used as a dwelling." (The words "to be used" in this part of the answer were subsequently, by leave of court, stricken out, but the amendment had no effect. The allegation of the complaint that the building was erected "to be used" as a dwelling was still admitted by the failure of the defendants to deny it.) The answer also contained a plea of estoppel, which is immaterial to the discussion of the present appeal, although it may become important upon a new trial.

The evidence introduced by plaintiff tended to support the controverted allegations of his complaint. Firth himself testified that he had bought and subdivided the tract, including lot 2; that he had placed similar restrictions in conveyances of other lots in the tract; that houses are built upon two-thirds of the lots of the tract; and that each of said houses (with the exception of that on lot 2), is worth at least \$1,500. On none of the other lots is there any outbuilding worth

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

less than \$1,500, unless there be on the same lot a residence costing \$1,500 or more.

There was testimony that the building complained of (which was admitted to be over 100 feet back from the street line) was a one-story structure, covering a space of 24 by 26 feet, and built of rough boards, battened. It was partitioned into rooms, and contained a kitchen with a sink and other conveniences. It was furnished and occupied as a residence, and had been so occupied from the time it was built until shortly before the trial, a period which, it may well be inferred from the record, was between one and two years. In this state of the evidence, the defendants moved for a nonsuit on the ground "that there is no violation of this restriction in the deed. It has not been shown."

[1] The motion should not have been granted. It is not open to question that building restrictions of the kind contained in the deed from plaintiff to Scherer are valid and enforceable at the suit of the grantor, so long as he continues to own any part of the tract for the benefit of which the restrictions were exacted. *Quatman v. McCray*, 128 Cal. 285, 60 Pac. 855; *Sanborn v. Rice*, 129 Mass. 387; *Evans v. Foss*, 194 Mass. 513, 80 N. E. 587, 9 L. R. A. (N. S.) 1039; *Meigs v. Milligan*, 177 Pa. 66, 35 Atl. 600; *Boyden v. Roberts*, 131 Wis. 659, 111 N. W. 701.

[2] A condition subsequent forfeiting the title to the grantor in case of breach is not repugnant to the granting clause, nor does it come within the terms of the Code sections prohibiting or limiting restraints on alienation. The power of alienation is not restrained. The grantee, Scherer, was at perfect liberty, at all times, to convey what title he had. In fact, he has conveyed it. But his title was limited to that of an estate subject to divestiture upon condition subsequent, and he could not enlarge this estate by conveying to a purchaser taking with notice. In view of the language of the clause providing for a forfeiture, there is no force in the respondents' contention that the clause in question should be construed as a personal covenant, rather than a condition subsequent.

[3] While restraints of this character are to be construed strictly as against the grantor (Civ. Code, § 1442; *Rec. Dist. v. Van Loben Sels*, 145 Cal. 181, 78 Pac. 638), they must be enforced when a case coming clearly within their terms is shown. Upon the testimony offered by the plaintiff, a finding that the structure erected on the lot did not comply with the requirements of the condition would, at the least, have been justified. The meaning and intent of the restrictive clause is plain. The purchaser is required, if he desires to put improvements upon the lot, to erect a residence, which shall cost and be worth not less than \$1,500. Such residence may be accompanied by the "customary outbuildings, including a private stable." There

is no provision governing the cost of such outbuildings. The residence is to be not less than 20 feet from the street line. The provision that "such building shall be used as a private residence only" of course refers to the main building, not to the stable or other outhouses.

[4] So far there is no room for doubt. The respondents point, however, to this clause, "and it is further agreed that no barn or shed or other building shall be built or located closer than ninety (90) feet from the front or street line of the building," and argue that it permits the erection, at a distance of 90 feet or more from the street line, of any building, whatever its cost, and for whatever use. This is an entirely inadmissible construction of the language. In view of the earlier provisions that *no building*, except a residence with outbuildings, should be erected on the premises, or any part thereof, the words "or other building" plainly have reference to the outbuildings permitted at the outset of the paragraph. This meaning is rendered more evident by the fact that this phrase is used in connection with and following the words "barn or shed." The effect of this final provision, reading it as a part of the entire restrictive clause, is to require outbuildings to be set back 90 feet from the street line, while the main residence building may be built at a distance of only 20 feet from the street.

[5] The word "outbuilding," or "outhouse," has been defined as "a building adjoining or belonging to a dwelling house." *Bouv. L. D.* "It is the subserviency of it to the mansion house that gives it the denomination of an outhouse." *State v. Brooks*, 4 Conn. 446. An outbuilding is "something which is to be used in connection with a main building." *Blakemore v. Stanley*, 159 Mass. 6, 33 N. E. 689. The structure erected by Mrs. Marovich was not an outbuilding. It was not an adjunct to any main building. So far as the evidence and the admissions of the pleadings show, it was built for no other purpose and put to no other use than that of a dwelling. Viewed as a residence, it did not comply with the requirements of the deed as to cost and value.

We are not called upon to decide whether it would be a violation of the conditions in this deed for the grantee to erect a stable or other outbuilding before constructing his residence, and to live in such outbuilding pending the construction of a residence. That question is not presented here. There is nothing to indicate that the structure complained of was designed or adapted for anything but a dwelling, or for any use to which an outbuilding could be put, or that the erection of a further residence was at any time contemplated. At any rate, the evidence would certainly have warranted a finding that it was a dwelling, and that alone. The right to erect a residence costing not less

than \$1,500, with customary outbuildings, did not authorize the erection of a residence costing no more than \$800.

It must therefore be held that the plaintiff is entitled to a new trial.

The judgment and the order appealed from are reversed.

We concur: SHAW, J.; ANGELLOTTI, J.

160 Cal. 197

BANNERMAN v. BOYLE, Auditor.
(S. F. 5,758.)

(Supreme Court of California. June 8, 1911.)

1. STATUTES (§ 184*)—CONSTRUCTION—LEGISLATIVE INTENT.

The court, in construing an ambiguous statute, must consider the evil to be cured and the object to be accomplished.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 262; Dec. Dig. § 184.*]

2. OFFICERS (§ 95*)—DE FACTO OFFICERS—RIGHT TO SALARY.

Pol. Code, § 936, as amended in 1891 (St. 1891, p. 28), providing that when the title to an office is contested no warrant can thereafter be drawn for salary until the proceedings have been finally determined, but the provision shall not apply to any party holding a certificate of election or commission of office does not change the rule that a de facto officer cannot compel the public disbursing officer to pay salary, for the statute does not enact any rule governing a case where there is no contest.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 134-139; Dec. Dig. § 95.*]

3. OFFICERS (§ 95*)—DE FACTO OFFICERS—RIGHT TO SALARY.

Pol. Code, § 937, as amended in 1891 (St. 1891, p. 28), providing that as soon as proceedings are instituted to contest an office the clerk of the court shall certify the facts to the officers required to draw warrants or pay salaries, etc., does not by implication declare that an intruder in a public office is entitled to the salary where no action concerning his title is begun, since positive legislation is necessary to change the established rule that a de facto officer cannot compel the payment of his salary.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 134-139; Dec. Dig. § 95.*]

4. MANDAMUS (§ 107*)—COMPELLING PAYMENT OF OFFICIAL SALARY—QUESTIONS REVIEWABLE.

The court in mandamus to compel the payment of salary to a public officer must determine whether or not plaintiff holds the title to the office during the time for which he claims his salary.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 225-234; Dec. Dig. § 107.*]

5. MUNICIPAL CORPORATIONS (§ 155*)—OFFICERS—REMOVAL.

Under San Francisco city charter (St. 1899, p. 317), providing for a board of education composed of school directors appointed by the mayor, empowering the mayor to remove for cause any appointed officer, requiring the mayor suspending an elected officer to present charges against him to the board of supervisors, and when removing an appointed officer to notify the board of supervisors thereof, the mayor's power to remove any appointed officer for cause is practically confined to the members of the several boards appointed by him.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 155.*]

6. MUNICIPAL CORPORATIONS (§ 159*)—OFFICERS—APPOINTMENT—REMOVAL.

Under San Francisco charter (St. 1899, p. 317), empowering the mayor to remove for cause any appointed officer and requiring the mayor, on removing an appointed officer, to notify the board of supervisors thereof with a statement of the cause therefor, the mayor may only remove an officer for cause after notice and hearing, and the act of the mayor in merely giving the board of supervisors notice of the removal of an appointed officer with a statement of the cause therefor, but without having given notice thereof to the officer or an opportunity for a hearing, is insufficient to effect a removal.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 159.*]

In Bank. Application for writ of mandate by Thomas R. Bannerman against Thomas F. Boyle as Auditor of the City and County of San Francisco. Peremptory writ issued.

Chas. S. Wheeler (J. F. Bowie and Thomas E. Hayden, of counsel), for petitioner. Edward F. Moran, Garret W. McEnerney and Andrew F. Burke, for respondent.

SHAW, J. This is an original proceeding in this court for a writ of mandate to compel the defendant to audit and approve plaintiff's demands against the city and county of San Francisco for his monthly salary as member of the board of education, for each month from March, 1910, to December, 1910, inclusive. The principal defense is that the plaintiff, during that period, had no right or title to the office, but was a mere usurper. It is conceded that he was in exclusive possession of the office as a de facto officer, and performed all the duties of the office during the time for which he claims his salary. The plaintiff claims that this gives him the right to the salary, regardless of the want of title, or of the fact that another person held title to the office.

Prior to the amendment of 1891 (St. 1891, p. 28) to sections 936 and 937 of the Political Code, it was the settled law of this state that, although no private person could question the title of one holding a public office and the official acts of a mere de facto officer were valid, as far as private rights affected thereby were concerned, nevertheless, as a de facto officer, he was not legally entitled to the salary fixed by law to be paid out of public funds, and he could not compel the public disbursing officer to pay such salary. The fact that he was not lawfully entitled to the office was a complete defense to any action or proceeding by him to compel payment to him of the salary thereof out of the public treasury. *Dorsey v. Smyth*, 28 Cal. 25; *Stratton v. Oulton*, 28 Cal. 51; *Carroll v. Siebenthaler*, 37 Cal. 195; *People v. Potter*, 63 Cal. 128; *Burke v. Edgar*, 67 Cal. 184, 7 Pac. 488; *Ward v. Marshall*, 96 Cal. 155, 30 Pac. 1113, 31 Am. St. Rep. 198; *Adams v. Doyle*, 139 Cal. 680, 73 Pac. 582. This is also the general rule in other states.

Mechem on Officers, § 331; Throop on Public Officers, § 517. "In any action by a person claiming to be a public officer for the fees or compensation given by law, his title to the office is in issue, and if that is defective and another has the real right, although not in possession, the plaintiff cannot recover. Actual incumbency merely gives no right to the salary or compensation." *Dolan v. Mayor*, 68 N. Y. 279, 23 Am. Rep. 168.

The plaintiff claims that this rule was changed and the contrary rule established by the amendment of sections 936 and 937 aforesaid. The amended section 936 is as follows, the amendment consisting of the proviso: "936. When the title of the incumbent to any office in this state is contested by proceedings instituted in any court for that purpose, no warrant can thereafter be drawn or paid for any part of his salary until such proceedings have been finally determined; provided, however, that this section shall not be construed to apply to any party to a contest or proceeding now pending or hereafter instituted, who holds the certificate of election or commission of office and discharges the duties of the office; but such party shall receive the salary of such office, the same as if no such contest or proceeding was pending."

Section 937 is as follows: "As soon as such proceedings are instituted, the clerk of the court in which they are pending must certify the facts to the officers whose duty it would otherwise be to draw such warrant or pay such salary, except in the cases included in the proviso to the foregoing section." The amendment of 1891 to this section merely added the words stating the exception.

[1, 2] In construing an ambiguous statute, the evil to be cured and the object to be accomplished are proper matters for consideration and often point clearly to the true meaning and application of the act. The provisions of sections 936 and 937, as they stood before 1891, were first enacted as statute law in 1860 (St. 1860, c. 140) but that act applied only to state officers. The rule generally prevailing in other states was that payment to the de facto officer would protect the public against a second payment to the rightful claimant, whose sole remedy was an action against the usurper. *Chubbuck v. Wilson*, 151 Cal. 164, 90 Pac. 524. But in *Dorsey v. Smyth*, supra, decided in 1865, and *Carroll v. Siebenthaler*, supra, decided in 1869, it was held that the rightful claimant of a county office was entitled to payment of the salary from the public funds, although it had been previously paid to an opposing claimant who had been in possession of the office and had performed the duties thereof during the litigation between them concerning the title thereto. The original Code sections, in 1872, to remedy this condition of the law, extended the statute of 1860 to local public officers. The object was

to prevent the intruder into any office, the title to which was in litigation, from receiving the salary accruing during the litigation. It is clear that they did not apply, except where there was an action involving the title to the office, and only while it was pending.

If section 936, prior to the amendment of 1891, did not apply to an intruder whose title was not in litigation, but was merely a provision for withholding the salary accruing during litigation over the title, so that it might be afterwards paid to the person who finally prevailed in the action, it is manifest that the proviso added by the amendment does not enlarge its application or extend it to cases where no action has been instituted concerning it. The first clause of the proviso declares, in effect, that the section does not apply to a contest or proceeding, if the party who holds the certificate of election or commission, also discharges the duties of the office. It restricts the application of the entire section to the extent of the exception stated therein.

It is urged that the last clause of the proviso is broader, and that it enacts a general rule to the effect that if the person who discharges the duties of an office has the regular evidence of title thereto, he shall receive the compensation fixed by law, although there has been no action or proceeding to oust him or determine his title. There is no language indicating that this was the intent of the Legislature. The clause does not so declare. It says: "But such party shall receive the salary of such office, the same as if no such contest or proceeding was pending." This is not a declaration that if no proceeding or action to oust him or contest his title is pending, the de facto officer with color of title shall receive the salary thereof, whether the title he claims is valid or invalid. The use of the word "party," in connection with the preceding part of the section, limits its application to cases where a suit is pending to determine the title. It does not enact any rule applicable to a case where there is no contest. It merely declares that, if there is a contest, the party with the regular evidence of title shall have the same right that he would have if there was no contest, and is silent as to what his right would be in the latter case. The language of the entire section shows that the proviso was not intended to apply to this rule at all, except in the specified case where one party to litigation over the title to an office performs its duties and holds the regular color of title; that is, a certificate of election, or a commission. Under the terms of the section, if the claimant who obtains possession of the office and acts as such during the contest against him by the rightful owner is the one who does not hold the certificate or commission, the salary is withheld pending the contest. No right is given to such an incumbent by the section. The section does not

declare what shall be done with the salary so withheld in such a case, if the rightful owner prevail. That question is to be decided by reference to the general rule aforesaid that the right to the salary goes with the title to the office. Not being within the exception made by section 936, the general rule controls, the intruder could not get any of the salary, and the person who held the certificate or commission finally adjudged to be valid, would be entitled to receive it, although he did not discharge the duties of the office.

[3] Counsel for plaintiff also contend that the clause in section 937, requiring the clerk to give notice of the institution of the action to the officers "whose duty it would otherwise be" to pay the salary, by implication declares that an intruder is entitled to the salary if no action concerning his title is begun. Positive legislation changing established rules of law is not made in this manner. The clause in question alludes merely to the fact that, but for the notice required, the warrants would in due course be drawn to the person appearing to be lawfully entitled to the office. It is obvious that it was not designed to, and does not, direct that the warrants must be drawn to the actual incumbent, regardless of his right.

There is nothing contrary to these conclusions in *Wilson v. Fisher*, 140 Cal. 188, 73 Pac. 850, *Anderson v. Browning*, 140 Cal. 222, 73 Pac. 986, *Tout v. Blair*, 3 Cal. App. 180, 84 Pac. 671, *Merkley v. Williams*, 3 Cal. App. 268, 84 Pac. 1015, or *Chubbuck v. Wilson*, 151 Cal. 162, 90 Pac. 524, cited by plaintiff's counsel. None of them involved the question here presented. They decide several of the questions which arise when there is a litigation to determine the title to an office, but nothing whatever concerning the withholding of payment, where no action or proceeding to determine such title has been instituted.

[4] There is some discussion in the briefs upon the proposition that the question of title cannot be raised in a suit for mandamus, referring to the well-known rule that mandamus will not lie to try the title to an office. This rule has no application. Rival claimants, it is true, cannot thus try their title. But this is not an action between rival claimants. It is an action by one asserting that he is the de jure officer to compel another public officer, not the claimant, to perform a duty pertaining to his office; that is, to audit and approve the plaintiff's demand for the salary. It is clearly within the terms of the statute authorizing mandamus. The court can try and decide any question in issue. It has the same power, in mandamus, to determine the truth of the allegation that the plaintiff holds the legal title to the office, as it has to determine whether or not the defendant Boyle is the auditor, and whether or not he has refused to approve

plaintiff's demand. It has been recognized as a legitimate issue for determination in mandamus. *Morton v. Broderick*, 118 Cal. 474, 50 Pac. 644; *Davenport v. Los Angeles*, 146 Cal. 508, 80 Pac. 684; *McKannay v. Horton*, 151 Cal. 711, 91 Pac. 598, 13 L. R. A. (N. S.) 661, 121 Am. St. Rep. 146.

We conclude that the title may be questioned, under the facts assumed, by the auditor in a mandamus proceeding against him. This makes it necessary to determine whether or not plaintiff held the title to the office during the time for which he claims his salary.

The San Francisco charter provides that the board of education shall be composed of four school directors appointed by the mayor, whose terms of office shall be four years, so classified that the term of one of them expires each year. Stats. 1899, p. 317. *Bannerman* was appointed in 1909 to hold the remainder of an unexpired term ending on January 8, 1911. On February 15, 1910, the mayor without any notice or hearing, removed, or attempted to remove, him from said office, and appointed *James E. Power* to fill the vacancy assumed to have been caused thereby. *Bannerman* refused to vacate the office, and denies the validity of the act of removal.

[5] It is claimed that the charter of San Francisco confers this power upon the mayor. The provisions of the charter concerning the removal of officers are found in article 16 (Stats. 1899, pp. 361, 362). Section 18 is as follows: "Any elected officer, except supervisor, may be suspended by the mayor and removed by the supervisors for cause; and any appointed officer may be removed by the mayor for cause. The mayor shall appoint some person to discharge the duties of the office during the period of such suspension."

Section 19 provides that when the mayor suspends an elected officer, he must present charges against him to the board of supervisors and serve them upon the officer suspended, and that, after a hearing before the board, that body may remove him. There are additional provisions concerning appointed officers, as follows:

"Sec. 20. When the mayor shall remove an appointed officer from office, he shall immediately notify the board of supervisors of such removal, and furnish it with a statement of the cause therefor, which statement shall be entered in the record of its proceedings."

"Sec. 21. Unless otherwise provided by law or by this charter, any officer, board or department authorized to appoint any deputy, clerk, assistant or employé, shall have the right to remove any person so appointed."

The charter authorizes the mayor to appoint a secretary, an usher, a stenographer and a typewriter, and provides that they shall hold their positions "at the pleasure

of the mayor." Some of the other principal officers have authority to appoint and remove at pleasure a secretary or other confidential officer. The only officers except the personal attachés above mentioned, who are to be appointed by the mayor, are the members of the several boards which control the respective departments of the municipal government, the board of education being one of them. There are eight of these boards. All other subordinate officers, deputies, clerks, and employés are chosen by the respective boards, or by the elected officers under whose supervision they serve, and the authority to remove them is, by section 21 aforesaid, lodged in the person or board which appoints them. We do not refer here to those who compose the classified civil service, concerning whose tenure and removal elaborate special provisions are made. This recital of the provisions of the charter clearly shows that the application of the provision of section 18 giving the mayor power to remove any appointed officer "for cause" practically confined to the members of the several boards appointed by him. It remains to inquire how this power may lawfully be exercised, whether by a summary removal without notice or hearing, or only by formulating the charges constituting the "cause," giving the officer notice thereof and affording him an opportunity to be heard in his defense, before conviction and removal.

[6] Upon this question the great weight of authority is to the effect that where an officer is appointed for a fixed term and it is provided that he may be removed during the term "for cause," without other qualifying words, such removal cannot be made except after notice and a hearing. Mr. Throop states it thus: "The doctrine that an officer can be removed only upon notice, and after a hearing, where the tenure of his office is during good behavior, or until removal for cause, or for a definite term, subject to be removed for cause, * * * may be regarded as settled law in this country." Throop on Public Officers, § 364. Mr. Mechem says: "Where the appointment or election is made for a definite term or during good behavior, and the removal is to be for cause, it is now clearly established by the great weight of authority that the power of removal cannot, except by clear statutory authority, be exercised without notice and hearing, but that the existence of the cause, for which the power is to be exercised, must first be determined after notice has been given to the officer of the charges made against him and he has been given an opportunity to be heard in his defense." Mechem on Officers, § 454. The same is said to be the rule by Mr. Dillon. Dillon, Mun. Corp. (4th Ed.) § 250. A large number of decisions are cited in support of this doctrine. The following apply the doctrine to cases like the present one, where the tenure is for a fixed term: Ham v. Boston, 142 Mass. 95, 7 N. E. 540; State

v. St. Louis, 90 Mo. 22, 1 S. W. 757; Field v. Com., 32 Pa. 484; Board v. Darrow, 13 Colo. 468, 22 Pac. 784, 16 Am. St. Rep. 215; Dullam v. Willson, 53 Mich. 407, 19 N. W. 112, 51 Am. Rep. 128; Page v. Hardin, 8 B. Mon. (Ky.) 672; State v. Bryce, 7 Ohio, 82, pt. 2; State v. Hoglan, 64 Ohio St. 532, 60 N. E. 627; State v. Smith, 35 Neb. 13, 33, 52 N. W. 700, 16 L. R. A. 791; Biggs v. McBride, 17 Or. 651, 21 Pac. 878, 5 L. R. A. 115; Singleton v. Charleston, 2 Bay (S. C.) 105; King v. Gaskin, 8 T. R. 209; Ramshay's Case, 18 Ad. & El. N. S. 190; Queen v. Archbishop, 1 Ell. & El. 545. Many of these are cases where the power to remove was qualified, as here, simply by the words, "for cause"; in others particular causes are specified, such as "official misconduct," "inability or misbehavior," and the like. The distinction is not material. The words "for cause," without more, imply good cause; the existence of some fact which would constitute a reasonable cause for the removal.

The defendant refers to the decision of this court in Matter of Carter, 141 Cal. 316, 74 Pac. 997, as establishing the rule that power to remove "for cause," without other qualification, authorizes a summary removal, without notice or hearing. The remarks to that effect therein go too far and were unnecessary to the decision. The law considered in that case was a provision in the charter of the city of San Diego. It provided that the mayor could "remove for cause" any officer appointed by him, but added that "in case of such removal" he should give written notice thereof, "stating the cause, to the person removed," and that he should immediately notify the common council of his action and the reasons therefor. What was really decided in that case on this point was that these additional provisions so qualified the words "remove, for cause," that the entire provision must be interpreted to mean that the removal might be made before the giving of the notice and without any hearing, and hence that it was not a judicial act. The clause requiring notice of the removal "to the person removed," being in the past tense, and being the only notice required, the language necessarily implied that the removal was to be made before the notice thereof was given to the officer. Section 18 does not contain such provisions and the decision in the Carter Case does not apply. The Carter Case is similar to O'Dowd v. Boston, 149 Mass. 443, 21 N. E. 949, where the members of the council were given power to remove officers "for such cause as they may deem sufficient and shall assign in their order for removal." This was held to imply a removal without notice or hearing, and on that ground the case was held not to come within the general rule above stated. The case of State v. Grant, 14 Wyo. 41, 81 Pac. 795, 82 Pac. 2, 1 L. R. A. (N. S.) 588, 116 Am. St. Rep. 982, cited by respondent, is of like effect. There the Governor was given power to re-

move for any cause deemed sufficient by him "provided, reason for such removal shall be filed in the office of the Secretary of State in writing, subject to inspection by any person interested." This was held to prescribe the procedure, and to imply that no previous notice to the officer, nor any hearing, was necessary. The court recognizes the general rule above stated, but declares this to be an exception because the statute makes it so. The cases of *State v. Kennelly*, 75 Conn. 316, 55 Atl. 555, and *Sullivan v. Martin*, 81 Conn. 585, 71 Atl. 783, also cited by the respondent in support of the proposition that the mayor's summary removal was valid, are not in point on that question. In each of them there was a notice, a hearing, and thereupon a removal. In the latter the hearing was expressly required by the statute. The point decided in each case was that the hearing and removal were not quasi judicial proceedings, but were executive acts; that the facts and evidence were not subject to review by the courts; and that only the regularity of the proceeding could be inquired into.

The provisions of section 20 do not bring it within the rule of the *Carter Case* and similar cases. They do not refer at all to the method of removal or the procedure thereon, but are directed to another object. The mayor is not required to make or keep any record of his acts. But for section 20, he might remove an officer without there being any record whatever to show the fact, or the cause thereof, and the other officers of the city, and citizens who might have to deal with the removed officer, would be without notice or means of definite and reliable information of the fact. It is obvious from the language of section 20 that its purpose was merely to require a public notice and record of a removal already made. It refers to the removal as a fact accomplished, but it does not prescribe a mode of procedure therefor. Every act it requires is an act to be done subsequent to the act of removal and not as a part of it. So understood, there is nothing in its terms which implies an intent to give to the clause conferring power to remove "for cause," any other than its well-established meaning; that is, a sufficient cause proven upon a hearing after reasonable notice.

Certain other provisions of the charter furnish strong additional reasons for this interpretation of the removal clause. As before stated, it applies only to the members of the several boards appointed by the mayor. The mayor's term of office is only two years. The members of these boards are appointed for fixed terms, in some boards for three years, and in others for four years, but in each case the terms begin in successive years so that one member is regularly to be appointed each year. Some boards have five members, with four-year terms, in which case

two terms expire every fourth year. Thus the members holding over in each board are always in the majority. The obvious purpose was to have always on each board two or more members who were familiar with its affairs, and to prevent sudden changes of policy and secure stability and efficiency in the administration of the municipal affairs. No mayor could, in regular course, change the personnel of a majority of any board in less than two years from his advent, except in the case of the board of public works and the civil service commission, which have three members and three-year terms, making a change possible in a little over 12 months. This plain policy of the charter might be practically overthrown if the mayor were given power to remove the members summarily by the simple process of stating a cause in writing, with no investigation to show whether the cause existed in fact, or only in fancy, and with no notice to the officer or opportunity to prove himself not guilty of the alleged dereliction, incapacity, or incompetency. It would need much more explicit language than we find in the provisions concerning the removal of these officers to authorize an interpretation so destructive of this wise and important part of the plan of municipal government.

In this case the mayor gave the board of supervisors notice of the removal of Bannerman and furnished it with a statement of the cause alleged therefor, which was duly recorded. But no notice was given to Bannerman thereof, and he had no opportunity to make a defense. We are of the opinion that the act of removal was void. The cause alleged was that Bannerman had joined in appointing an ineligible person as secretary of the board and had approved the payment of his salary. We have assumed that this alone, without any allegation that it was done corruptly or in bad faith, was a sufficient cause. We have also assumed that it is competent for the charter of San Francisco to provide for the removal of a member of the board of education, although he may be, in law, an officer of the state, administering a branch of the state school system, and the Constitution (article 11, § 8½), it is claimed, does not expressly allow the city charter to do more than fix his term of office and the time and mode of appointment or election. We find it unnecessary to decide either of these propositions, and we express no opinion concerning them.

It follows that the petitioner had title to the office during the period in question, and that he is entitled to the mandamus.

Let a peremptory writ issue as prayed for.

We concur: SLOSS, J.; ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.

(160 Cal. 263)

UNION TRUST & REALTY CO. v. BEST.

(L. A. 2,665.)

(Supreme Court of California. June 22, 1911.)

1. INJUNCTION (§ 62*)—COVENANTS—ENFORCEMENT.

Restrictive covenants in deeds as to buildings or improvements will not be enforced, where enforcement would be inequitable.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 124-127; Dec. Dig. § 62.*]

2. COVENANTS (§ 103*)—RESTRICTIONS—WAIVER OF OR ESTOPPEL TO ENFORCE RESTRICTIONS.

Defendant, under an agreement of purchase containing a covenant that the grantee should not erect any dwelling nearer than 20 feet from the street, received a deposit slip from the grantor's general agent, and under the direction of such agent erected a house on the lot before the execution of the deed to him; and the grantor from and after the time the house was commenced had full knowledge of its location, and received payments on the purchase price, and made no objection, until long after it was completed, the deed executed, and the purchase price paid. *Held*, that the grantor had waived his right to enforce the restriction.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 169; Dec. Dig. § 103.*]

3. EVIDENCE (§ 467*)—PAROL EVIDENCE AFFECTING WRITINGS—EVIDENCE EXTRINSIC TO WRITING.

A waiver of a restriction contained in a deed may be shown by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2146; Dec. Dig. § 467.*]

4. INJUNCTION (§ 128*)—ACTION FOR NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

Evidence, in an action by a grantor for injunction to enforce a building restriction, *held* sufficient to sustain a finding that the grantee's house had been located on the lot by direction of the grantor's agent.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 128.*]

5. PRINCIPAL AND AGENT (§ 173*)—RATIFICATION—EVIDENCE OF RATIFICATION—SUFFICIENCY.

Evidence, in an action by a grantor for injunction to enforce a building restriction contained in his deed, *held* sufficient to show a ratification by the grantor's general agent of the act of a subagent in locating the grantee's house, which under Civ. Code, § 2307, is equivalent to precedent authorization.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 173.*]

6. PRINCIPAL AND AGENT (§ 169*)—RATIFICATION—IMPLIED RATIFICATION.

Ratification need not be express, but may be implied from the conduct of the principal reasonably tending to show an intention to ratify the acts of the alleged agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 636, 637; Dec. Dig. § 169.*]

7. APPEAL AND ERROR (§ 194*)—REVIEW—ESTOPPEL TO ALLEGE ERROR—ISSUES.

Where an answer sufficiently showed the position defendant intended to maintain, and the parties went to trial upon the issues so presented, an objection first made on appeal that the answer was insufficient as to a particular outside the issues is too late.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1241-1246; Dec. Dig. § 194.*]

8. INJUNCTION (§ 127*)—ACTION FOR INJUNCTION—ADMISSIBILITY OF EVIDENCE.

In an action for injunction to enforce a building restriction contained in plaintiff's deed, testimony that plaintiff's subagent had built houses upon the tract not conforming to the restriction is inadmissible, since the fact to which it is directed is immaterial.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 127.*]

Department 1. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by the Union Trust & Realty Company against John S. Best. Judgment for defendant, and plaintiff appeals. Affirmed.

Percy B. Lhoyd, for appellant. Williams, Goudge & Chandler, for respondent.

SLOSS, J. The plaintiff appeals from a judgment in favor of defendant, and from an order denying a motion for new trial.

The action was brought to compel the enforcement of a building restriction contained in an agreement for the sale of a residence lot by plaintiff to defendant.

The complaint alleges that in May, 1906, the plaintiff became the owner of a tract of land in the city of Los Angeles, comprising 461 lots; that it was and is plaintiff's intention to sell said lots (with some exceptions not material here) for residence purposes, and to insert in every agreement for sale or conveyance made by it a covenant that the grantee or vendee would not, within five years, erect any dwelling on the lot conveyed closer than 20 feet to or from the front line of such lot. On May 19, 1908, it is alleged, plaintiff and defendant entered into an agreement for the sale to the latter of lot 226 of the tract for the sum of \$573, payable in installments. Said agreement contained a covenant as aforesaid. On September 24, 1908, plaintiff executed a deed of the lot to defendant. It is alleged that defendant thereafter erected a dwelling within eight feet of the front line of said lot. The prayer is for an injunction restraining the defendant from permitting his dwelling to remain, at any time prior to May 20, 1913, closer than 20 feet to the front line of his lot.

The answer denies that defendant erected the building after the execution of the deed to him, and sets up as an affirmative defense that he purchased the lot from plaintiff through its agents, the Burck-Gwynn Company, on May 19, 1908, receiving from said agents a deposit receipt; that a building was located on said lot by defendant under the direction of plaintiff's agents, and the same was erected and completed before the execution of the deed to him. It is alleged that at the time of the commencement of the construction, and thereafter until completion, the plaintiff had full knowledge of the location of the building on the lot, and that it received payment of the various installments of the purchase price from defendant, and made its

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

deed to him, with such knowledge. It made no objection regarding the location of the house until March 1, 1909, long after the payment of the purchase price, the making of the deed, and the expending by defendant of over \$2,000 in the erection of his building.

The court found in accordance with these averments of the answer. It also found that the agreement containing the covenant counted upon, although bearing date the 19th day of May, 1908 (the day when defendant made his deposit and took his receipt therefor), was executed on June 5, 1908; that the main body of the house built by defendant is 21 feet from the front line of the lot, and the porch and steps of the porch of the house are within 20 feet of said line. The conclusion of law was that plaintiff was entitled to no relief, and that defendant was entitled to judgment for his costs.

[1] Little argument can be required to show that if the facts be as found, the proper conclusion was drawn from them. This is a suit in equity to compel, by mandatory decree, the enforcement of a covenant restricting the defendant's right to use his own land. Such enforcement would, the court finds—and it is apparent without any finding—subject the defendant to considerable expense. Restrictive agreements of this kind will not be enforced, where, under all the circumstances of the case, the granting of the relief sought would be inequitable. 5 Am. & Eng. Enc. of L. (2d Ed.) 15; *Columbia College v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365; *Conger v. N. Y., etc., R. Co.*, 120 N. Y. 29, 23 N. E. 983.

[2] No strong appeal to the discretion of a court of chancery is made by a plaintiff who, after inducing the defendant to violate a building covenant, makes no complaint until the improvements have been completed, and in the meanwhile, with full knowledge of the violation, accepts payment for his land and makes conveyance. In so far as the covenant was made for the benefit of the grantor, who alone is complaining here, it might be waived, and the facts found establish a clear case of waiver.

[3] The argument of appellant that evidence of an oral understanding regarding the location of the house cannot vary the terms of a written contract is not to the point. The facts pleaded in defense were not relied upon to prove that the agreement did not prohibit the construction of the building where located, but to establish a waiver of the covenant, or an estoppel to rely upon it. Such waiver or estoppel may be shown by parol.

[4] The only question of importance, then, is whether the evidence supports the findings under discussion. It is urged that the finding that the house was located on the lot by direction of the Burck-Gwynn Company, plaintiff's agents, is against the evidence. We think this claim cannot be sustained. There is testimony which, although contradicted, is sufficient to warrant a finding that the

defendant, on the day following the making of his deposit, made preparations to build his house at a place which would leave the main body of the building over 25 feet, and the porch 21 or 22 feet, from the street line; and that, upon the representations of one Edmison that the body of the house should be set back not more than 20 feet from the street, he changed the stakes and erected his house upon the line indicated by Edmison. The appellant claims, however, that there is no evidence that Edmison had any authority to bind the plaintiff, or the Burck-Gwynn Company, by his declarations. There was testimony, given by an officer of the plaintiff, that the Burck-Gwynn Company, a copartnership, had always been plaintiff's agents for all purposes in connection with the tract, and that said company and its agents made all sales, and generally supervised the handling of the tract. Burck, one of the partners of the Burck-Gwynn Company, testified that Edmison was the company's "tract agent" on the tract, and Edmison gave testimony to the same effect. But Burck testified further that he had carefully explained to Edmison "what the building line restriction was—that is, that nothing should project over that line except the front steps—and had instructed him to see that the orders were carried out in that particular." The appellant's claim is that this evidence shows that Edmison's express authority was limited to requiring compliance with the restriction as plaintiff interprets it, and that he had no authority to waive such compliance.

[5] But if the soundness of this position be conceded, we find in the record further evidence which is ample to sustain an inference that the Burck-Gwynn Company subsequently ratified Edmison's acts. Such ratification is equivalent in effect to precedent authorization. Civ. Code, § 2307; *Kraft v. Wilson*, 37 Pac. 790.¹ The evidence tending to show ratification is that of the defendant, who testified as follows: "Soon after it (the house) was finished, I went to the office of the Burck-Gwynn Company to see about paying up the balance of my contract price for the lot, and Mr. Burck then said to me that he understood I had got my house out a little, and I replied that it was the first I knew of it, and I told him that the body of my house was set just as Mr. Edmison gave it to me, to which he replied that Edmison ought to know better than that, and he then said to me that they were not going to give me any trouble about it, so that I didn't put any more up that way."

[6] Ratification need not be express. It may be implied from conduct on the part of the principal "reasonably tending to show an intention to ratify the acts of the alleged agent." 31 Cyc. 1263; *Pope v. Armsby Co.*, 111 Cal. 159, 43 Pac. 589; *Ballard v. Nye*, 138 Cal. 588, 72 Pac. 156. The statements

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 104 Cal. xvii.

of Burck, as detailed in the testimony just quoted, afford ample basis for an inference of ratification. While he expressed some criticism of Edmison's conduct as reported to him, his language manifested clearly an intent to adopt and approve that conduct and its results.

[7] Further points made by appellant require but brief notice. It is said that the answer fails to allege with sufficient particularity the purpose and extent of the agency of the Burck-Gwynn Company. No such point was made at the trial. The answer sufficiently showed that defendant relied upon the Burck-Gwynn Company's acts as binding the plaintiff, and the parties went to trial upon the issue so presented. The objection, if it be well founded, comes too late. *Arnold v. Am. Ins. Co.*, 148 Cal. 660, 84 Pac. 182, 25 L. R. A. (N. S.) 6; *Penrose v. Winter*, 135 Cal. 289, 67 Pac. 772.

[8] Testimony that Edmison had built houses upon other lots in the tract, and that the porches of such houses did not extend beyond the 20-foot line, was properly rejected. The fact sought to be proven was entirely immaterial.

The judgment and the order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

(160 Cal. 306)

CLARK et al. v. BEYRLÉ et al.
(L. A. 2,624)

(Supreme Court of California. June 29, 1911.
On Rehearing in Bank, July 28, 1911.)

1. MECHANICS' LIENS (§ 13*)—SUBJECTS OF LIEN—PUBLIC PROPERTY—TUNNEL.

No liens can be asserted on a tunnel constructed by a city as a public improvement.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 14, 15; Dec. Dig. § 13.*]

2. MUNICIPAL CORPORATIONS (§ 519*)—PUBLIC IMPROVEMENTS—EXTENT OF LIEN—LIMITATION TO AMOUNT PAYABLE UNDER CONTRACT.

Under Code Civ. Proc. § 1184, which gives to a subcontractor a right to an equitable garnishment, a subcontractor who performed labor on tunnel construction on each of a number of sections all let to the same contractor, but upon separate contracts, has no right to compel the application of what is due under one of the contracts to the payment of demands which accrued under another of the contracts.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1220; Dec. Dig. § 519.*]

3. MECHANICS' LIENS (§ 107*)—NATURE OF SERVICES RENDERED—COOK FOR LABORERS.

Under Code Civ. Proc. § 1183, which provides that mechanics, materialmen, contractors, subcontractors, artisans, and all persons and laborers of every class performing labor, etc., shall have a mechanic's lien, a cook for the laborers of a contractor has no lien for such services.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 139; Dec. Dig. § 107.*]

4. CONTRACTS (§ 187*)—PARTIES—BUILDING CONTRACTS—"CONNECTED WITH SAID WORK."

Civ. Code, § 1559, provides that a contract made expressly for the benefit of a third person may be enforced by him. A contractor with a city for the construction of a tunnel agreed to protect it from "all claims and liens of any kind whatsoever, connected with said work," and authorized the city to withhold money due by him to his laborers or other workmen. *Held*, that a cook for the laborers engaged in the construction of the tunnel was not "connected with said work" and could not enforce the provisions of the contract as against the contractor.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 798-807; Dec. Dig. § 187.*]

Department 1. Appeal from Superior Court, Santa Barbara County; Robert M. Clarke, Judge.

Action by Warren W. Clark and George E. Little, doing business as partners, etc., and others, against Robert Beyrle and others. Judgment favorable to defendants, and plaintiffs Norman W. Clark and others appeal. Affirmed.

Canfield & Starbuck, for appellants. B. F. Thomas, W. P. Butcher, Chickering & Gregory, and Louis H. Roseberry, for respondents.

SLOSS, J. The controversy in this action is over the right of the plaintiffs to receive payment of certain demands out of moneys due from the city of Santa Barbara to Robert Beyrle for work done in the construction of a tunnel.

The city of Santa Barbara undertook to construct a water conduit tunnel running in a northerly and southerly direction through the Santa Ynez Mountains for a length of some 19,000 feet. Contracts for the construction of the northerly 8,560 feet of the tunnel were entered into between the said city and Beyrle. For the purpose of doing the work, this part of the tunnel was divided into nine sections numbered respectively 20, 19, 18, 17, 16, 15, 14, 13, and 12. Section 20 was the first section from the northerly mouth of the tunnel, and the others ran successively southerly in the inverse order of their numbers. Section 20 was 560 feet in length, and each of the other sections 1,000 feet. The respective contracts were similar in form, specific prices being agreed upon for each cubic yard of excavation, and for each thousand feet of timbering, while the rate for hauling excavated matter out of the tunnel increased with the distance from the mouth in hundred feet lengths.

The complaint sets forth the making of a single contract and alleges that it was put in the form of nine several and separate agreements. It alleges further that Beyrle entered upon the performance of the contract and after completing section 20 made an agreement with T. A. McCullough whereby the latter was to complete the work as sub-

contractor. The plaintiffs Clark & Little became associated with McCullough in the work and ultimately succeeded to all of his interest under his contract with Beyrle. Said Clark & Little continued to perform the contract between Beyrle and the city of Santa Barbara until February 13, 1908, when by reason of the alleged failure of Beyrle to keep certain terms of the contract between himself and McCullough said Clark & Little were compelled to abandon the work. Thereupon Beyrle re-entered upon the performance of the contract between himself and the city of Santa Barbara, and from February 13, 1908, to June 10, 1908, employed Warren W. Clark to superintend such performance. It is alleged that, while the work of construction was being carried on by the firm of Clark & Little, the plaintiff Norman W. Clark performed labor for said Clark & Little upon said tunnel, and that a balance of \$1,395.50 remains unpaid to him on account of said work; that during the same time the plaintiff John G. Sanborn performed work for Clark & Little upon said tunnel; that a balance of \$757.17 remains due to him; that during the same period Minnie Chant performed labor on said tunnel "as cook for the laborers and others engaged in the construction thereof"; and that a balance of \$780.04 remains due to her.

On July 2, 1908, each of the claimants gave to the defendant city of Santa Barbara written notice that they had respectively performed said labor and notified the city to withhold from the defendant Beyrle sufficient money then due or to become due to him to answer the respective claims of said plaintiffs. The complaint alleges that there is due from the city for the unpaid portions of the completed work upon said tunnel the sum of \$3,977.91, which the city is holding pursuant to said notices. Judgment is asked for the sums alleged to be due to the respective plaintiffs. The plaintiffs also seek to hold the defendant the Title Guaranty & Trust Company, which, as surety, signed a bond attached to the contract, and guaranteeing faithful performance by Beyrle.

The answers of the defendants contained a number of denials which need not be here detailed. Upon the issues so made the court made its decision. With reference to the contracts, the court found that nine separate agreements were made between the city of Santa Barbara and Beyrle for the construction of nine successive portions or sections of the tunnel; the terms of such agreements being as hereinbefore stated. It is found that the agreements were so severally executed for the purpose of enabling Beyrle to receive payments in full for the successive portions of said construction. The agreement with McCullough and the transfer of McCullough's rights to Clark & Little are found as alleged in the complaint. It is found that sections 20, 19, 18, and 17 of the proposed tunnel were completed and accept-

ed by the city on January 5, 1905, November 23, 1905, February 25, 1907, and December 27, 1907, respectively, and all balances due to Beyrle from the city under the agreements providing for the construction of said sections were respectively paid to Beyrle by the city 36 days after the respective dates of completion and acceptance of the sections, and the defendant Title Guaranty & Trust Company was discharged by the city from all liability on account of said agreements. Between January 31, 1906, and February 13, 1908, the plaintiff Norman W. Clark performed labor upon the tunnel at the request of Clark & Little, and a balance of \$1,395.50 remains due and unpaid to him. It is further found, however, that only \$152.90 of this amount accrued after the 27th day of December, 1907 (i. e., the date of the completion of section 17 of the tunnel), and the last-named amount is all that accrued for labor performed on section 16. There are similar findings with respect to the plaintiff John C. Sanborn that a balance of \$757.17 is due, but only \$129.25 of this amount is due for labor performed in the construction of section 16. Likewise the court finds that Minnie Chant performed labor as alleged, but finds that only \$76.45 of her claim accrued while the firm of Clark & Little was engaged in the construction of section 16. The court finds, further, that there is due from the city of Santa Barbara the sum of \$3,977.91 on account of the construction of section 16 of the tunnel, and that the said city is holding this sum to abide the event of this action. The conclusions of law are to the effect that none of the plaintiffs is entitled to any judgment for labor performed on the tunnel prior to the completion of section 17 and that plaintiffs Norman W. Clark and Sanborn are entitled to judgments that the city of Santa Barbara pay them the amounts found to be due for labor performed on section 16; that is to say, \$152.90 to the plaintiff Norman W. Clark, and \$129.25 to the plaintiff John G. Sanborn. As regards the plaintiff Minnie Chant, the conclusion is that she is not entitled to any judgment.

There were also findings and conclusions of law in favor of a claim of Warren W. Clark; but, as the disposition of this claim is not disputed, we shall make no further reference to it.

On the foregoing findings and conclusions of law judgment was entered that the city of Santa Barbara pay plaintiffs Norman W. Clark and John G. Sanborn the amounts found to be due to them as aforesaid, and that the plaintiff Minnie Chant take nothing by this action. There is a further declaration in the judgment that the plaintiffs Norman W. Clark and John G. Sanborn "take nothing by this action except as hereinbefore adjudged."

The present appeal is taken by Norman W. Clark, John G. Sanborn, and Minnie Chant

from those parts of the judgment which adjudged that said plaintiffs Clark and Sanborn take nothing by this action except as in said judgment adjudged and that said plaintiff Minnie Chant take nothing.

A preliminary motion to dismiss the appeals of Clark and Sanborn is made by the respondents. It is shown that on the 10th day of January, 1910, the day before the notice of appeal was filed, these plaintiffs accepted payment of the sums allowed by the judgment and acknowledged satisfaction of that part of the judgment which adjudged that the city of Santa Barbara pay them these sums. It is urged by the respondents that by receiving and accepting the amounts granted by the judgment and causing satisfaction to be entered these appellants waived their right of appeal from the judgment. There is a good deal of force in the argument of respondents that the judgment in question is not divisible in such manner as to permit a party to accept what it gives him and still appeal. Inasmuch, however, as we are satisfied that the judgment should be affirmed on the merits, we prefer to so dispose of it, rather than to have the case go off upon technical considerations affecting the right to maintain the appeal.

The appeals are presented on the judgment roll alone. No question of error in admitting or rejecting evidence, or of the sufficiency of the evidence to support the findings, is, therefore, raised. The only point made by the appellants is that, on the facts found, a different judgment should have been entered.

1. The claims of Norman W. Clark and John G. Sanborn.

These appellants performed labor on sections 19, 18, 17, and 16. The money remaining in the possession of the city, when Clark and Sanborn served their notices to withhold, and when the action was commenced, was due under the contract for the construction of section 16. All moneys payable for the construction of sections 20, 19, 18, and 17 had already been paid in accordance with the terms of the contracts covering those sections. The judgment allows to the claimants, out of the money on hand, payment for the work done by them on section 16, and denies recovery for so much of their claims as represents work done on other sections.

The claim of the plaintiffs rests upon an equitable garnishment, pursuant to section 1184 of the Code of Civil Procedure, of the fund owing by the city to Beyrlé, the contractor.

[1, 2] Inasmuch as the tunnel was a public improvement of the municipality, no liens could be asserted against it (*Bates v. Santa Barbara*, 90 Cal. 543, 27 Pac. 438), and the only remedy of the claimants under the mechanic's lien law was to intercept, by the method here pursued, the money due or to become due the contractor. The theory upon which the right to so intercept the contract price rests is analogous to that underlying

the entire scheme of mechanics' liens, viz., that the laborers and materialmen who have added value to the property should be protected by making the property liable to them for the increased value which they have created. With respect to the remedy by notices to withhold, it was, no doubt, thought by the Legislature that those who had, by furnishing labor or materials, enabled the contractor to complete the construction and earn the contract price, should, in justice, be entitled to enforce payment of their demands out of any balance of such contract price properly due. But this does not carry with it the right to compel the application of what is due under one contract to the payment of demands which accrued in the performance of other contracts. The very purpose of the provision of section 1184, permitting the service of notices upon the owner, is to give to persons who have assisted in the performance of a contract a right to receive payment out of the money to be paid for the performance of that contract. If, then, the contracts for the construction of the nine sections comprising the northerly half of the tunnel were separate and distinct, in law and in fact, as they were in form, the judgment of the lower court was clearly right. The only contract price remaining unpaid at the time the notices were served was that which would become due on section 16. This amount was applicable to the payment of claims incurred in the construction of section 16, and no further. Sections 19, 18, and 17 had already been completed and paid for. If the claimants ever had the right to receive a part of the contract price payable for any of these sections, they should have asserted their right by giving notice before the city had paid the contractor.

Recognizing the force of these considerations, the appellants are driven to the contention that the nine contracts are, for the purposes of this case, to be treated as a single agreement for the construction of 8,560 feet of the tunnel. The complaint, as has been said, sets forth such single contract. But issue was joined as to this, and the court found that the city of Santa Barbara and Beyrlé made and entered into nine separate signed agreements providing respectively for the construction of nine successive portions or sections of a tunnel. Notwithstanding this finding, which on the present appeal is not attacked, the appellants argue that, because the nine sections of the tunnel were successive portions of a single and entire improvement, and because the various contracts were all entered into between the same parties, they must, for the protection of the rights of materialmen and laborers, be treated as constituting one indivisible contract for the doing of the entire work described in the nine papers. We are cited to no authority supporting this contention, and we think it cannot be maintained. It is not questioned that the city has the same right that a private

owner would have to let separate contracts for the doing of different portions of a proposed work. It appears from the exhibits attached to the complaint that these contracts were let after inviting competitive bids, and that separate proposals for constructing the several sections were called for. It was quite possible that the nine contracts might have been let to nine different bidders. In such case, it certainly would not have been claimed that a claimant doing work on a section being constructed by one contractor could enforce payment out of the price due another contractor for the construction of a different section. The nine contracts would clearly have been separate and distinct. We do not see that their character is necessarily changed by the circumstance that a single bidder happened to secure all of the contracts.

It is argued that it would be a great hardship upon materialmen or laborers to permit the work to be separated so as to limit them in their right of recovery for work done upon any section to the contract price payable for that section. But each of the contracts was duly recorded, and thereby any claimant was given the opportunity to know what work was covered by the contract, and the terms and conditions of payment. There was nothing to prevent the appellants from serving notices to withhold the amount due them on the various sections before the contract price for the respective sections had been paid.

The further suggestion is made that, if the plaintiffs were entitled to mechanics' liens, their liens would extend to the entire improvement, even though there had been separate contracts for the construction, and it is urged that the right under notices to withhold should extend to any part of the contract price remaining unpaid. It is by no means clear that, in case of a private improvement, such as a tunnel, constructed under separate contracts in the manner here adopted, the liens of laborers or materialmen for labor done or materials furnished on one section would extend to the entire improvement. See *Pacific R. M. Co. v. Bear Valley Irr. Co.*, 120 Cal. 94, 52 Pac. 136, 65 Am. St. Rep. 158. But, if we assume that the appellants are right on this point, their premise does not justify the conclusion. Where valid contracts are filed, the right of lienors is limited to the balance of the contract price due the contractor. *Kellogg v. Howes*, 81 Cal. 175, 22 Pac. 509, 6 L. R. A. 588; *McDonald v. Hayes*, 132 Cal. 490, 64 Pac. 850; *Stimson Mill Co. v. Braun*, 136 Cal. 124, 68 Pac. 481, 57 L. R. A. 726, 89 Am. St. Rep. 116; *Hampton v. Christensen*, 148 Cal. 729, 84 Pac. 200. The lien claimants derive their rights through the contractor. Where they have acquired a right to apply the balance due under a contract to the payment of their demands, this balance must be applied solely to the satisfaction of such demands as have arisen under the contract. Thus, if an owner

erecting a house makes one contract for the brickwork, and another for plastering, the lien of one working under either contract would apply to the entire structure. But if the brickwork had been completed, and payment duly made in accordance with the contract covering that branch of the construction, a laborer in that branch, who had failed to file his claim of lien or to give notice in time, could not assert a right to have his claim paid out of the price payable under the contract for plastering. This would obviously be so if the contractors were different. The rights of claimants are not changed where both contracts, if in fact separate and distinct, are held by the same contractor. Accordingly, even if this were a case of lien, the question would come back to that first discussed, i. e., whether the agreements for the construction of the various sections of the tunnel were separate, or constituted a single agreement. As we have said, this question is answered by the finding of the court.

It must be remembered that the appellants are seeking payment, out of a fund due from the city to Beyrle, of demands for which neither the city nor Beyrle is personally liable. The work was done for subcontractors, and the only liability of the owner or the original contractor is that created by the statute. The contractor is equitably, as well as legally, entitled to insist that his money shall not be paid in satisfaction of claims to which it is not applicable.

2. The claim of Minnie Chant.

[3] This claim was for services rendered as cook for the laborers working in the construction of the tunnel. It is conceded that these services furnish no basis for relief under the mechanic's lien law. *McCormick v. L. A. Water Co.*, 40 Cal. 185. They do not come within the terms of section 1183 of the Code of Civil Procedure. The contention is, however, that she is entitled to recover directly against the contractor (and, incidentally, against his surety) under the clauses by which the contractor agrees to protect the city from "all claims and liens of any kind whatsoever connected with said work" and authorizes the city to withhold "money due by him to his laborers or other workmen," and further agrees "to pay to the proper parties all amounts due for * * * labor * * * employed in the performance" of the contract. It is claimed that, under section 1559 of the Civil Code, this contract may be enforced by Minnie Chant as one made expressly for her benefit.

[4] It would require a highly strained interpretation of the contract to hold that it assumed to bind the contractor to pay the wages of a cook engaged in preparing meals for laborers. The agreement of Beyrle was to hold the city harmless against claims and liens "connected with said work." The work contemplated was the construction of a tunnel. This appellant was not engaged in any

such work, and the city was not concerned in the payment or nonpayment of her claim. It is not to be supposed that the contract was designed to protect the city against a claim, which could not in any way affect its interests.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

On Rehearing in Bank.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I have dissented from the order denying a rehearing of this cause, partly for the reason that a question as to the right of Minnie Chant to recover upon the bond of Beyrle's surety for a portion at least of her demand is left undecided, and partly for the reason that the opinion of the court goes beyond the necessities of the case in stating a doctrine which imposes what in my opinion is an unauthorized and unjust restriction upon the right of garnishment in similar cases involving public improvements, and by consequence abridges the right of lien, as well as garnishment, in similar cases involving private improvements.

It is stated in the opinion of the court that "the appellants are seeking payment, out of a fund due from the city to Beyrle, of demands for which neither the city nor Beyrle is personally liable." And this seems to be true, except as to a part of the claim of Minnie Chant. So far as it is true that the appellants are seeking payment, out of a fund due Beyrle for work done on section 16, of claims for work done for his subcontractors on sections 17, 18, etc., I agree with the court that their position is untenable, and this, except as to the claim of Minnie Chant, was all that was necessary to be said in affirming the judgment of the superior court.

But the opinion of this court goes further, and will be cited hereafter as holding that where a single improvement—as, for instance, a house—has been constructed by the same contractor under separate contracts for different parts of the work, and the owner, in consequence of garnishments duly served, has withheld a sufficient amount of the money due the contractor to pay all claims in full, the fund must nevertheless be apportioned with reference to the application of previous payments to the one contract or the other, and if the result is that the fund assigned to one contract is insufficient to pay claims arising under that contract they must go unpaid, and the surplus in the fund apportioned to the other contract go to the contractor's general creditors. I find no warrant in the statute (Code Civ. Proc. § 1184) for this construction. The letter of the statute does not sustain it, and certainly it is opposed to the policy of the law, which, being remedial in its nature, demands a liberal construction in furtherance of its objects.

160 Cal. 223

BOGGS v. DUNN. (Sac. 1,871.)

(Supreme Court of California. June 27, 1911.)

1. JUDGMENT (§ 753*)—LIEN—STATUTES.

The lien of a judgment is wholly statutory.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1312; Dec. Dig. § 753.*]

2. HOMESTEAD (§§ 103, 107*)—LIEN OF JUDGMENT—EXTENT.

Under Code Civ. Proc. §§ 671, 674, making the docketing of a judgment a lien on the debtor's real property not exempt from execution, etc., a judgment is not a lien on property covered by a valid declaration of homestead, regardless of its value, but the judgment creditor may subject the excess above the statutory homestead exemption only by proceedings under Civ. Code, § 1245 et seq., defining proceedings on execution against homestead, and the levy of an execution thereon creates no lien, but merely serves as a foundation for the statutory proceedings to ascertain the value of the homestead and the procurement of an order for partition and sale thereof, and the application of the excess to the satisfaction of the judgment.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 157, 158; Dec. Dig. §§ 103, 107.*]

3. COURTS (§§ 93*)—DECISIONS—STARE DECISIS.

The decisions of the Supreme Court that a judgment is not a lien on a homestead, without reference to its value, must be followed under the rule of stare decisis.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 336-339; Dec. Dig. § 93.*]

4. BANKRUPTCY (§ 433*)—DISCHARGE IN BANKRUPTCY—EFFECT.

The right of a judgment creditor to proceed under Civ. Code, § 1245 et seq., to reach the excess above the statutory homestead valuation of the homestead of the debtor is destroyed by a discharge of the debtor in bankruptcy; the judgment being based on a claim provable in bankruptcy, and no proceeding having been initiated at the time of the discharge to reach the homestead.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 814; Dec. Dig. § 433.*]

Department 1. Appeal from superior Court, Shasta County; J. E. Barber, Judge.

Action by M. H. B. Boggs, executrix, against R. G. Dunn. From an order perpetually staying execution of a judgment, plaintiff appeals. Affirmed.

Herzinger & Herzinger and W. H. H. Hart, for appellant. Braynard & Kimball (William A. Kelly, of counsel), for respondent.

ANGELLOTTI, J. On November 27, 1888, defendant being the owner of and residing with his wife and children on lots 3 and 4 of block 2, Breslau's addition to the city of Redding, county of Shasta, duly selected such property as a homestead, in accord with the laws of this state, and ever since such date he and his wife have continued to reside on such property. The homestead so selected has never been abandoned. On October 29, 1904, plaintiff recovered a judgment in this action, in the superior court of Shasta county, for \$966, and \$3.75 costs of suit, and on November 1, 1904, this judgment was duly

docketed in the office of the clerk of said Shasta county. The claim of plaintiff thus reduced to judgment was not of such a character as to except the judgment from the effect of a discharge in bankruptcy, under section 17 of the bankruptcy act. No appeal was taken from this judgment. No part of the judgment has ever been paid. On March 15, 1906, defendant was adjudged a bankrupt under the United States bankruptcy act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), and on January 23, 1907, by decree of the United States District Court in and for the Northern District of California, he was duly and regularly discharged from all debts and claims made provable by said act against his estate and which existed on the 15th day of March, 1906, excepting only such debts as are by law exempted from the operation of a discharge in bankruptcy. On October 28, 1909, the execution in question was issued on the judgment of October 29, 1904, and levied on the property described in defendant's homestead declaration. On November 17, 1909, plaintiff filed in the superior court her petition alleging that the value of such property exceeds the amount of \$5,000, and is, in fact, \$8,000, and asked that appraisers be appointed to appraise the same, with a view to the enforcement of the judgment against the property, in so far as it exceeded \$5,000 in value. The superior court having fixed a time for the hearing of such petition, defendant, on November 29, 1909, made his motion to recall, quash, and set aside the execution and to perpetually stay execution of such judgment, and on April 29, 1910, the superior court made its order granting such motion. This is an appeal by plaintiff from such order.

It is not questioned that plaintiff's claim against defendant, evidenced by this judgment, was provable in the bankruptcy proceedings, or that the effect of the discharge granted to defendant in such proceeding was to bar enforcement of the judgment so far as any personal liability is concerned. Plaintiff claims that, by reason of her docketed judgment, she had a judgment lien on defendant's land, which may be enforced under section 1245 et seq. of the Civil Code against the homestead of defendant, to the extent that the same exceeds \$5,000, in value, notwithstanding the discharge in bankruptcy.

[1] The lien of a judgment is purely the creature of the statute; no such lien having existed at common law. *Ackley v. Chamberlain*, 16 Cal. 181, 76 Am. Dec. 516; *Lean v. Givens*, 146 Cal. 741, 81 Pac. 128, 106 Am. St. Rep. 79. Our statute provides that from the time a superior court judgment is docketed by the clerk "it becomes a lien upon all the real property of the judgment debtor *not exempt from execution* in the county, owned by him at the time, or which he may afterward acquire, until the lien ceases," and that such lien continues for five years, unless the en-

forcement of the judgment be stayed on appeal by the execution of a sufficient undertaking, in which case it ceases. Section 671, Code Civ. Proc. The lien may be created as to real property not exempt from execution situate in another county, by filing a transcript of said docket in such county, being limited therein, however, to two years from the filing. Section 674, Code Civ. Proc.

We will pass without discussion a question not suggested by the briefs, viz., whether, assuming that plaintiff had a judgment lien as to this property, such lien did not wholly cease at the expiration of five years from the date on which the judgment was docketed (November 1, 1904), notwithstanding the levy of execution on October 28, 1909 (see *Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256), thus leaving plaintiff's judgment a mere personal judgment, unsecured by any lien.

[2] It is to be borne in mind that sections 671 and 674, Code of Civil Procedure, make the judgment a lien only on "real property * * * not exempt from execution." Under our decisions, property covered by a valid declaration of homestead is, regardless of its value, not within this class of property, either in whole or in part. While the excess above the statutory homestead valuation may be reached by a judgment creditor by proceedings under section 1245 et seq., Civil Code, there is no judgment lien as to such excess, and the judgment creditor's right to subject such excess to the satisfaction of his judgment is initiated by and finds its sole basis in the levy of execution provided for by section 1245, Civil Code; it being held, in *Lean v. Givens*, 146 Cal. 739, 81 Pac. 128, 106 Am. St. Rep. 79, that such levy establishes the lien for the purpose of such proceedings. This rule is not in accord with that adopted in some other states, where it is held that the excess above the statutory exemption is subject to the lien of a judgment against the homestead debtor. In his note to *Vanstory v. Thornton*, 34 Am. St. Rep. 505, Mr. Freeman discusses this question, strongly upholding the latter view, but says at the end of his note: "In California, a rule exactly contrary to that maintained in a majority of the states is firmly established. This rule is stated in *Sanders v. Russell*, 86 Cal. 119 [24 Pac. 852] 21 Am. St. Rep. 26, that, though a homestead is in value largely in excess of the amount allowed by law, the docketing of a judgment against the homestead owner, and the levy of an execution under such judgment upon the homestead, does not create any lien. The operation of the levy of such execution simply serves as a foundation for statutory proceedings for the ascertainment of the value of the property covered by the declaration of homestead and the procurement of an order of court for the partition and sale thereof, and the application of the excess to the satisfaction of the judgment. The same doctrine is announced

in *Barrett v. Sims*, 59 Cal. 615, 618, and in *Lubbock v. McMann*, 82 Cal. 226 [22 Pac. 1145] 16 Am. St. Rep. 108."

In *Barrett v. Sims*, 59 Cal. 615, the judgment creditor sought by action to enforce his judgment against homestead property, on the theory that he had a lien thereon for the excess over \$5,000, by virtue of a transcript of the judgment filed in the county where the land was situated. This court said: "Until such ascertainment (the ascertainment of value had in the manner provided by section 1245 et seq., Civ. Code), the property covered by the declaration is exempt from execution or forced sale. There is no lien of the judgment until the levy of an execution; and that levy creates no lien, except for the purpose of, and as a foundation for, instituting and carrying on proceedings to have an appraisalment and sale under the statute." In *Lubbock v. McMann*, 82 Cal. 226, 22 Pac. 1145, 16 Am. St. Rep. 108, this court said, as to property covered by a valid homestead declaration: "A judgment creates no lien upon property thus affected, and a levy gives no right, except to inaugurate the proceedings for the admeasurement of such excess"—citing *Barrett v. Sims*, 62 Cal. 440. In *Sanders v. Russell*, 86 Cal. 119, 24 Pac. 852, 21 Am. St. Rep. 20, among the questions involved, the question whether a docketed judgment constitutes a lien as to the excess over \$5,000 was squarely presented, and this court said: "Property impressed with the character of homestead, no matter what its value, is exempt from seizure and forced sale. There was no lien of the judgment, and the levy created no lien, but simply created a foundation for proceedings under the statute (Civ. Code, § 1245 et seq.) for the ascertainment of the value of the property covered by the declaration of homestead, and the procurement of an order of court for the partition or sale thereof, and the application of the excess to the satisfaction of the judgment"—citing *Barrett v. Sims*, supra, and *Lubbock v. McMann*, supra. In *Lean v. Givens*, 146 Cal. 739, 81 Pac. 128, 106 Am. St. Rep. 79, it was expressly recognized that the effect of the prior decisions is that a judgment constitutes no lien in such a case.

[3] So that, whatever might be our views if the question were a new one in this court, it is clear that the rule above set forth is too firmly established to be departed from. The question is of such a nature that the rule of stare decisis must be held to apply. What is said in *Schoonover v. Birnbaum*, 148 Cal. 548, 83 Pac. 999, on this point is applicable here. It may properly be noted, however, that the Supreme Court of Montana has reached the same conclusion as this court, on similar statutes, as to the nonexistence of a judgment lien in such a case. *Vincent v. Vineyard*, 24 Mont. 207, 216, 61 Pac. 131, 81 Am. St. Rep. 423.

[4] It necessarily follows that at the date of the discharge in bankruptcy plaintiff's judgment did not constitute a lien on the property embraced in defendant's homestead declaration, but was merely a personal liability, which was released by the discharge. See *Loveland, Bankruptcy*, § 285. There is no force in the claim made by learned counsel for plaintiff that, by reason of the docketing of the judgment, plaintiff had a vested right to the remedy afforded by section 1245 et seq., Civil Code, which was not affected by the discharge in bankruptcy. No proceeding under those sections had been initiated at the time of the discharge in bankruptcy, and, until the initiation of such a proceeding, certainly plaintiff, in view of what we have said, had no existing claim of any kind against the homestead property. She was simply a judgment creditor, whose judgment was not a lien, and a taking by levy of execution for the purposes of the proceeding given by section 1245 et seq., Civil Code, was essential to the creation of any lien. See *Lean v. Givens*, supra. Until the initiation of such a proceeding, the judgment was in no way secured by any kind of lien, so far as the homestead property was concerned, amounting, as we have said, to merely a personal liability, and the effect of the discharge was necessarily to bar any proceeding to enforce it.

The order appealed from is affirmed.

We concur: SLOSS, J.; SHAW, J.

160 Cal. 331

GJURICH v. FIEG. (Sac. 1,903.)

(Supreme Court of California. July 1, 1911.
Rehearing Denied July 25, 1911.)

1. COURTS (§ 57*)—STENOGRAPHER'S FEES—PREPARING TRANSCRIPT.

Code Civ. Proc. § 953a, provides that a person desiring to appeal, may file with the clerk a notice of appeal, requesting that a transcript be made, and the court shall require the reporter to transcribe the report of the trial and file with the clerk within 20 days after notice, and on the same being filed the clerk shall notify the attorneys that within five days the same will be presented to the judge for his approval; the transcript when allowed to become a portion of the judgment roll, and may be considered in lieu of a bill of exceptions. Section 953b declares that when the notice provided for in the preceding section is filed with the clerk the appellant shall file an agreement to pay to the clerk the cost of preparing the transcript. *Held* that, where a transcript has been ordered under such section, the stenographer must file the same without concurrent payment of his fees, which do not become due until approval of the transcript by the trial judge.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 57.*]

2. MANDAMUS (§ 57*)—APPEAL—FAILURE TO FILE TRANSCRIPT.

Where, after a transcript had been demanded and the proper bond filed, as required by Code Civ. Proc. §§ 953a, 953b, the stenographer

improperly refused to file the transcript until his fees had been paid, it was the duty of the appellant to compel such filing by mandamus, within a reasonable time, to avoid the dismissal of the appeal for delay.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 68, 114-120; Dec. Dig. § 57.*]

In Bank. Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Action by Emanuel Gjurich against Fanny Fleg. Judgment for defendant, and plaintiff appeals. On motion to dismiss. Denied.

A. H. Carpenter, for appellant. Webster & Webster and Charles Light, for respondent.

HENSHAW, J. [1] This is a motion to dismiss an appeal upon the ground that the transcript has not been filed within the time limited by law. The question involves a consideration of certain portions of sections 953a and 953b of the Code of Civil Procedure. The appeal was taken under the new alternative method. Appellant filed his notice, as required by section 953a, and gave the bond exacted by the clerk in the penal sum fixed by that officer as contemplated by section 953b. The stenographic reporter in due time prepared his transcript of the matters required and tendered the same to the clerk of the trial court with a demand for the payment of his fee. No moneys being in the hands of the clerk with which to pay this fee, the reporter refused to leave the transcript, did not in fact leave it, and the clerk never since has had possession of it. Upon this state of facts, respondent insists that the appeal should be dismissed, contending that the purpose of the undertaking contemplated by section 953b is to secure the clerk only until such time as the reporter has made the transcript, and the amount of the fee or charge therefor has become definitely known.

If such were the true construction, then the long delay which has resulted in this case, if unexplained, would afford ample ground for the dismissal sought. But we do not so construe the provisions of the law. It is made the duty of the stenographic reporter, not only to make his transcription, but to "file the same with the clerk of said court." It becomes the clerk's duty immediately upon such filing to give notice to the attorneys that the transcript has been filed, and that within the time limited by law he will cause it to be presented to the judge for approval. At the time so specified in this notice of the clerk to the attorneys, the clerk shall so present the transcript to the judge for his approval, and the judge is to review it and see that the same is full, true, and fair. When so satisfied, the judge certifies to the truth and correctness of the transcript, and when so certified it "becomes a portion of the judgment roll." Nothing in all

of this contemplates that the stenographic reporter has the right to withhold delivery of the transcript until the payment of his charge. Everything in the section tends to a contrary construction. Thus it is made the duty of the stenographic reporter, not alone to make his transcription within 20 days after notice, but to file this transcript with the clerk of the court. This filing is as much a duty imposed upon him by law as is the making of the transcription, and he can no more refuse to do the one, without prepayment of his charge, than he can the other. Moreover, it is provided that the judge shall review the transcript and approve it only when to his satisfaction it is established that it is full, true, and correct. This may involve the striking out by the judge of superfluous matter ordered in appellant's notice (for the cost of the transcription of which, of course, appellant would be liable), but it may equally well involve the mistaken insertion by the stenographic reporter of matters not ordered by the appellant, and for the transcription and insertion of which, of course, appellant should not be compelled to pay. To say that the law contemplates the payment of the demand of the stenographic reporter at the time when the transcript is presented to the clerk for filing is to deprive the appellant of any right to object to the fees charged, or by objecting force the appeal to await the final determination of this controversy between the stenographic reporter and the appellant. The law desires and urges a speedy determination of appeals, and it is not to be supposed that it ever contemplated either such injustice to an appellant, or the delaying of an appeal to settle such a minor separate controversy. The true, and we think the obvious, construction of the statute is that the undertaking given to the clerk is security until such time as the exact amount due to the reporter can be known, and that this cannot be known until the final approval of the transcript by the judge. Thereupon and thereafter the appellant becomes liable for the just fees of the stenographic reporter so determined and upon his failure to pay them recourse may be had against him and the sureties on his undertaking filed with the clerk.

[2] In this view of the law, it was, of course, within the power of the appellant to have had mandate issued against the stenographic reporter to compel him to file his transcript with the clerk as the law contemplates, and in ordinary cases appellant's failure to do this within a reasonable time might be construed to be such lack of diligence as to justify the dismissal of an appeal. But the practice being new and this question being presented to the court for the first time, appellant should be allowed a reasonable time after this determination within which to proceed to perfect his appeal in the man-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ner here intimated, or in such other manner as may be thought appropriate.

The motion to dismiss is, therefore, denied.

We concur: ANGELLOTTI, J.; SHAW, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.

160 Cal. 209

BOBRICK CHEMICAL CO. v. PREST-O-LITE CO. (L. A. 2,692.)

(Supreme Court of California, June 19, 1911.
On Application for Rehearing, July 17, 1911.)

1. SALES (§ 273*)—CONTRACTS—WARRANTY.

Under Civ. Code, § 1770, providing that one manufacturing an article under an order for a particular purpose warrants by the sale that it is reasonably fit for that purpose, a seller contracting to manufacture and deliver an article invented by him, designed to accomplish a particular purpose, warrants that the article is reasonably fit for that purpose, the parties contracting on the theory that it would accomplish such purpose.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 773; Dec. Dig. § 273.*]

2. SALES (§ 126*) — RESCISSION — TIME FOR — REMEDY OF BUYER.

Where a buyer of a designated number of sets of an appliance to be manufactured by the seller, who is the inventor thereof, receives and pays for an installment and discovers that the appliance has not been sufficiently perfected to accomplish the purpose contemplated by both parties, he may at once rescind and refuse to go on with the contract, and he need not wait until the seller has manufactured and offered for delivery the balance of the sets.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 313-317; Dec. Dig. § 126.*]

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by the Bobrick Chemical Company against the Prest-O-Lite Company. From a judgment for defendant, plaintiff appeals. Affirmed.

J. W. McKinley, for appellant. Woodruff & McClure, for respondent.

ANGELLOTTI, J. This action was instituted by plaintiff corporation, which is the assignee of G. A. Bobrick of a contract for a term of three years under which Bobrick agreed to furnish defendant, an Indiana corporation, 11,000 sets of parts of tire-inflating apparatus (each set consisting of one valve, one coil and one bushing), for a specified price per set, the defendant agreeing to order and pay for 5,000 of said sets during the first year of the term, and 3,000 of said sets during each of the second and third years of the term. The contract was dated December 6, 1906. By a provision contained therein, defendant at once ordered 3,000 of said sets, at the scheduled price of \$4.45 per set. On June 4, 1907, it notified both Bobrick and plaintiff that it canceled this agreement, and would not receive any more goods thereunder. It had then received 1,137 of the 3,000 sets ordered, which it retained

and paid for. This action was brought to recover \$8,290.35 for the remaining 1,863 sets of the 3,000 sets ordered, which defendant refused to receive or pay for and \$23,600 loss of profits on the remaining 8,000 sets, caused by defendant's refusal to go on with the contract, making an aggregate of \$31,890.35. Judgment went for defendant, and we have here an appeal by plaintiff from such judgment.

The appliances referred to in this agreement were the result of an invention of Mr. Bobrick, constituting, according to his claim, a great improvement in the appliances then in use for the inflation of tires, and one that could be manufactured and sold for considerably less than a device which defendant was then using, under a contract with the United States Liquid Air & Oxygen Company, a California corporation, which contract was dated February 21, 1906. The appliances were to be manufactured by him, or under his order, and delivered by him ready for use to defendant. The contract between the defendant and the United States Liquid Air & Oxygen Company was also for the term of three years. The last-named contract granted to defendant the exclusive right to sell the tire-inflating devices manufactured by the United States Liquid Air & Oxygen Company, which will hereafter be designated herein as the Air & Oxygen Company, in all of the states and territories of the United States except nine. Under paragraph 12 of its contract with the Air & Oxygen Company defendant was obligated to order and pay for each year at least 1,000 of the devices described therein, and, further, not to order such devices or any part thereof, from any other source than the Air & Oxygen Company.

There was evidence sufficient to sustain conclusions that the devices covered by Bobrick's later contract with defendant involved some features that were the product of an earlier invention by him which he had conveyed to the Air & Oxygen Company; that these features were contained in the devices covered by the contract of the Air & Oxygen Company with defendant; that this contract was defendant's sole authority for the sale of any device containing such features, and that it was therefore essential to defendant's being able to sell the device covered by the Bobrick contract, that the Air & Oxygen Company contract should remain in force. It was also important that said contract should remain in force to protect it from competition in the sale of such devices as were covered thereby. At the same time, it is clear that defendant considered it absolutely necessary that it should be relieved from the burden imposed by paragraph 12 of that contract, if it was to assume the burden proposed to be created by the Bobrick contract. Bobrick was, at the time of the negotiations preceding

the execution of his contract and at the time of such execution, a director and vice president and mechanical engineer of the Air & Oxygen Company, and had been sent east from California by such company on its business, and, among other things, to confer with defendant company and endeavor to settle certain difficulties that had arisen in regard to the contract of February 21, 1906. Although there is some conflict on the point the evidence was certainly sufficient to support the conclusion that defendant insisted that the contract proposed by Bobrick could not be entered into by it unless the Air & Oxygen Company contract was modified by the elimination of paragraph 12 thereof, and, as so modified, continued in force, and would enter into the new contract only on such understanding. The evidence was also legally sufficient to support the finding of the trial court that Bobrick, for the purpose of inducing the execution of the contract, represented to defendant that he, as an officer and one of the principal owners of the stock of the Air & Oxygen Company, could and did, to a large extent, control said company, and as such officer, etc., orally promised and agreed with defendant that if defendant would enter into said agreement with him, for the purchase and sale of his device for inflating tires, he would cancel or cause to be canceled and eliminated from the Air & Oxygen Company contract paragraph 12, and that said agreement with the exception of paragraph 12 should remain and continue in full force, and that the elimination of paragraph 12 of said contract would be a part of the consideration for entering into the new agreement with him. The written agreement between Bobrick and defendant contained no reference to this matter.

The evidence was also ample to support the conclusion that defendant relied on such assurances, and would not have entered into the Bobrick agreement except therefor.

Bobrick endeavored to obtain this modification of the Air & Oxygen Company contract, but the directors of that company at first refused to grant the same, with the result that, defendant refusing to comply with the provision thereof requiring it to order and pay for at least 1,000 of the devices referred to therein, on April 24, 1907, a resolution was adopted by said directors annulling such contract and directing formal notice of such annulment to be sent to defendant. Such notice was given to defendant, whereupon defendant, on May 28, 1907, notified Bobrick thereof by telegram, further notifying him that unless the contract was at once renewed with paragraph 12 eliminated, it would cancel its contract with him, inasmuch as it was advised that it could not sell the Bobrick device without infringing the patents owned by the Air & Oxygen Company. On May 29, 1907, it again telegraphed him that not having received any answer, it canceled its contract with him, and again, on June 4,

1907, it gave notice to both him and plaintiff to the same effect. On June 12, 1907, the directors of the Air & Oxygen Company reconsidered the matter and unanimously voted to reinstate its contract with defendant, with paragraph 12 eliminated, and notified defendant thereof, and defendant at once notified the Air & Oxygen Company that it had already accepted such annulment as final and acted thereon, that it would adhere to such position and was now entirely out of the "tire tank business."

The trial court further found, in accord with allegations contained in defendant's pleadings, that the device to be furnished by Bobrick under his contract failed to do and perform the work it was sold to do and perform, that it was defective, and would not cause the liquid gas contained in the tanks to enter the tire in a gaseous condition, but the same would freeze up, so that said liquid contained in the tanks would not enter the tire in a gaseous condition, and that the valves in said device were also defective, and would leak after using the same a few times by the operator.

It appears to be conceded that it was necessary, in order to render the device reasonably fit for the particular purposes contemplated by all parties, that the liquid gas should be wholly changed into gas while passing through the appliance and should enter the tire to be inflated solely in the form of gas. While it is true that from the time of the very first delivery by Bobrick under his contract to the time of the attempted rescission there were many complaints by defendant in regard to the working of the appliances furnished, the evidence indicates that defendant did not know until after its cancellation of the contract how unsatisfactory they proved to be to those purchasing from it. It was in evidence on behalf of defendant that at the time of the trial it still had on hand, including those that had been returned as unsatisfactory, over 900 of the 1100 odd sets that had been delivered by Bobrick. We must accept the finding of the trial court as a conclusion by it that there was some defect in the device itself, as invented, perfected, and constructed by Bobrick up to that time, that prevented it being reasonably fit for the particular purpose intended, rather than a conclusion that the particular sets furnished were not constructed in accord with the device invented. While Mr. Bobrick earnestly insisted that there was no basis for any such claim, we are of the opinion that it must be held that the evidence on this point was of such a nature that we cannot say, as matter of law, that the finding of the trial court is without sufficient support.

Taking up the finding last discussed, we are of the opinion that it furnished sufficient basis for a judgment for defendant in this action to recover damages for refusal on its part to take any further sets under the contract of December 6, 1906. Aside from its

claim that this finding is not sufficiently sustained by the evidence, a claim that we have concluded cannot be maintained, the only point made by plaintiff is that, if the sets offered were defective, the only remedy of defendant was to refuse to accept them and insist upon the delivery of sets complying in all respects with the contract, and that it could not, while accepting and paying for a portion of the goods, base a refusal to accept further goods upon defects in those already accepted. This contention is supported by the authorities in so far as a mere failure of the vendor to deliver articles of the quality and character stipulated for is concerned. See *Guernsey v. West Coast Lumber Co.*, 87 Cal. 249, 25 Pac. 414; *Valleys v. Tillmann*, 103 Cal. 191, 37 Pac. 213. In the first of the cases just cited, the contract was for the sale and purchase of lumber, and the complaint was that the lumber delivered was cut "too thin," and in the other case the claim was that cigars delivered under a contract for the sale and purchase of cigars, did not come up to the sample that had been furnished and constituted a part of the contract. But, as we have seen, the finding here implies a material defect in the device itself, as distinguished from a failure of the articles manufactured and furnished to accord with the device as invented and constructed by Mr. Bobrick. The sets furnished were manufactured in accord with the device and plan of Bobrick but although so manufactured were not reasonably fit for the particular purpose intended. The device itself had not been sufficiently perfected to accomplish the purposes intended and contemplated by both parties, and any set of appliances to be furnished in the future which was in accord with such device would not be reasonably fit for the purpose intended.

[1] We think that the facts of this case were such as to make section 1770, Civil Code, applicable. That section provides that "one who manufactures an article under an order for a particular purpose warrants by the sale that it is reasonably fit for that purpose." The articles to be manufactured in accord with his invention and delivered by Bobrick to defendant were designed to accomplish a particular purpose, and the parties contracted upon the theory that articles so constructed would be reasonably fit to accomplish that purpose.

[2] If it is made apparent that the articles to be furnished by the vendor cannot come up to this standard, by reason of some defect in the plan or device according to which they are to be made, which we must assume to be the case here in view of the finding referred to, no reason is apparent why the vendee may not refuse in advance to go on with the contract, instead of waiting until plaintiff has manufactured and offered for delivery the sets still to be furnished, and

then refusing to accept the same. The latter course would hardly be consonant with fair dealing where it is apparent that goods to be manufactured by the vendor at great expense would be unsatisfactory to an extent warranting and in fact compelling their rejection when offered.

It follows that the conclusion of the trial court upon this question furnishes sufficient basis for the judgment in favor of defendant.

The finding in regard to the parol understanding as to the elimination of paragraph 12 of the Air & Oxygen Company contract, which is also sufficiently sustained by the evidence, presents a case in which it would appear exceedingly unfair to require defendant to proceed with the Bobrick contract unless the Air & Oxygen Company contract was modified in the respect stated, and as so modified continued in force. No such modification was made prior to defendant's cancellation of the contract. There is, however, some question whether such parol understanding could avail defendant in view of the fact that it was in no way a part of the written contract between Bobrick and defendant, and the doubt whether the statements of Bobrick found by the court to have been made constituted such false representations as may be the basis for a rescission. It is unnecessary to decide this question in view of our conclusion upon the effect of the finding already discussed, and it is likewise unnecessary to consider the question whether, in view of the finding as to the matter of the elimination of said paragraph 12, the Bobrick agreement was void as to defendant as against public policy because of the relationship of Bobrick to the Air & Oxygen Company.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

On Application for Rehearing.

PER CURIAM. The decision in this case was placed by the opinion solely on the ground that the device to be furnished by Bobrick under his contract failed to do and perform the work it was sold to do and perform, etc. Upon this point, we see no reason for receding from the views set forth in the opinion. The opinion is erroneous in stating that there was evidence sufficient to sustain the conclusion that the devices covered by Bobrick's contract with defendant involved some features that were contained in the devices covered by the contract of the Air & Oxygen Company with defendant, and that the latter contract was defendant's sole authority for the sale of any device containing such features. In view of the sole ground upon which the decision is based this error is not material, and does not warrant a rehearing.

The petition for a rehearing is denied.

160 Cal. 288

WILLCOX v. ENGBRETSEN et al.
(L. A. 2,656.)

(Supreme Court of California. June 28, 1911.)

1. TIME (§ 10*)—OBJECTIONS TO IMPROVEMENT—FILING.

Gen. Laws 1909, Act 3930, § 38, relating to street improvements, provides that if no objection to a change of grade is filed with the clerk of the council within 30 days from the first publication of the ordinance or resolution of intention, the council shall have power to declare the grades to be changed. *Held* that, where the first publication of the resolution of intention to change the grade of a street was made on January 24, 1908, and February 23d, the last of the 30 days, fell on Sunday, the time was extended to Monday by Pol. Code, § 13, Civ. Code, § 11, and Code Civ. Proc. § 13, so that objections filed on Monday were in time.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 34-52; Dec. Dig. § 10.*]

2. MUNICIPAL CORPORATIONS (§ 324*)—STREETS—CHANGE OF GRADE—PETITION—SUFFICIENCY—DETERMINATION.

Since, under Gen. Laws 1909, Act 3930, § 38, providing that no change of an established street grade shall be ordered by city council, except on petition of the owners of a majority of the property affected by the proposed change, a petition for such change, signed by the requisite number of competent property owners, is a condition precedent to the making of an order for a change, and the city council has no power to order a change until a sufficient petition is filed, and since such an improvement directly affects private property an order of the council directing the improvement was not a conclusive adjudication that a sufficient petition had been filed, there being nothing in the statute giving the order such effect, so that, if the petition was not sufficient to confer jurisdiction, it was subject to collateral attack in any action involving the validity of the proceedings.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 847-849; Dec. Dig. § 324.*]

3. MUNICIPAL CORPORATIONS (§ 278*)—STREETS—GRADE—ILLEGAL CHANGE.

Where a change of street grade was not legally established, a subsequent proceeding to grade the street to that grade would be unauthorized.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 738; Dec. Dig. § 278.*]

4. MUNICIPAL CORPORATIONS (§ 401*)—STREETS—GRADE—CHANGE—DAMAGES—ASSESSMENTS.

Gen. Laws 1909, Act 3930, §§ 39, 40, 44, 46, 48, 49, provide that within 30 days after the first publication of a resolution of intention to change a street grade an abutting property owner may claim damages by the proposed change, if completed, whereupon the commissioners must assess the benefits, damages, and costs, and report the assessment to the council. The council is then required to give notice that the report will come up for confirmation on a date named, at or before which time written objections to the confirmation may be filed, and on the hearing the assessment may be confirmed, corrected, modified, or rejected, and a new assessment ordered. When finally confirmed and delivered to the street superintendent, the assessment becomes a lien on the property assessed. *Held* that, where plaintiff objected to a change of street grade in front of his property and claimed damages, and after confirmation of the report of the commissioners that his property would be benefited by the change as

much as it would be damaged, he refused to abide by the decision and gave notice that he claimed damages, notwithstanding the confirmation of the report, but no award was ever made to him or steps taken to assess his damages, the city had no power to proceed with the work on the theory that plaintiff was bound by the commissioners' report, and that no suit in condemnation or payment of damages was necessary.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 956-968; Dec. Dig. § 401.*]

5. JURY (§ 19*)—STREET GRADE—CHANGE—ABUTTING PROPERTY OWNERS—DAMAGES—RIGHT TO TRIAL BY JURY.

The right of an abutting property owner claiming damages by reason of a change of a street grade depends on Const. art. 1, § 14, providing that private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner, which compensation shall be assessed by a jury, unless a jury is waived, and not on Gen. Laws 1909, Act 3930, § 38, regulating the procedure for change of street grade, and therefore it is not material that the statute makes no provision for a condemnation suit, except where damages are awarded to the owner, and he is not willing to accept the amount allowed.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 115; Dec. Dig. § 19.*]

6. MUNICIPAL CORPORATIONS (§ 404*)—STREET GRADE—CHANGE—RIGHTS OF ABUTTING OWNERS—INJUNCTION.

Where an abutting owner claims damages in proceedings for change of the grade of a street, he is entitled to enjoin the prosecution of the work until his damages have been legally ascertained and paid in the manner prescribed by the Constitution.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 989-999; Dec. Dig. § 404.*]

7. MUNICIPAL CORPORATIONS (§ 404*)—STREETS—CHANGE OF GRADE—INJUNCTION—COMPLAINT.

Where a complaint for an injunction to restrain the alteration of a street grade until damage to plaintiff's abutting property was ascertained and paid alleged that the elevation of the street with respect to plaintiff's property would be seven feet lower at one end and five feet higher at the other if the contemplated change was carried out than it would be if the street conformed to the previously established grade, and that in consequence thereof plaintiff's ingress and egress to and from the lot would be impeded and interfered with, it sufficiently alleged that plaintiff would be substantially damaged by the work, though it did not allege the amount of damage in money that would be sustained.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 993; Dec. Dig. § 404.*]

Department 1. Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Suit by H. W. Willcox against John Engbretsen and others. Judgment for defendants and plaintiff appeals. Reversed.

Ward, Wells & Ward, for appellant. Haines & Haines and W. R. Andrews, City Atty., for respondents.

SHAW, J. This is an action by an abutting property owner to enjoin the city coun-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cil of San Diego and Engbretsen, as contractor under a street grading contract, from proceeding to reduce the street surface in front of the plaintiff's property to the established grade.

It is alleged that if the level of said street is made to conform to the established grade, as proposed, the plaintiff's property, at the east end, will be 15 feet above the level of the street, and that at the west end the street will be 11 feet higher than the surface of his property, and that the consequence of the doing of the work will be to interfere with and impede plaintiff's ingress and egress from the property, and thereby cause great injury and damage thereto. The official grade to which the street is to be made to conform is not the grade originally established, but is a grade claimed to have been established by an ordinance of the council purporting to change the previously established grade. The effect of the change proposed is to reduce the official grade of the street level seven feet at the east end, and to raise it five feet at the west end. The allegation is to the effect that this proposed change of grade will cause the damage alleged. The suit for an injunction is based in part on the alleged invalidity of the ordinance making this proposed change of grade. Judgment was given in the court below for the defendants, after sustaining a general demurrer to the complaint. The plaintiff appeals.

The proceedings to change the grade appear to be invalid. The allegations of the complaint are admitted by the demurrer to be true. The proceedings were taken under the act of March 9, 1893 (Stats. 1893, p. 89; Deering's General Laws of 1909, p. 1307). Section 38 of this act provides that the city council shall have power to change or modify the grade of any public street, and that before ordering such change it shall pass an ordinance or resolution of intention to do so, and shall publish the same in a newspaper for ten days and post notices thereof for five days. It then proceeds as follows: "If no objection to the said proposed change * * * shall be filed with the clerk of the council within thirty days from the first publication of the ordinance or resolution of intention hereinbefore mentioned, the city council shall have power to declare such grades to be changed and established in conformity to said ordinance or resolution; provided, that no change of an established grade shall be ordered except on petition of the owners of a majority of the property affected by the proposed change of grade."

[1] The resolution of intention was passed on January 20, 1908, and the first publication thereof was on January 24, 1908. The 30 days allowed for filing objections would have expired on February 23, 1908, but for the fact that that day fell on a Sunday. The time was thereby extended to February 24th. Pol. Code, § 13; Civ. Code, § 11; Code Civ.

Proc. § 13. The decision in *Derby v. Modesto*, 104 Cal. 522, 38 Pac. 900, does not hold to the contrary. The plaintiff and others interested filed written objections to the change of grade on February 24, 1908. If the filing of objections were necessary to the point made in opposition to the resolution, these objections were filed within the time allowed by law for that purpose.

The objections stated were, first, that the public interest and convenience did not require the change, and, second, that the petition upon which the council acted in passing the resolution was not signed by owners of a majority of the property affected by the change of grade proposed in the resolution. The council did not fix any time for hearing said objections, nor give any notice of such hearing. No hearing or opportunity to be heard was given by the council to the plaintiff or to the persons signing the said objections, or any of them. The council took no action thereon, and failed and neglected to hear or pass upon the same. The complaint alleges that the owners of the majority of the property affected by said change of grade did not petition therefor.

The ordinance declaring the grades changed in conformity with the resolution of January 20th was passed on July 20, 1908, five months after the filing of the aforesaid objections. It is claimed by the defendants that the action of the council in declaring the grade changed was, in effect, an adjudication by it that the petition for such change was in fact signed by the necessary majority of the owners, and that such adjudication is conclusive. In support of this claim counsel cite *Spaulding v. Homestead Ass'n*, 87 Cal. 40, 24 Pac. 600, 25 Pac. 249; *People v. Los Angeles*, 133 Cal. 338, 65 Pac. 749; *German, etc., Socy. v. Ranish*, 138 Cal. 130, 69 Pac. 89, 70 Pac. 1067; and *Chase v. Trout*, 146 Cal. 370, 80 Pac. 81. In opposition to this claim plaintiff cites *Mulligan v. Smith*, 59 Cal. 206; *Kahn v. Board*, 79 Cal. 396, 21 Pac. 849; *Zeigler v. Hopkins*, 117 U. S. 683, 6 Sup. Ct. 919, 29 L. Ed. 1019; and *Dyer v. Miller*, 58 Cal. 585. These apparently conflicting decisions make it necessary to deal with the question at some length.

[2] It is necessary at the outset, to state some fundamental distinctions which have not always been noted, and which serve to explain some of the decisions. Where a statute requires such a petition to be filed as a condition precedent to the making of such order, the board or council has no power to make the order until a sufficient petition has been filed. This is settled by the cases of *Turrill v. Grattan*, 52 Cal. 97, *Dyer v. Miller*, supra, *Mulligan v. Smith*, supra, and *Kahn v. Board*, supra, and as to that point there is no dispute. But the necessity for such petition is the creature of the statute. It is not required by any constitutional guaranty. From this it follows that the statute may dispense with such requirement, or it

may provide that the decision of the board or council as to its sufficiency, or any subsequent act depending upon it, such as the issuance of the bonds, shall be conclusive evidence of the fact that a sufficient petition has been filed. Such provisions will be upheld as valid. *Chase v. Trout*, supra, 146 Cal. 356, 80 Pac. 81. In the case just cited, and in *German, etc., Socy. v. Ramish*, supra, the conclusive evidence clause of the street improvement bond act of 1893 cured all such defects. Another distinction is to be made between the proceedings of a board or council acting in pursuance of some delegated legislative authority in creating or extending a political subdivision of the state, as a county or a city, a proceeding which does not directly affect private property, and proceedings to open, grade, regrade, or improve a street, which do directly change or affect private property. *People v. Ontario*, 148 Cal. 632, 634, 84 Pac. 205; *People v. Loy-alton*, 147 Cal. 779, 82 Pac. 620; *Dean v. Davis*, 51 Cal. 412; *In re Madera Irr. Dist.*, 92 Cal. 323, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106. The creation of a city and the annexation of territory thereto are matters delegated to the Legislature, acting by means of general laws, by which some board or council is invested with authority in that behalf. If the statute provides that such proceeding may be begun by the filing of a petition with the particular board or council having the authority, the fact that such body acts upon a petition which does not appear bad upon its face, and proceeds thereon according to law, is usually held to be conclusive of the sufficiency of the petition against any collateral attack. *People v. Los Angeles*, supra, was a case of this character. It was in quo warranto to test the validity of the annexation of territory to the city. It is obvious that everything there said concerning the conclusive effect of the ex parte action of the council would be entirely obiter, if attempted to be applied to proceedings against or directly affecting private property. It has been sometimes cited in cases of the latter class without noting the distinction. See *German, etc., Socy. v. Ramish*, supra, 130 Cal. 138, 69 Pac. 89, 70 Pac. 1067; *Chase v. Trout*, supra, 146 Cal. 369, 80 Pac. 81.

In *German, etc., Socy. v. Ramish*, the declaration that the making of the order changing the grade was conclusive evidence of the sufficiency of the petition is obiter dictum. The question presented was whether or not it was prima facie evidence and good, in the absence of any evidence to the contrary. In *Chase v. Trout*, the passage was quoted from *German, etc., Socy. v. Ramish*, to the effect that such order was conclusive evidence, but the passage was not expressly approved, and the opinion immediately proceeds to show that the point was not involved in the case. In both the cases, as above stated, the curative clause of the bond act operated to cure

all such defects in previous proceedings. In *Spaulding v. Homestead Ass'n*, supra, the court was considering a statute which provided for a hearing upon the sufficiency of the petition in this respect, and declared that the decision upon such hearing should be final and conclusive. The decision was expressly put upon that ground, and it was thereby distinguished from *Mulligan v. Smith* and *Kahn v. Board*, supra, in which cases the statute did not provide for such hearing or decision. Inasmuch as the Legislature was not bound by any constitutional mandate to require the previous filing of such petition, it follows that its declaration that the subsequent decision of the board should foreclose further inquiry on the subject would be valid and controlling.

In this case, as we have seen, objections to the sufficiency of the petition in this respect were filed, but no hearing thereon was allowed. The part of the statute above quoted does not require or provide for such hearing. There is no provision declaring that any subsequent act, ordinance, or order shall be final or conclusive as to such objections. If the resolution of intention merely calls for the change of the official grade and does not declare an intention to do the work of grading the street to the proposed grade, and no claim for damage as provided in section 39 is filed, the simple making of the order, after the expiration of 30 days, terminates the proceeding and establishes the official grade. Section 39 provides for the filing of a petition, within the 30 days, by any property owner, claiming that his property will be damaged "by the proposed change if completed." Thereupon commissioners must assess the benefits, damages, and costs (section 40) and report the assessment to the council (section 44). The council must give notice that said report will come up for confirmation on a day named, at or before which time written objections to the confirmation thereof may be filed. Upon the hearing of such objections, the assessment may be confirmed, corrected, or modified, or rejected, and a new assessment ordered. Section 46. When finally confirmed by the council and delivered to the street superintendent, the assessment becomes due and constitutes a lien on the property assessed. Section 48. Such lien may be enforced by a sale of the lots in the same manner as in the case of delinquent tax sales. The street superintendent's deed is made prima facie evidence of the regularity of all proceedings. Section 49. This is the only provision in the act declaring any presumption of regularity. It does not make such deed conclusive, and, of course, the deed does not have any effect until it is executed. The act of 1893 is amendatory of the act of 1891 (Stats. 1891, p. 116), which was declared to be supplementary to the act of March 18, 1885 (the Vrooman act; St. 1885, p. 147). Section 52 of the amendatory act of 1893 declares that all other provisions contain-

ed in the Vrooman act shall apply to all the matters in the supplementary act, if not in conflict therewith. This, of course, does not include subjects covered by the supplementary act itself. The Vrooman act provides for work upon streets, and does not provide for the establishment of official grades, nor for the assessment and payment of damages caused thereby. We find nothing in that act that could be applied to a change of grade and which would operate to make the order changing such grades conclusive of the sufficiency of the petition therefor. We have, therefore, no legislative declaration that such order is, or shall upon any event become, conclusive.

In this state of the law, the authorities on the point in question are clear. The establishing of the official grade affects the property abutting thereon. Whatever conditions for the protection of the property owner are prescribed by the statute, as essential to the power of the local board to make the change, must be complied with, or the power will not exist. If no mode is provided for the ascertainment of the existence of such conditions precedent and for the adjudication thereof, the jurisdictional fact must remain open for inquiry whenever the validity of the order is lawfully called in question. In *Mulligan v. Smith*, supra, the act of 1872 (St. 1871-72, p. 911), for the opening of Montgomery avenue in San Francisco, was involved. That act authorizes the proceeding only upon the petition of the owners of the majority of the frontage of the property to be affected. It was held (page 230 of 59 Cal.) that such petition was jurisdictional; that neither the certificate of the mayor that it was sufficient, nor his action under it, nor that of the board of public works, nor the judgment of the county court in confirming the assessment subsequently made in the proceeding, were conclusive of the fact that the owners of the majority frontage had signed the petition, and that a property owner could show that it was not thus signed, in a suit against him in ejectment founded upon a deed made upon a sale under the assessment lien. In *Kahn v. Board*, supra, the same question was presented in an action by the holder of bonds issued in the proceeding; it being a suit in mandamus to compel the levy of a tax to pay said bonds. It was there held, following and approving *Mulligan v. Smith*, supra, that the board of supervisors in such suit could show that the original petition was not signed by the owners of a majority of the frontage, and that this fact thus shown rendered the proceedings invalid. In *Zeigler v. Hopkins*, supra, the question of the validity of the Montgomery avenue bonds came before the Supreme Court of the United States, and that court followed and approved *Mulligan v. Smith* and *Kahn v. Board*, supra, on that point.

Mr. Dillon states the rule as follows: "Where the power to pave or improve de-

pends upon the consent or petition of a given number or proportion of the proprietors to be affected, this fact is jurisdictional, and the finding of the city authorities or council that the requisite number had consented or petitioned is not, in the absence of legislative provision to that effect, conclusive; the want of such assent makes the whole proceeding void, and the nonassent may be shown as a defense to an action to collect the assessment, or may, it has been held, be made the basis of a bill in equity to restrain a sale of the owner's property to pay it"—citing a large number of authorities.

The case of *Miller v. Amsterdam*, 149 N. Y. 288, 43 N. E. 632, is exactly in point. The suit was a collateral attack upon a proceeding under a statute substantially the same as that here involved. Referring to a similar petition by property owners, the court said: "There was no express authority (in the statute) to decide upon its sufficiency. While it was the duty of the council to consider it, there was no implied authority to base a judicial decision upon it. Implied authority that may deprive a man of his property is not favored by the law. There is nothing in the statute, which conferred all the powers possessed by the council, to suggest judicial action on the part of that body with reference to the subject." And, quoting from *Sharpe v. Speir*, 4 Hill (N. Y.) 88, in a similar case: "The defendant insists that the petition conferred jurisdiction on the trustees * * * provided they should judge that a majority of the persons intended to be benefited had signed; that by maintaining the petition and proceeding with the work the trustees adjudicated upon the question and determined that a majority had petitioned, and that this judgment of the trustees is conclusive upon all persons, so long as it remains unreversed. It is impossible to maintain that in this matter the trustees were sitting as a court of justice with power to conclude any one by their determination. True they were called upon to decide for themselves whether a case had arisen in which it was proper for them to act, but they acted at their peril. They could not make the occasion by resolving that it existed. They had power to proceed if the majority petitioned, but without such petition they had no authority whatever. They could not create the power by resolving that they had it." See, also, *Graves v. Otis*, 2 Hill (N. Y.) 466; *Jex v. Mayor*, 103 N. Y. 539, 9 N. E. 39; *Corry v. Gaynor*, 22 Ohio St. 593; *Campbell v. Park*, 32 Ohio St. 544; *McVey v. Danville*, 188 Ill. 428, 58 N. E. 955; *State v. Mayor*, 62 N. J. Law, 621, 43 Atl. 578.

[3] Upon these authorities and for these reasons we hold that, according to the allegations of the complaint, the change of grade was not legally established. Consequently a subsequent proceeding to grade the street to that grade would be unauthorized. As the defendant may, however, take issue on this

allegation and plaintiff may not establish it on the trial, we think it necessary to consider a question arising upon the subsequent steps in the proceedings.

[4] The commissioners to whom was referred the plaintiff's claim for damages from the change of grade, reported that the change would cause no damage to plaintiff's property in excess of the benefits it would receive therefrom, and the report awarded him no damages. He objected to the report on this ground, but his objections were overruled and the report was confirmed by the council. Thereupon plaintiff informed the council that he refused to abide by the decision, and gave notice to the council and all the officers of the city that he claimed damages on account of the said change of grade, notwithstanding such confirmation.

The statute authorizes an assessment upon the property benefited to pay the damages awarded, and provides that when the money is collected thereon the owners to whom damage is allowed are to be notified that they will be paid accordingly, and that if any such owner refuse to accept the amount in satisfaction of his damages the city may have the damages assessed by regular proceedings in condemnation under the Code of Civil Procedure. No money was ever tendered to plaintiff in satisfaction of the damages, and no condemnation suit was begun against him. In March, 1909, the proceeding to do the work of reducing the street to the grade claimed to have been established by the aforesaid order changing the grade was begun, and under it the defendants now propose to do that work. The theory of the defendants is that plaintiff is bound by the report of the commissioners, as confirmed by the council after he was fully heard in regard to it, declaring that he was not damaged, and that when the report, as confirmed, is to the effect that no damage will be caused by the grade established, no suit in condemnation or payment of damages is necessary before doing the work which may cause such damage.

[5] This theory cannot be upheld. The statute is intended to provide a mode by which the damage to private property caused by the public improvement may be ascertained to the satisfaction of the owners and paid over to them, without the delays consequent upon a suit at law. If such mode succeeds and the owner accepts the amount awarded, that is an end to the matter. The Legislature, however, understood the force of the constitutional provision "that private property shall not be taken or *damaged* for public use without just compensation having been first made to, or paid into court for,

the owner, * * * which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as prescribed by law." Article 1, § 14. The statute recognizes the right of the abutting owner under this provision to refuse the award made by the council, and to insist upon submitting the question of his damage to a jury, and accordingly it expressly provided that he might do so. He cannot be deprived of this constitutional guaranty by the decision of a city council that he is not damaged. His right to a trial by jury does not depend upon the provisions of the statute, but upon the Constitution. The fact that the statute makes no provision for a condemnation suit, except where damages are awarded to the owner, and he is unwilling to accept the amount allowed, does not deprive him of the right to a jury trial in cases where no damages have been awarded him in the proceedings. Under the Constitution, the ascertainment and payment of such damages in the mode there prescribed is a condition precedent to the right of the city to do the public work which will cause the damage.

[6] It follows that the property owner has the right to enjoin such work until his damages have been lawfully ascertained and paid in the manner prescribed by the Constitution. *Guerkink v. Petaluma*, 112 Cal. 306, 44 Pac. 570; *Bigelow v. Ballerino*, 111 Cal. 559, 44 Pac. 307; *Duncan v. Ramish*, 142 Cal. 694, 76 Pac. 661; *Eachus v. Los Angeles*, 103 Cal. 620, 37 Pac. 750, 42 Am. St. Rep. 149; 2 *Lewis on Eminent Domain*, §§ 618, 634, 638. Consequently, if it should turn out that the change of grade was lawfully ordered, the plaintiff would still be entitled to enjoin the work until his damages, if any, in excess of benefits shall have been lawfully ascertained and paid.

[7] It is claimed that there is no sufficient allegation that the plaintiff's property would be damaged by the proposed work. The actual amount of damage in money is not stated, but it does appear from the facts stated that the elevation of the street with respect to plaintiff's property will be seven feet lower at one end and five feet higher at the other end than it would be if the street conformed to the previously established grade, and that in consequence thereof plaintiff's ingress and egress to and from the lot will be impeded and interfered with. This sufficiently shows that the plaintiff will be substantially damaged by the work complained of if it is allowed to proceed to completion.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

160 Cal. 300

Ex parte BURKE. (Cr. 1,609.)

(Supreme Court of California. June 28, 1911.)

1. STATUTES (§ 77*)—SPECIAL LEGISLATION—
CLASSIFICATION.

A statute regulating the sale of intoxicating liquors is not to be condemned as special legislation, merely because the class to which it applies consists of one unit, individual, or entity; the Legislature, in the exercise of its vested right to classify, being entitled to a wide discretion.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 79-82; Dec. Dig. § 77.*]

2. STATUTES (§ 77*)—SPECIAL LEGISLATION—
SALE OF LIQUOR—UNIVERSITY GROUNDS—
"PRINCIPAL ADMINISTRATIVE OFFICE."

Pen. Code, § 172a, provides that every person who, on or within 1½ miles of a university grounds or campus, on which are located the "principal administrative offices" of any university having an enrollment of more than 1,000 students, more than 500 of whom reside or lodge on such university grounds or campus, sells, gives away, or exposes for sale any vinous or alcoholic liquors is guilty of a misdemeanor. *Held*, that the words "principal administrative offices" as so used did not mean those offices and those activities through which the university, as an institution, was organized and financed, but were used in the sense of the principal place of business of the university as such, and that act was not in violation of Const. art. 1, § 11, and of article 4, § 25, subd. 33, as a special and local law, on the theory that classification based on the student enrollment and student residence was improper and unreasonable, and was adopted as a mere cover of an intent to make the statute applicable to a single university, and that the act was general.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 79-82; Dec. Dig. § 77.*]

For other definitions, see Words and Phrases, vol. 6, p. 5559.]

In Bank. Petition of B. Burke for writ of habeas corpus against the Sheriff of San Mateo County and the Superior Court of that county. Petition dismissed, and petitioner remanded.

Thomas, Gerstle, Frick & Beedy, and J. J. Lerman, for petitioner. S. F. Leib and Edward F. Treadwell, for Leland Stanford Junior University. Joseph J. Bullock, Dist. Atty., and Ross & Ross, for respondent San Mateo County.

HENSHAW, J. Petitioner was arrested and convicted in the justice's court of a violation of the provisions of section 172a of the Penal Code, which section, in so far as it is pertinent to this consideration, reads as follows: "Every person who, upon or within one and one-half miles of the university grounds or campus, upon which are located the principal administrative offices of any university having an enrollment of more than one thousand students, more than five hundred of whom reside or lodge upon such university grounds or campus, sells, gives away, or exposes for sale, any vinous or alcoholic liquors, is guilty of a misdemeanor." He sued out and obtained a writ of habeas corpus from the superior court of San Mateo

county asserting the illegality of this law, and was remanded to custody. In like manner he was remanded under a writ of habeas corpus sued out by him and issued from the district Court of Appeal. As his petition before this court presents the question of the constitutionality of the section of the Penal Code above quoted, for the final determination of that question a writ was issued from this court.

Petitioner contends that the act under which he was convicted violates article 1, § 11, of the Constitution of this state, which provides that all laws of a general nature shall have a uniform operation; that it violates the provision of article 4, § 25, subd. 33, of the same Constitution, which provides that the "Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say * * * 33. In all those cases where a general law can be made applicable." And, finally, he contends that the law is in violation of the fourteenth amendment of the Constitution of the United States.

The argument of petitioner is that the law is, in fact, a special law directed against the sale of liquor within 1½ miles of the Leland Stanford, Jr., University; that there is merely a colorable attempt to phrase the law in general language; that the limitations in the law of the number of enrolled students, of the number of students residing or lodging upon the university grounds, and of the location of the principal administrative offices, are, one and all, unreasonable in themselves, and designed to make the law applicable only to the one educational institution above named.

If the concession should be at once made that this is a special law, and that it was designed to accomplish the very purpose which petitioner specifies, it still would not follow that the law must for that reason be condemned; for, if the case be one to which a general law cannot be made applicable, the constitutional limitation upon the power of the Legislature is at an end, and the Legislature may properly pass a special law to meet such a case. *People v. Mullender*, 132 Cal. 217, 64 Pac. 299. If it be that the Leland Stanford University is an educational institution needing legislation, and if, because of the character of the institution, its location, or any one of a number of other reasons appearing sufficient to the legislative mind, the desired or required legislation is special to that university, and is not applicable to educational institutions as a whole, or as a class, there is no prohibition in the law against the Legislature passing just such special legislation of this character as the exigencies of the situation may demand. If, therefore, the Legislature had specifically addressed this legislation to the requirements of the Leland Stanford Universi-

ty, it would demand a very plain exposition of the abuse of legislative power before a court would hold that the legislation should have been made to apply to all or to any designated class of educational institutions.

[1] But passing this consideration, we come to the question whether this legislation, couched in general language, is obnoxious to the constitutional inhibition against passing special legislation in those cases where general laws may be made applicable. And, first, it is to be borne in mind that such legislation is not to be condemned, merely because the class to which it applies consists of but one unit, individual, or entity. Thus, where population is made the basis of classification, we have frequent instances of single cities or of single counties forming a separate class, but the classification itself is never judicially condemned for that reason, because when the power to classify has been given to the Legislature there is always with that power vested necessarily a very wide discretion in its exercise. *Grumbach v. Leland*, 154 Cal. 679, 98 Pac. 1059; *Ex parte King*, 157 Cal. 161, 106 Pac. 578; *Bacon v. Walker*, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. Ed. 490.

The law under consideration is penal. It is passed in the exercise of the police power. Its very apparent design is to protect students in the formative periods of their lives from the temptations of alcoholic drink. There is no occasion to point out the evils to which such alcoholic indulgences lead, in the deterioration of the moral and physical fiber of the student, in the destruction of discipline, and in the general demoralization, not alone to the student, but to the educational institution itself, which follows.

[2] It is argued, however, that, while in proper cases numbers or population may be the basis of classification, the basis of numbers in a law such as this is entirely without justification. But we do not think this is sound. A classification of educational institutions for the indicated purpose may well be based on numbers. The Legislature did not mean that any institution which called itself a university should, for the purposes of this law, be considered a university. It proposed for those purposes to say, and did say, that it should be a university with an enrollment of 1,000 students. True, as argued, there is no reason why an institution with an enrollment of 1,000 students should be put upon a different plane from an institution with an enrollment of 999 students; but, if this argument were to be recognized as final, it would mean the destruction of every classification based upon numbers or population, since no court could judicially declare in the case of a city or county that there was any difference justifying a classification between a population of 99,999 and 100,000. The judicial answer which has been and always must be made to this argument

is that made by the Supreme Court of the United States, in *Bacon v. Walker*, supra, namely that where the discretion so to classify is vested in the Legislature the selection of a limit is a legislative power which will be judicially reviewed only in a plain case of abuse.

The same answer is to be made to the second objection to the requirement touching a residence upon the university grounds of more than 500 enrolled students. There is, in this respect, of course, no material difference between a residence of 500 students and a residence of 501 students. The Legislature, however, has seen fit to prescribe that there shall be a residence of more than 500 students. It may have been within the legislative contemplation that when a lesser number of the students is resident upon the university grounds it is within the power of the university authorities to exercise such personal control over them as to relieve from the necessity of passing such a penal law. However this may be, the basis of the classification is not inherently unreasonable. It was within the legislative power and discretion to fix some limit, and while there is no essential difference between 499 resident students and 500 resident students, yet, if you carry the reasoning down the scale, still recognizing that there is no essential difference between 499 resident students and 498 resident students, the point will be reached where there is a marked difference between 500 resident students and 2 resident students. It will, of course, be said that such a law for 2 resident students would be unnecessary, but within its powers the Legislature has said that such a law becomes necessary when there are more than 500 resident students, and a court cannot say that the limit which the Legislature has thus fixed is so inherently unreasonable as to destroy the law itself.

The third objection to the validity of this act is that it limits the operation of the law to that class of educational institutions which, in addition to enrollment and residence of the specified number of students, has its "principal administrative offices" located upon the grounds or campus. In other words, the selling of liquor is prohibited within $1\frac{1}{2}$ miles of only those grounds or campuses upon which are situated the "principal administrative offices" of the university. "Principal administrative offices" is not a fortunate phrase in a penal law such as this, since very clearly it requires construction. If "principal administrative offices" is to be construed to mean the meeting place of the regents of the University of California, or the meeting place of the trustees of the Leland Stanford University, it would often be that the "principal administrative offices" of any or every university are far removed from the grounds or campus upon which the educational activities of the institution are carried on. It cannot be that this was the

meaning of "principal administrative offices" as employed in this section. The phrase is used as descriptive of the character of the grounds or campus to which the penal law is made to apply. It is not made to apply to university grounds or a university campus generally. Thus, treating of the University of California, it would not apply to its subordinate grounds, where special educational activities were in progress. It would not apply to the Lick Observatory. It would not apply to the Affiliated Colleges. It would not apply to its agricultural stations, but would apply only to those grounds and that campus which form the center of its activities, and where, because they are the center of its activities, the "principal administrative offices," within the meaning of the law, must be located. In this sense the "principal administrative offices" does not mean those offices and those activities through which the university, as an institution, is organized and financed. It means the principal place of business of the university as a university, where the principal educational functions of the university are carried out. So construed, the law means to limit the inhibition upon the sale of liquor to what we may designate the university proper, and the language is so chosen to avoid any possible application of the law to any outlying grounds or campuses, and, so construed, there is nothing unreasonable in the phrase "principal administrative offices."

It follows from the foregoing that if the classification here made be a narrow one, there is still reason for its narrowness, and the law operates uniformly upon all within the designated class.

Wherefore the writ is discharged, and the prisoner is remanded.

We concur: ANGELLOTTI, J.; SLOSS, J.; SHAW, J.; MELVIN, J.; LORIGAN, J.

160 Cal. 334

Ex parte FORD. (Cr. 1,611.)

(Supreme Court of California. July 3, 1911.)

1. CRIMINAL LAW (§ 576*)—DISMISSAL—DE-LAY IN PROSECUTION.

An indictment must be dismissed where accused is not brought to trial within 60 days after filing of the indictment as required by Pen. Code, § 1382, unless good cause is shown for the delay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1297-1304; Dec. Dig. § 576.*]

2. HABEAS CORPUS (§ 11*)—RIGHT TO RELIEF—SELF-INVITED IMPRISONMENT.

Habeas corpus cannot be invoked when the imprisonment involved is voluntary as where an indicted person on bail procures his surrender solely to make a habeas corpus case.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 12; Dec. Dig. § 11.*]

3. MANDAMUS (§ 61*)—SUBJECTS OF RELIEF—CRIMINAL LAW.

Mandamus lies to relieve an indicted person from prosecution where, without good cause shown, the trial court has arbitrarily postponed trial without accused's consent beyond the time within which he must be tried under Pen. Code, § 1382.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 125; Dec. Dig. § 61.*]

4. MANDAMUS (§ 28*)—SUBJECTS OF RELIEF—JUDICIAL PROCEEDINGS.

While generally a writ of mandate will not issue to correct errors of the court in passing upon questions regularly submitted to it or to control the exercise of its discretion, it is not universally true that a writ will not issue to control such discretion, nor to require a judicial tribunal to act in a particular way.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 64; Dec. Dig. § 28.*]

5. CRIMINAL LAW (§ 1023*)—APPEALABLE ORDER—FINALITY.

An order refusing to dismiss an indictment on the ground that the trial has been illegally continued beyond the time fixed by Pen. Code, § 1382, is not appealable, though it may be reviewed on appeal from a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2592; Dec. Dig. § 1023.*]

Beatty, C. J., dissenting.

In Bank. Petition by Tirey L. Ford for writ of habeas corpus. Petition denied.

A. A. Moore, Garret W. McEnerney, and Stanley Moore, for petitioner. C. M. Fickert, Dist. Atty., and A. E. Lane, Asst. Dist. Atty., for respondent.

LORIGAN, J. Petitioner seeks to be released from the custody of the sheriff of the city and county of San Francisco on habeas corpus.

On May 25, 1907, fourteen indictments, and on March 26, 1908, three other indictments, were returned and filed against petitioner charging him with bribery of various members of the board of supervisors of the city and county of San Francisco in connection with the granting of an electric overhead trolley system franchise on certain streets of said city to the United Railroads Company, a corporation. Petitioner gave bail under all these indictments, and was at liberty upon the same until about the time of his application for this writ. His trial under the first series of fourteen indictments was set for September 12, 1907, upon which date he was tried upon one of them resulting in a disagreement of the jury. Between this last date and May 2, 1908, he was tried on two other indictments of this first series and acquitted. A trial of petitioner was not had under any other of the indictments of said series. Various dates, however, were fixed therefor between September 12, 1907, and February 17, 1910, and continuances had until this latter date, sometimes with the consent of petitioner and sometimes against his protest. No trial of petitioner was had under any of the second series of indictments

returned March 26, 1908. One of these was dismissed by the court and the trial of petitioner upon the others was from a date originally fixed therefor from time to time continued up to February 17, 1910, sometimes with the consent, and at other times against the protest, of petitioner.

On February 7, 1910, the district attorney moved to dismiss all these indictments on the ground of lack of evidence to convict petitioner. This motion was denied by the court, and by consent of petitioner the trial under all these indictments was continued until February 17, 1910. On this latter date, when the cases were again called for trial, petitioner announced his readiness to proceed therewith, but the court, of its own motion, continued the trial until April 25, 1910, against the objection and protest of petitioner. On April 25, 1910, the date to which said trial had been continued, petitioner moved the court to dismiss all of said indictments upon the ground that the trial of petitioner under each of them had been continued and postponed for more than 60 days last past without his consent and against his protest, insisting that under section 1382 of the Penal Code he was entitled to a dismissal of each and all of said indictments. The court, without disposing of said motion to dismiss and against the objection and protest of petitioner, made an order continuing the trial of petitioner under all of said indictments and his motion to dismiss the same until July 14, 1910. Thereafter, and on June 22, 1910, petitioner, who had been theretofore at liberty on his bail bond given on all these indictments procured his sureties to surrender him to the custody of the sheriff of the city and county of San Francisco, and immediately thereafter applied to this court for this writ of habeas corpus, which was granted. In making the order for the writ, bail, pending the hearing and disposition by this court, in the same amount as under the indictments, was fixed. This was given by the petitioner who is now at large thereunder.

Having stated the facts, we now come to a disposition of this matter after a hearing had on the return to the writ.

The Constitution of this state guarantees to every person charged with crime the right to a speedy and public trial. Const. art. 1, § 13. In order to prescribe with definiteness what should constitute a reasonable time under the constitutional mandate, it is declared in the Penal Code that, unless good cause is shown to the contrary, a prosecution must be dismissed against a defendant when an indictment or information has not been filed against him within 30 days after he was committed to answer, or he is not brought to trial within 60 days after the filing of the indictment or information against him and the trial had not been postponed on his application. Pen. Code, § 1382. The effect of the last portion of the Code provision is to

imperatively fix the time as 60 days within which, under the constitutional guaranty, a defendant must be brought to trial, and to declare that the guaranty is violated and the defendant entitled to a dismissal of the indictment against him when he is not brought to trial within said 60 days after it is filed, unless good cause for not doing so is shown or the postponement of his trial beyond that period is made on his application. The claim of petitioner is that in clear violation of the constitutional guaranty and the provision of the Penal Code he is retained in custody under the indictments against him, and is entitled on the showing made at the hearing in this proceeding to a discharge from custody.

At the hearing the main question presented was whether under the provision of the Penal Code referred to there was good cause shown by the prosecution which warranted the superior court in continuing the trials of petitioner from February 17, 1910, to April 25, 1910, and again from the latter date to July 14, 1910, over the protest and objection of the petitioner, and in denying his motion for a dismissal of the indictments, which was, in effect, the result of continuing the trial and disposition of the motion from April 25, 1910, to July 14, 1910. It was insisted by the respondent to this writ that on the several days when continuances were ordered by the court a showing was made to it that a material witness for the prosecution—one J. L. Gallagher—upon whose testimony the prosecution relied for a conviction, could not be produced, and that this showing constituted good cause warranting the orders made. On the part of the petitioner the claim is that a simple showing that Gallagher was absent and could not be produced at the dates the trial had been set for did not amount to a showing of good cause or state any legal justification whatever under the section of the Penal Code for ordering the continuances or declining to grant the motion to dismiss; that it appeared that Gallagher had not been subpoenaed by the prosecution on the trial; that about November 26, 1909, he left California, and was then supposed to be somewhere in Europe, the particular locality unknown; that there was no showing made when, if ever, he would return to California, or that he would be available as a witness at any time to which a continuance might be had. We simply state the claims of the parties at the hearing as to the showing of good cause for the continuances, in a general way, because in the view we take as to the right of the petitioner to have the benefit of this writ, we are not called on to now determine whether under the Code provision there was any showing of good cause which justified the continuances as ordered by the court.

[1] Undoubtedly, where a defendant is not brought to trial within the statutory period, and no good cause is shown by the prosecu-

tion for a delay, it is the imperative duty of the superior court, on a motion of the defendant to that end, to order the indictment dismissed. The court has no discretionary power under such circumstances to further postpone the trial but is required to dismiss the indictment. Where, after such motion is made and denied and defendant is retained in prison, it has been held that he has a right to apply to this court for a writ of habeas corpus to be discharged from custody thereunder, and that when it appears upon the hearing here that there was no good cause for delay on the trial in the lower court beyond the 60 days provided in the statute, his discharge will be ordered. *Ex parte Vinton*, 47 Pac. 1019¹; *In re Bergerow*, 133 Cal. 349, 65 Pac. 828, 56 L. R. A. 513, 85 Am. St. Rep. 178.

[2] But assuming the right of a defendant to be discharged on habeas corpus, when the constitutional guaranty and the statutory provisions have been violated and he is detained in custody, we do not think that under the later decisions of this court the petitioner is in a position to invoke the benefit of the writ. It is unnecessary to discuss the history of the writ of habeas corpus. That topic is thoroughly treated of in the books. While regarded as the greatest remedy known to the law whereby one unlawfully restrained of his liberty can secure his release, still, whether considered as it existed at common law or under the English statutes, or as guaranteed under the Constitutions of the various states, including our own, with appropriate statutory procedure for readily invoking it, the essential object and purpose of the writ is to inquire into all manner of involuntary restraint, as distinguished from voluntary, and relieve a person therefrom if such restraint is illegal. It was never contemplated, as anciently designed, or as at present guaranteed in the different jurisdictions of this country, that the writ should be invoked in behalf of a person who was not actually in restraint and involuntarily and illegally so, and the granting of the writ necessary to relieve him from such restraint.

Now, when we examine the facts here, it appears that the petitioner at the time when the application for the writ was made to this court was not in actual, involuntary imprisonment such as entitled him to invoke its benefit. It was shown on the hearing that petitioner after the failure of the court to pass upon his motion to dismiss and the making of the order of April 25, 1910, further continuing his trial, procured the sureties on his bail bond to surrender him on June 22, 1910, into the custody of the sheriff. Application was made on the same latter date to this court for this writ, which at that

same date was granted and petitioner was ordered admitted to bail pending its hearing. This bail was at once given by the same sureties, and he was released from custody and has been at liberty ever since. While it is true that the petitioner was in the custody of the sheriff for a short time pending his surrender and his admission to bail under the order of this court, it is quite clear that this surrender by his sureties was solely for the purpose of working an imprisonment upon which to base an application for this writ to which otherwise he would not be entitled. It was evidently intended that the custody should endure no longer than was necessary to make this application and was solely for the purpose of making out a case to support the issuance of the writ.

But the right to a writ of habeas corpus to determine the illegality of a detention under criminal process is not intended to apply, and may not be invoked, when the imprisonment which is made the basis of its issuance is self-invited, and the surrender by the sureties is made at the instance of the petitioner, and is solely for the purpose of making a case on the face of the petition to which the provisions of the habeas corpus act will apply. This, at least, is the rule firmly established in this jurisdiction where petitions for a writ of habeas corpus were made under similar circumstances, and it likewise applies in other jurisdictions. *In re Gow*, 139 Cal. 242, 73 Pac. 145; *Ex parte Schmitz*, 150 Cal. 663, 89 Pac. 438, and cases referred to therein. In both these cases the circumstances under which applications for writs of habeas corpus were made were similar to those attending the application at bar. In the last case mentioned, after reciting the fact that the custody into which the petitioner Schmitz had surrendered himself was self-invoked and submitted to only for the purpose of making out a case on habeas corpus, this court adopted the principle and rule announced in *Re Gow*, supra, where it was said: "Our conclusion is that such a practice ought not to be countenanced, and hereafter the court will make strict inquiry 'in this class of cases whether the alleged imprisonment is actual and involuntary and if it be found to be, as in this case, a merely nominal restraint voluntarily submitted to for the purpose of making out a case, the proceeding will be dismissed.'" And in the *Schmitz Case* this court, after quoting the foregoing, said: "We deem the rule here declared a most salutary one entirely in accord with the object and purpose of the remedy by habeas corpus and adhere thereto. See, also, *In re Dykes*, 13 Okl. 336, 74 Pac. 506; *In re Dill* (Kan.) 11 Pac. 672; *Commonwealth v. Green*, 185 Pa. 641, 40 Atl. 96, 21 Cyc. 290. The writ is discharged and the proceeding is dismissed."

It is, however, earnestly insisted by petitioner that notwithstanding his surrender into custody by his sureties was at his solici-

¹ Reported in full in the Pac. Reporter; reported as a memorandum decision without opinion in 116 Cal. xvii.

tation and for the purpose of invoking the benefit of this proceeding on habeas corpus, and hence his application would fall within the rule laid down in the above cases, still that distinction should be made between his case and the cases cited; that the Gow Case was obviously an attempt to have this court determine on habeas corpus the validity of a local municipal ordinance, the Schmitz Case to have determined on habeas corpus the validity of an indictment; that these were questions which could be submitted for original determination in the trial court, and, if decided adversely to either petitioner, he had a remedy by appeal, in the one instance to the superior court, in the other to the district court of appeal; and that for these reasons, aside from voluntary surrender, this court was warranted in refusing to entertain the writs in those cases; that, on the other hand, in the case of petitioner there is no other remedy save the writ of habeas corpus which he can invoke for a violation by the superior court of his constitutional right to a speedy trial.

Giving due consideration to these suggestions, it is to be observed that the denial of the writ to petitioners in the cases cited was not placed on the ground that the points made on the hearing for a discharge under the writ of habeas corpus were available to the defendants in the trial court or on appeal, but the refusal to entertain the proceedings was placed specifically on the ground that voluntary imprisonment, had for the sole purpose of making a case on habeas corpus, was contrary to the spirit, purpose, and object of the writ and was an abuse of it. As the showing here clearly brings petitioner within the rule announced in the cases referred to, we perceive no reason why in his case it should not be adhered to and his petition dismissed.

[3] Nor, as claimed by petitioner, is he without remedy unless in a habeas corpus proceeding, because we are satisfied that where a superior court, without good cause shown therefor, and arbitrarily, has postponed the trial of a defendant without his consent beyond the 60 days within which the statute declares he must be tried, or the indictment against him dismissed, he is entitled to relief by a proceeding in mandamus. It is true that the contrary view was entertained in *Strong v. Grant*, 99 Cal. 100, 33 Pac. 733, which was a proceeding in mandamus to compel the superior court to dismiss a criminal prosecution for failure to bring the petitioner to trial within 60 days after the filing of the information against him. It was there held that mandamus could not be issued to correct errors of a court in passing upon a question regularly submitted to it in the course of a judicial proceeding, or to control the exercise of its discretion; that the petitioner *Strong* having invoked a judicial decision in submitting his motion for a dismissal to the superior court, although the

court may have erred in the decision of the question then submitted, the error could not be corrected on mandamus.

But it is quite apparent that if, as we hold, one will not be permitted to invoke proceedings in habeas corpus where his surrender into custody by his sureties is self-solicited, and his imprisonment thereby voluntarily assumed solely for the purpose of obtaining the benefit of the writ, and the rule in the *Strong* Case that he is not entitled to a writ of mandate is to be adhered to, a peculiar situation arises under which one whose right to a speedy trial guaranteed by the Constitution and under the statute is violated is entirely without remedy even when it appears that the postponement of his trial beyond the 60 days is arbitrarily made and unwarranted for any reason.

In this case of *Strong v. Grant* the present Chief Justice concurred in the denial of the application for a writ of mandamus because, in his judgment, there were circumstances in the case other than those stated in the main opinion upon which the superior court could without an abuse of discretion hold that there was good cause for delay in proceeding against the prisoner. In such concurring opinion, however, he so clearly presented the remediless situation in which a defendant is placed who is not permitted to invoke either habeas corpus, or mandamus, when his trial is arbitrarily and unjustifiably postponed beyond the period fixed by the statute, under the constitutional guaranty of a speedy trial, and the Code section in aid of it, that we quote from it. He said: "A person charged with a criminal offense has a right to a speedy trial, in order that, if innocent, he may go free. To detain him in custody, or to compel him by the exaction of bail to dance attendance upon a court while his trial is arbitrarily postponed without his consent, is not only a wrong and injustice to him, but is a detriment to the public. The design of the statute, quoted in the opinion of the court, is to prevent these evils. The effect of that opinion, however, coupled with other decisions in similar cases, is to deprive the statute of its intended operation—so far, at least, as its enforcement by this court is concerned—and to pervert it to a use wholly foreign and inimical to its purpose. In effect, it has been held that, no matter how unjustifiably the right secured by the statute has been disregarded by the superior court, the party injured has no remedy except by an appeal to this court, and this obviously is no remedy at all for an innocent man whose trial has been unreasonably delayed, because upon his acquittal he has nothing to appeal from. The only persons who can appeal are those who have been found guilty, and they, if their convictions are otherwise illegal, have no occasion to resort to this statute for their deliverance. The only person, therefore, who can secure its benefits through the intervention

of this court is one who stands convicted under a judgment in all other respects free from error, or, in other words, one who is actually guilty of the crime charged against him. *People v. Morino*, 85 Cal. 515 [24 Pac. 892]. It is very safe to say that the Legislature would never have enacted such a law if this were the only case in which it could be made effective. The truth is the law was enacted like all similar provisions relating to criminal procedure for the benefit of the innocent—and not for the sake of screening the guilty. It is true, with respect to this, as with respect to all rules of procedure deemed necessary for the security of innocent men unjustly accused. Guilty men also—being deemed innocent until proved guilty—may take advantage of them, but it is a most extraordinary result that for the wanton and deliberate violation of this rule, an innocent man has no remedy, while one justly convicted of a crime may by means of it evade the penalty. To me it seems there must be a mistake somewhere in the decisions that lead to such a result, and I think the mistake consists either in holding that the injured party cannot resort to a mandamus, as this opinion holds, or in holding that he cannot resort to habeas corpus, as was held upon a former proceeding by this petitioner. (December 12, 1892.) If an innocent man who is kept in jail month after month while his trial is arbitrarily postponed cannot resort to this court for relief, either by habeas corpus or by mandamus, I know of no other remedy he has. Appeal, as above stated, is no remedy, for he cannot appeal until after a trial, and the refusal to bring him to trial is the very wrong of which he complains, and moreover, being innocent, it is to be presumed he will be acquitted if he ever is brought to trial, and that he will have nothing to appeal from. I cannot bring myself to admit that for such a wrong there is no remedy, and consequently I feel satisfied that either habeas corpus or mandamus must lie.”

Digressing for a moment, it may be said that in the habeas corpus proceeding referred to in the foregoing opinion *Ex parte Strong*, 31 Pac. 574, it was held by this court that while the allegations in the petition, if true, showed that it was the duty of the superior court to dismiss the prosecution, it was held that until the prosecution was dismissed the imprisonment was lawful. This doctrine while supported by decisions in other jurisdictions is opposed to the rulings in *In re Begerow*, supra, and *Ex parte Vinton*, supra, where it was held that when a motion to dismiss for failure to bring one to trial within the statutory time has been denied by the superior court and no reason or other cause whatever exists or is shown why the defendant has not been brought to trial within the limited time provided by the statute and he is retained in actual, involuntary custody, a writ of habeas corpus will lie, and, upon such

a showing, the defendant petitioner will be discharged from custody thereunder.

Recurring now to *Strong v. Grant*, which is the only authority here holding that mandamus will not lie even where it appears that the court should have granted the motion to dismiss, and its action refusing it is plainly arbitrary and an abuse of discretion, it will be found that that decision is based upon the general rule referred to therein that a writ of mandamus cannot be issued to correct the errors of a court in passing upon questions regularly submitted to it in the course of a judicial proceeding, or to control the exercise of its discretion. Several authorities are cited in that opinion illustrating the application of the general rule, but the case of *Lewis v. Barclay*, 35 Cal. 213, was particularly relied on and quoted from. In this latter case a writ of mandate was sought here to compel a county judge to reinstate an appeal which it was claimed he had erroneously dismissed. In refusing the writ this court said: “The duty to be performed by the respondent in this case was strictly judicial, and there was no refusal on his part to perform it. He may, or may not, have erred in the disposition of the case, but whether he did or not his action cannot be reviewed by mandamus, nor, indeed, by any other means, for the case is one of which the county court had final jurisdiction, and, if error was committed, there is no remedy.” But, while it is true that when the *Strong Case* was decided, and for many years thereafter, the general rule prevailed as laid down in *Lewis v. Barclay* that mandamus would not lie to compel an inferior court to reinstate an appeal regularly dismissed even where the appellant was otherwise without remedy, a different view has for several years past been entertained by this court, and in the case of *Golden Gate Tile Co. v. Superior Court*, 114 Pac. 978, it is expressly held that a writ of mandate will lie to the superior court to compel it to reinstate an appeal from a justice's court erroneously dismissed. So that, in as far as the decision in the *Strong Case* is based particularly on the doctrine announced in *Lewis v. Barclay*—a doctrine which no longer obtains here—to that extent has the case of *Strong v. Grant* lost its weight as an authority.

[4] And, while the general rule announced in *Strong v. Grant*, that a writ of mandate cannot be issued to correct the errors of a court in passing upon questions regularly submitted to it in the course of judicial proceedings or to control the exercise of its discretion undoubtedly obtains, it is not universally true that such writ will not issue to control such discretion or to require a judicial tribunal to which a matter for determination is submitted, to act in a particular way. As an illustration, a writ of mandate will issue to compel the superior court

to reinstate an appeal erroneously dismissed (*Golden Gate Tile Co. v. Superior Court*, supra); to compel a judge to enter judgment on the report of a referee (*Russell v. Elliott*, 2 Cal. 245); to compel a district judge to issue an attachment for contempt in disobeying an injunction (*Merced Mining Co. v. Fremont*, 7 Cal. 130); to compel a judge to sign a bill of exceptions (*Lin Tai v. Hewill*, 56 Cal. 118; *People v. Crane*, 60 Cal. 279); to compel the court under the McEnerney act (Laws 1906 [Ex. Sess.] p. 78) to order a publication of summons, although the refusal may be based on the insufficiency of the complaint or the accompanying affidavit; to compel a judge to settle a statement or bill of exceptions. Other illustrations, if necessary, might be given. It is hardly necessary to say that in all the matters particularly referred to the exercise of judicial discretion by the lower court is in the first instance involved, and yet it is held that on mandamus such judicial discretion may be controlled, and the lower court or judge thereof, compelled to act in a particular way when the facts are not in dispute, and the court has come to a wrong conclusion of law therefrom, or disregarded a duty expressly enjoined by the law under the undisputed facts.

This subject of controlling the judicial discretion of the lower court by mandamus is exhaustively treated in *Wood v. Strother*, 76 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249, where, after reviewing the authorities we have referred to and authorities from other jurisdictions, it is said that: "In view of the foregoing cases, it seems a mere perversion of language to say that the writ will never issue to control judicial action or to compel a tribunal to act in a particular way." In this same case the court lays down the test under which the right to a writ of mandate is to be determined, where it is said: "In every case the tribunal that is to act must determine in the first instance whether the case is a proper one for its action. And in our opinion the true tests are whether its determination is intended by law to be final; and, if not, whether there is any other 'plain, speedy, and adequate remedy.' If the determination of the tribunal was intended to be final, it is plain that it cannot be disturbed, either on mandamus or in any other way. If it was not intended to be final, but there is another 'plain, speedy, and adequate remedy,' the writ cannot issue; for it was not designed to usurp the place of other remedies. But, if the determination was not intended to be final, and there is no other adequate remedy, the writ must issue. Otherwise there would be an admitted wrong without a remedy. The writ issues in such case to prevent a failure of justice. And this is its ancient office. In the language of Lord Mansfield: 'It was introduced to prevent disorder from a failure of justice and defect of police. Therefore it ought to be used

upon all occasions where the law has established no specific remedy, and where, in justice and good government, there ought to be one.' *Rex v. Barker*, 3 Burr. 1268. See, also, 3 Bla. Com. 110; *Tapping on Mandamus*, 9; *Commonwealth v. Sessions of Hampden*, 2 Pick. [Mass.] 418."

[5] There is no finality to an order refusing to dismiss an indictment where the motion is based on the ground that the trial of a defendant has been illegally continued beyond the prescribed period. It may be reviewed on appeal if the defendant is subsequently brought to trial and convicted. There is, however, no appeal directly from the order refusing to dismiss and the right of appeal after conviction affords no adequate remedy as the defendant may never be brought to trial. Under such circumstances, if a party at large on bail is not afforded a remedy by mandamus to correct a clear abuse of discretion on the part of the court in arbitrarily refusing to dismiss the indictment against him, where he has not been brought to trial within the specified period, the constitutional guaranty and the statutory mandate are, as to him, worthless. While in the *Wood Case* the court was considering more particularly the right to a writ of mandate in civil cases, still the writ lies as well in criminal cases where there is a clear legal right to be enforced, as well as a clear legal duty on the part of the court to discharge it and where there is no other remedy. 26 Ency. L. & Proc. pp. 166, 188, 218.

It is unnecessary to discuss this matter further. As far as the case of *Strong v. Grant* is concerned, we do not think the rule announced there denying a defendant the right to a writ of mandate where he has not been brought to trial within the statutory period and no good cause for the refusal to dismiss exists should be adhered to. The rule is not supported by the weight of authority, finds no support now in the doctrine announced in the case particularly referred to and quoted from to sustain it, and is not consonant with justice, because it deprives the party of all remedy where there may exist an arbitrary violation of his clear constitutional and statutory rights. In our view, a defendant who claims that the superior court illegally refuses to grant his motion to dismiss an indictment against him where he had not been brought to trial within 60 days is entitled to apply to this court for a writ of mandate, and if, upon the hearing thereof, it clearly appears that there was no good cause shown at the hearing of the motion, and upon which showing alone would the court be warranted under the statute in refusing to dismiss, that the action of the court in its refusal was simply arbitrary and amounted to an abuse of discretion, this court will direct a peremptory writ of mandate to issue compelling the superior court to do what, in the absence of

such showing, was its clear positive legal duty, dismiss the indictment.

It is, of course, to be understood that such a writ will only issue where there was an entire absence of any showing constituting good cause presented in the superior court upon the hearing of the motion to dismiss. If the evidence presented on that subject was conflicting or on the conceded facts in evidence a reasonable deduction therefrom would support the action of the trial court in denying the motion, a writ of mandate would be denied.

As under the authorities heretofore referred to the petitioner is not in a position to avail himself of this proceeding in habeas corpus, his petition therefor is dismissed and he is remanded to custody.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.

I dissent: BEATTY, C. J.

160 Cal. 805

Ex parte MULLALLY. (Cr. 1,612.)

(Supreme Court of California. July 3, 1911.)

In Bank. Petition by Thornwell Mullally for a writ of habeas corpus. Petition denied.

A. A. Moore, Garret W. McEnerney, and Stanley Moore, for petitioner. C. M. Fickert, Dist. Atty., and A. E. Lane, Asst. Dist. Atty., for respondent.

PER CURIAM. Petitioner, together with Tirey L. Ford, Patrick Calhoun, and William M. Abbott, was jointly indicted by the grand jury of the city and county of San Francisco charged with the bribery of certain members of the board of supervisors of said city and county in connection with the granting of certain electric overhead trolley franchises on certain streets of said city to the United Railroads, a corporation. These parties on the same day filed separate petitions in this court for a writ of habeas corpus seeking their release from the custody of the sheriff of said city and county into whose custody they had voluntarily surrendered themselves for the purpose of suing out this writ. These petitions contain practically the same statement of facts, and on the hearing similar points were made and similar grounds urged for the granting of the writ and their discharge thereunder.

In the Matter of the Application of Tirey L. Ford, 116 Pac. 757, for his writ we have this day filed an opinion and rendered judgment dismissing it. The application of this petitioner is based upon the same grounds as were urged in the matter of Tirey L. Ford and submitted on the same showing as was made at the hearing in that proceeding, and for the same reasons as are assigned in the opinion accompanying the denial of the application of said Tirey L. Ford, this present petition is denied, the writ dismissed, and petitioner remanded to custody.

160 Cal. 807

Ex parte CALHOUN. (Cr. 1,620.)

(Supreme Court of California. July 3, 1911.)

In Bank. Petition by Patrick Calhoun for a writ of habeas corpus. Petition denied.

A. A. Moore, Garret W. McEnerney and Stanley Moore, for petitioner. C. M. Fickert, Dist. Atty., and A. E. Lane, Asst. Dist. Atty., for respondent.

PER CURIAM. Petitioner, together with Tirey L. Ford, William M. Abbott, and Thornwell Mullally, was jointly indicted by the grand jury of the city and county of San Francisco charged with the bribery of certain members of the board of supervisors of said city and county in connection with the granting of certain electric overhead trolley franchises on certain streets of said city to the United Railroads, a corporation. These parties on the same day filed separate petitions in this court for a writ of habeas corpus seeking their release from the custody of the sheriff of said city and county into whose custody they had voluntarily surrendered themselves for the purpose of suing out this writ. These petitions contain practically the same statement of facts, and on the hearing similar points were made and similar grounds urged for the granting of the writ and their discharge thereunder.

In the Matter of the Application of Tirey L. Ford, 116 Pac. 757, for his writ we have this day filed an opinion and rendered judgment dismissing it. The application of this petitioner is based upon the same grounds as were urged in the matter of Tirey L. Ford and submitted on the same showing as was made at the hearing in that proceeding, and for the same reasons as are assigned in the opinion accompanying the denial of the application of said Tirey L. Ford, this present petition is denied, the writ dismissed, and petitioner remanded to custody.

160 Cal. 806

Ex parte ABBOTT. (Cr. 1,613.)

(Supreme Court of California. July 3, 1911.)

In Bank. Petition by William M. Abbott for a writ of habeas corpus. Petition denied.

A. A. Moore, Garret W. McEnerney, and Stanley Moore, for petitioner. C. M. Fickert, Dist. Atty., and A. E. Lane, Asst. Dist. Atty., for respondent.

PER CURIAM. Petitioner, together with Tirey L. Ford, Patrick Calhoun, and Thornwell Mullally, was jointly indicted by the grand jury of the city and county of San Francisco charged with the bribery of certain members of the board of supervisors of that said city and county in connection with the granting of certain electric overhead trolley franchises on certain streets of said city to the United Railroads, a corporation. These parties on the same day filed separate petitions in this court for a writ of habeas corpus seeking their release from the custody of the sheriff of said city and county into whose custody they had voluntarily surrendered themselves for the purpose of suing out this writ. These petitions contain practically the same statement of facts and on the hearing similar points were made and similar grounds urged for the granting of the writ and their discharge thereunder.

In the Matter of the Application of Tirey L. Ford (116 Pac. 757) for his writ we have this day filed an opinion and rendered judgment dismissing it. The application of this petitioner is based upon the same grounds as were urged in the matter of Tirey L. Ford and submitted on the same showing as was made at the hearing in that proceeding, and, for the same reasons as are assigned in the opinion accompanying the denial of the application of said Tirey L. Ford, this present petition is denied, the writ dismissed, and petitioner remanded to custody.

ed to be removed from the sheep, and all of the wool was to be weighed to determine the entire price, title had not passed to the buyer at the time of the fire, and the loss was the loss of the seller, under the rule that where, by a sale agreement, the seller is bound to do anything to the goods to put them into a deliverable state the performance of such things, in the absence of circumstances indicating a contrary intention, is a condition precedent to the passing of title.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 171-179, 571-573; Dec. Dig. §§ 62, 214.*]

In Bank. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by F. R. Walti and others against Marks Gaba and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Cassin & Lucas, for appellants. Joseph H. Skirm, for respondents.

PER CURIAM. This case was ordered heard in this court after decision by the District Court of Appeal of the First district.

The opinion filed in that court, prepared by Hall, J., was as follows:

"This is an appeal from an order denying plaintiffs' motion for a new trial.

"On the 2d day of April, 1906, plaintiffs were the owners of 39 sacks of wool of the fall clip of 1905, then stored with the Kron Tanning Company in San Francisco, and a band of sheep located on a ranch at Bitter Water, near Kings City. On said day plaintiffs and defendants entered into a written contract as follows:

"Tully Ranch, Bitter Water, April 2, 1906.

"I, the undersigned, have this day sold to Gaba-Magidson all of our spring wool clip of 1906 at eighteen (18) cent per lb.; also the fall clip wool of 1905 at fourteen (14) cent per lb. The fall wool, which is stored at the Kron Tanning Co. office, at San Francisco, the spring wool to be delivered at Kings City depot in consideration thereof we accepted a deposit of two hundred and fifty (250) dollars part payment of said sale, the balance to be paid on the delivery of wool.

"[Signed] Walti and Bourdieu,

"Per Ed. Bourdieu."

"The \$250 referred to in the contract was paid to plaintiffs by defendants upon the execution of the contract. At this time the wool described as the spring clip of 1906 was growing on the bodies of the sheep running on the ranch at Bitter Water, and the fall wool of 1905 was stored with the Kron Tanning Company in San Francisco, where it remained until the conflagration of April 18, 1906, when it was destroyed. In May, 1906, after the sheep had been sheared, plaintiffs tendered the spring clip of wool at Kings City to defendants and demanded payment for all the wool, both that then tendered and the wool that had been destroyed at the Kron Tanning Company's warehouse on April 18th, at the stipulated price. Defend-

(160 Cal. 324)

WALTI et al. v. GABA et al. (S. F. 5,220.) (Supreme Court of California. July 1, 1911.)

1. SALES (§ 61*)—CONTRACT—CONSTRUCTION—"BOUGHT"—"SOLD."

The use of the words "bought and sold" in a written contract of sale does not necessarily import a present sale, but are frequently used to express a mere agreement to sell.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 162-170; Dec. Dig. § 61.*]

For other definitions, see Words and Phrases, vol. 1, pp. 850, 851; vol. 7, pp. 6540-6542; vol. 8, p. 7801.]

2. SALES (§§ 62, 214*)—CONTRACT—CONSTRUCTION.

Plaintiffs executed a memorandum reciting that one of them had that day sold to defendants all plaintiffs' spring wool clip of 1906 at 18 cents per pound, also the fall clip of 1905 at 14 cents per pound, the fall wool being stored at a specified place, the spring wool to be delivered at a specified depot, and had accepted a deposit of \$250, part payment, the balance to be paid on the delivery of the wool. At the time of the execution of the memorandum, the spring 1906 clip was growing on the bodies of the sheep, and the fall wool was stored as recited, where it remained until April, 1906, when it was destroyed by fire. *Held*, that the contract was entire, and since the spring clip was requir-

ants refused to pay for the destroyed wool, but offered to accept and pay for the spring wool at 18 cents per pound, less the \$250 paid on account. This offer plaintiffs refused, and insisted on payment for all the wool, less the \$250 paid on account, and, defendant refusing to accept the tendered wool on these terms, plaintiffs brought suit for \$2,195.34, being the price of all the wool, both that which had been destroyed and the spring clip of 1906, less \$250, paid at the execution of the contract.

"Defendants answered and sought to recover the \$250 paid to plaintiffs.

"Appellants' theory was and is that the transaction had between them and defendants was an absolute sale, and that title passed to all the wool involved at the time the memorandum was signed by Walti and Bourdieu and the \$250 paid by Gaba and Magidson.

"If this theory of the case be correct, it is certain that defendants should bear the loss of the destroyed wool and should pay for the entire amount. But the respondents contend that the transaction constituted an agreement to sell and to buy only, and that no title passed at the execution of the contract, or would pass until delivery of the wool.

"The court adopted respondents' theory of the case, and found in accordance with their pleadings: 'That the said plaintiffs did not sell and the said defendants did not buy any wool by the said agreement in writing, but the said plaintiffs agreed to sell and the said defendants agreed to buy the wool mentioned in the said agreement in writing upon the terms and conditions therein set forth and contained, and that the said agreement in writing constituted and was one entire contract, by which the said defendants agreed to pay the balance of the price of all the wool therein mentioned upon the delivery of all the wool therein mentioned by the said plaintiffs to them, the said defendants.' It is the correctness of this finding that is attacked.

"We are of the opinion that the interpretation adopted by the court of the transaction is sufficiently supported by the writing itself, and the evidence as to the circumstances and conditions surrounding its execution.

[1] "It is true that the writing states that 'I have this day sold,' etc., but the use of the word 'sold' or the word 'bought' does not always import a present sale, but such words are frequently used where the parties in fact intend only an agreement to sell. *Blackwood v. Cutting Packing Co.*, 76 Cal. 218 [18 Pac. 248, 9 Am. St. Rep. 199]; *Anderson v. Read*, 106 N. Y. 344 [13 N. E. 292]; *McLaughlin v. Piatti*, 27 Cal. 458; *Elgee Cotton Cases*, 22 Wall. 180 [22 L. Ed. 863].

"If the contract now under discussion had only referred to the spring wool, which was still growing on the backs of the sheep at the execution of the contract, and had then still to be fully grown, sheared, and delivered at

Kings City by appellants, there could hardly be room for discussion as to the fact that no title passed at the execution of the contract. The rule laid down by Benjamin on Sales, and approved in *Blackwood v. Cutting Packing Co.*, supra, and in *Elgee Cotton Cases*, supra, is: 'Where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of property.'

"In the case at bar it is perfectly clear from the conditions existing when the writing was executed that the parties intended that the appellants, the owners of the sheep, should care for the sheep until the proper time for shearing the spring wool, should then shear it and put it in a condition for delivery, transport it to Kings City, and there deliver it. Incident to this delivery it would also be necessary to weigh it to ascertain the price to be paid, and this is laid down by Benjamin, and approved in the *Blackwood Case* and in the *Elgee Cotton Cases*, as another indication that the title has not passed.

"If the sheep had been destroyed by act of God before the spring wool had been sheared, and the wool thus lost, it would hardly be contended by any one that the buyer should bear the loss of the wool, or could be compelled to pay for it. Yet this would be the case if title had vested in him. He would not bear such loss, because the title to the wool had not vested in him, and by the terms of the contract was not intended to vest in him until it had been sheared and delivered at Kings City. In both *Blackwood v. Cutting Packing Co.*, supra, and the *Elgee Cotton Cases*, supra, the pivotal point was as to whether title had passed to the buyer upon the execution of the contract.

"In the *Elgee Cotton Cases*, supra, a part payment had been made, and the contract provided that the cotton 'from this date is at the risk of Mr. Lobdell' (the buyer). Yet, as in the *Blackwood Case*, the court held that no title had passed, in accordance with the rule above quoted from Benjamin on Sales. In neither case can the essential facts be distinguished from the facts in the case at bar, so far as the sale of the spring wool is concerned, and, so far as the contract related to the spring wool, it is perfectly plain that no title passed at the execution of the contract.

"This brings us to a more particular consideration of the contract as relating to the fall wool.

"The court found that the agreement constituted one entire contract, by which the defendants agreed to pay the balance of the

price of all the wool therein mentioned upon the delivery of all the wool mentioned.

"In this connection we note that appellants in their brief claim that the fall wool was delivered. The record does not support this claim. It is true that Mr. Bourdieu did testify that Mr. Gaba, who acted for defendants, agreed to go to San Francisco the next day after making of the contract, and take and pay for the wool at the warehouse. Mr. Gaba, however, denied this, and testified that nothing was said about delivery, except as contained in the writing. In support of the action of the trial court, we must accept this as true. Appellants did notify the warehouseman to deliver the wool to defendants on their paying for it at 14 cents per pound, but no order on the warehouseman was given to defendants, and no notice given to defendants of the instructions sent to the warehouseman, and defendants never did in any way accept delivery of or control over the wool in the warehouse.

[2] "The court was justified in finding that the contract was entire. The circumstances under which the contract was executed, as well as the wording of the contract, indicate that it was an entire contract for the purchase of all the wool, both spring wool and fall wool. Under the contract the sellers could not compel acceptance and payment for the fall wool, unless they also delivered the spring wool. Neither could they compel payment for the spring wool, unless they delivered the fall wool. A payment of \$250 was made at the execution of the contract. This was not a payment on the purchase price of the spring wool alone; neither was it a payment on the purchase price of the fall wool alone. It was a payment on the entire purchase price of all the wool. In the words of the contract, it was 'a part payment of said sale,' not a part payment of said sales. The contract concludes with the words, 'the balance to be paid on the delivery of wool.' These words indicate that the parties had in mind but one 'balance,' which would be the difference between the total purchase price and the \$250 paid down. The language suggests but one more payment, the amount of which could only be ascertained or be due upon delivery of all the wool. The plaintiffs seem to have adopted this construction of the contract, for they made no demand for any payment until they tendered the spring wool. Further the evidence shows that defendants did not desire to purchase the fall wool at 14 cents, as they considered it worth but 13 or 13½ cents per pound, while plaintiffs desired 19 cents per pound for the spring wool, but would not sell it for even that price, unless they also sold the fall wool. Mr. Gaba testified that he could not get the spring wool unless he bought the fall wool with it. In support of the action of the trial court, we must accept this as true. It thus appears that the inducement to the contract

as made was the sale and purchase of the entire lot. In such case the contract is entire, and not severable. 35 Cyc. 116.

"Upon the question of the entirety of the contract, a case in all respects in point with the case at bar is the case of *Thompson & Petty v. Conover*, 30 N. J. Law, 329. Conover agreed to sell to Petty all the corn he then had, about 600 bushels, at 65 cents per bushel for the white, and 63 cents per bushel for the yellow. The white was delivered and accepted, but Petty without cause refused to accept the yellow. Conover then sued in trover to recover the white corn that had been delivered. It was held that the contract was entire, and that the seller could recover from the buyer the possession of the corn delivered, as the buyer refused to accept the other corn.

"In *Pope v. Porter*, 102 N. Y. 368 [7 N. E. 304], the contract was as follows: 'Sold to the following named parties Scotch Pig Iron to arrive as specified below * * * 500 tons Coltness pig iron at 36 per ton for shipment to be due here in April next, 500 tons of Coulder pig iron at 34 per ton, for shipment to be due here in March next. Payable on arrival here by four months note indorsed by the above-named parties with interest added at 6 per cent.'

"The seller did not deliver the Coulder iron, which was due to arrive in March, but did deliver the Coltness iron, which arrived later. This the buyer refused to accept, and the seller sued for its price. It was held that the contract was entire, and that the seller having failed to deliver the part first to be delivered could not recover for the iron subsequently tendered.

"Other instances of contracts for the purchase of different articles at specified prices for each article, which were held to be entire and not severable contracts, are found in *Smith v. Lewis*, 40 Ind. 98; *Bruce v. Pearson*, 3 Johns. [N. Y.] 534; *Pratt v. Frasier*, 72 S. C. 369 [51 S. E. 983].

"Because of the wording of the contract in the case at bar, the part payment to be credited on the entire purchase price, and balance to be paid on delivery of wool, as well as the circumstances in evidence concerning the sale of all or none of the wool, it is clear to us that the contract was entire.

"It is equally clear, under the authorities hereinbefore cited (*Benjamin on Sales*; *Blackwood v. Cutting Packing Co.*, supra; *Elgee Cotton Cases*, supra), that it was not intended to pass title to the spring wool, until it had been sheared and delivered at Kings City. As the contract was entire, the court was justified in finding that it was not intended that title to the fall wool should pass until delivery of the spring wool. In other words, the court was justified in finding that the contract was not one of present sale, but an agreement to sell and deliver at a future time all the wool referred to. Be-

fore the time for delivery of all the wool had arrived, the fall wool was destroyed while still in the hands of the seller."

This opinion correctly states the facts of the case, except as to two matters which are altogether immaterial here, viz.: There were only 29 sacks of the fall wool, instead of 39, as stated in the opinion, and in the written agreement the word "of" occurred before the word "payment"; the agreement reading "part of payment," instead of "part payment."

Upon further consideration of the legal questions presented by the facts, we are satisfied with the views expressed by the District Court of Appeal in the foregoing opinion, and adopt the same as the opinion of this court.

The order appealed from is affirmed.

160 Cal. 317

CLARK v. CITY OF LOS ANGELES et al.
(L. A. 2,793.)

(Supreme Court of California. June 30, 1911.)

1. MUNICIPAL CORPORATIONS (§ 918*)—BONDS
—ELECTIONS—PROPOSITION—SEPARATE SUB-
MISSION.

Where the issuance of bonds by a city is submitted to vote of the electors, there must be a separate proposition on the ballot for each distinct, unrelated, or independent object or purpose for which it is intended to incur indebtedness, showing separately the amount desired for each one, in order that the voter may express his opinion on each without affecting the other.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1920; Dec. Dig. § 918.*]

2. MUNICIPAL CORPORATIONS (§ 918*)—BONDS
—HARBOR IMPROVEMENTS—SUBMISSION TO
VOTE.

A council resolution declared that the public interest demanded the acquisition and construction of certain municipal improvements in a harbor within the city, and particularly described the same by dividing them into two parts consisting of (1) "docks, wharves, and warehouses" on or adjacent to the city water front, and comprising that portion of the harbor lying southerly of a line passing through the center of a turning basin east of an island, together with an extension of streets to the water line, and the making of canals from such streets to the water, estimating the cost at \$2,000,000; and (2) like improvements on that portion of the harbor lying north of the line referred to, of which part the estimated cost was \$1,000,000. *Held*, that the proposition on the ballot, combining such improvements and reciting, "Shall the city incur a bonded debt of \$3,000,000, to acquire and construct certain municipal improvements, to wit, the construction of docks, wharves, and harbors, and the opening, improving, constructing, and maintaining of streets and highways to navigable waters, the construction and maintaining of canals and waterways, and the acquisition of all necessary lands for improvement?" was not objectionable as submitting distinct propositions in a single question; the contemplated improvements being of the same character, and all relating to the improvement of the harbor in question.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 918.*]

3. MUNICIPAL CORPORATIONS (§ 911*)—HARBOR
IMPROVEMENTS — AUTHORITY — "DOCK" —
"WHARVES."

Los Angeles City Charter (St. 1889, p. 457) art. 1, § 2, subd. 7, confers on the city of Los Angeles power to lay out, open, extend, pave, repave, and improve streets, and as amended in 1909 (St. 1909, p. 1291) authorizes the city to acquire or construct and operate public wharves, docks, piers, or moles along the seashore in connection with the transportation of passengers and freight between the ocean and the city. By the charter (section 258), as amended by St. 1909, p. 1303, the city was authorized, throughout its entire area, to acquire, construct, own, operate, and maintain docks, wharves, piers, canals, and sea walls; and by section 262, as amended by St. 1909, p. 1305, was given power to incur a bonded debt for all the foregoing purposes, including the maintaining of the streets in question. *Held* that, since the term "dock" means an artificial basin, in connection with a harbor, for the reception of vessels and the slip or waterway extending between two piers or projecting wharves, waterways were included within the term, and warehouses were included within the right to erect "wharves," so that the city was authorized to contract indebtedness for the construction of docks, wharves, and warehouses, including the maintaining of streets and highways to navigable waters, and the construction and maintaining of canals and waterways.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 911.*]

For other definitions, see Words and Phrases, vol. 3, p. 2151; vol. 8, p. 7640; vol. 8, pp. 7433-7435.]

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Percy H. Clark against the City of Los Angeles and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Scarborough & Bowen, for appellants.
John W. Shenk, City Atty., Leslie R. Hewitt, and W. B. Mathews, for respondents.

SHAW, J. This is an action against the city and certain of its officers to enjoin the sale of city bonds, amounting to \$3,000,000, known as "Harbor Improvement Bonds," and to declare the same void. A general demurrer to the complaint was sustained, and thereupon judgment was given for defendants. The plaintiff appeals.

The defendants claim that the issuance and sale of the bonds in question were authorized by the electors of Los Angeles city at an election called and held for that purpose on April 19, 1910. It is admitted that the amount exceeds the annual income and revenues of the city, and that, under section 18, art. 11, of the Constitution, they cannot be lawfully sold, unless authorized by the assent of two-thirds of the qualified electors of the city, voting at an election held for that purpose. Such an election was held, and the proposition to incur the indebtedness in the amount of these bonds, by the issuance and sale thereof, was carried by the necessary two-thirds vote. Appellant asserts that the proceedings are void.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

1. Appellant claims that the election was unavailing, because the question submitted with regard to these bonds included an aggregate debt to be incurred for two or more distinct and independent objects, each of which, it is argued, should have been submitted separately in a separate question.

The Constitution declares that no city "shall incur any indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose." Article 11, § 18. The act providing for such elections requires that the council shall first resolve that the public interest "demands the acquisition, construction or completion of any municipal improvement, * * * to carry out the objects, purposes and powers of the municipality, the cost of which will be too great to be paid out of the ordinary annual income." At any subsequent meeting, it may pass an ordinance calling a special election to submit to the voters "the proposition of incurring a debt for the purpose set forth in said resolution, and no question other than the incurring of the indebtedness for said purpose shall be submitted; provided, that propositions of incurring indebtedness for more than one object or purpose may be submitted at the same election." This ordinance must "recite the objects and purposes for which the indebtedness is proposed to be incurred." Stats. 1907, p. 609.

The resolution of the council declared that the public interest demanded "the acquisition and construction of certain municipal improvements" in the harbor of San Pedro, which had been shortly before brought into the city by annexation of territory. It more particularly described the proposed improvements by dividing them into two parts, to wit, first, "docks, wharves, and warehouses" upon or adjacent to the city water front bordering upon navigable waters, comprising that portion of the harbor lying southerly of a certain line passing through the center of the turning basin east of Smith Island, together with the extension of streets to said waters, and the making of canals from such streets to such waters, all of which part was estimated to cost \$2,000,000; second, like improvements on that portion of the harbor lying northerly of said line, through the center of said turning basin, of which part the estimated cost was \$1,000,000, making the total estimated cost of all the improvements \$3,000,000. The ordinance calling the election also provided for the submission of a separate proposition to incur a debt of \$3,500,000 to pay the cost of certain electric light and power works. It stated that the election was to be held to submit "the propositions of incurring debts for the purposes set forth in said resolutions and hereinafter stated." Two purposes were then

stated, designated, respectively, as "first" and "second." The one designated as "first" described all the harbor improvements, stating them in two parts, and giving the estimated cost of each part and the total cost of all, in the same words as in the resolution. It thus presented the proposition for all the harbor improvements as a single "purpose," for which a debt of \$3,000,000 was necessary.

The proposition was stated on the ballot as follows: "Shall the city of Los Angeles incur a bonded debt of \$3,000,000, for the purpose of acquiring and constructing certain municipal improvements in said city, to wit, the construction of docks, wharves and warehouses, the opening, improving, constructing and maintaining of streets and highways to navigable waters, the constructing and maintaining of canals and waterways, and the acquisition of the necessary lands for said improvements?"

It is obvious that the statement of the proposition in the ballot must needs be brief and in general terms. The purpose for which such elections are required is to obtain the assent of the voters to a public debt, to the amount, and for the object, proposed. The amount must, of course, be stated on the ballot; the general purpose must be stated with sufficient certainty to inform the voters, and not mislead them, as to the object intended; but the details of the proposed work or improvement need not be given at length in the ballot. The statute provides that the ordinance calling the election shall recite the objects and purposes, and that it must be published daily for seven days, or once a week for two weeks, before the election. It may and should give a fuller description of the object or purpose for which the debt is to be incurred, and the voters may thereby obtain full information on the subject. The question as stated on the ballot was sufficient to inform the voters that the question presented included the objects and purposes set forth in the resolution and ordinance. It remains to consider whether or not, when taken in connection with the resolution and ordinance, it is not invalid because it presents two distinct and separate objects, not related to or dependent on each other, without giving the voter an opportunity to distinguish and vote for one and against the other.

[1] The rule seems to be that there must be a separate proposition on the ballot for each distinct, unrelated, and independent object or purpose for which it is proposed to incur indebtedness, and showing separately the amount desired for each one, in order that the voter may express his choice on each without thereby affecting the other.

Some examples from the decisions will serve to illustrate what are considered distinct objects. On this point the cases conflict. A proposition to vote a lump sum for waterworks and electric works was held void.

Stern v. Fargo, 18 N. D. 289, 122 N. W. 403, 26 L. R. A. (N. S.) 665. The contrary was decided in *Kemp v. Hazlehurst*, 80 Miss. 443, 31 South. 908; *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077; and *State v. Wilder*, 200 Mo. 97, 98 S. W. 465. An election to vote a lump sum to be devoted to the construction of an electric plant and to the maintenance thereof was said to embrace two distinct objects. *Neacy v. Milwaukee*, 142 Wis. 590, 126 N. W. 8. The construction of waterworks and the purchase of waterworks already constructed have been declared to be different and distinct objects. *Elyria, etc., Co. v. Elyria*, 57 Ohio St. 374, 49 N. E. 335; *Leavenworth v. Wilson*, 69 Kan. 74, 76 Pac. 400; *Farmers', etc., Co. v. Sioux Falls (C. C.)* 131 Fed. 912. Contrary decisions on these points are found in *Nash Co. v. Council Bluffs (C. C.)* 174 Fed. 182; *State v. Allen*, 183 Mo. 283, 82 S. W. 103; and *State v. Allen*, 178 Mo. 555, 77 S. W. 868. In *People v. Baker*, 83 Cal. 149, 23 Pac. 364, 1112, the statute provided that the order calling the election should "specify the particular purpose for which the indebtedness is to be created, and the amount of bonds which they propose to issue." Stats. 1883, p. 311, § 37. The order was for the issue of bonds to the amount of \$250,000, "for the purpose of constructing, grading, repairing, and maintaining bridges and public highways within the county, and for the purpose of erecting and maintaining a county jail and poorhouse and hospital." It did not state how many bonds were to be issued for each purpose, nor provide for a separate vote on each. It was held that two distinct and independent purposes were specified, and that consequently the election was ineffectual.

On the other hand, in *People v. Counts*, 89 Cal. 15, 26 Pac. 612, the order was for the issuance of bonds for \$75,000, the money raised to be used to construct two certain and described public wagon roads in the county. The ballot did not separate the two purposes. The court said: "The object of the statute in requiring the board to 'specify the particular purpose for which the indebtedness is to be created and the amount of the bonds,' is simply to notify the electors of the county of these facts, to the end that they may be enabled thereby to form an intelligent judgment as to the propriety of creating the proposed indebtedness for such purpose; and it would seem that this object is as well accomplished by the specification in the order under consideration, as it would have been if the purpose, specified in the same way, had been to construct only one road." The two roads led to the same main county road, but connected at different places. The case of *People v. Baker*, supra, was distinguished. It was held that the proposition to construct the two distinct roads connecting with the same main road embraced but a single purpose, within the meaning of the statute quoted. In *Oakland v. Thompson*, 151 Cal.

576, 91 Pac. 387, bonds were voted for the purpose of acquiring several distinct and widely separated parcels of land in the city of Oakland, to be converted into separate public parks, for the enjoyment of all the inhabitants of the city. Answering the same objection, the court said: "The scheme is a single scheme, the purpose a single purpose. * * * The plan is a single plan for the acquisition of all these lands for park purposes. * * * Certainly the plan adopted was within the discretionary power of the council under the law, and it enabled every voter to express himself for or against the whole proposition. More than this was not required."

[2] Upon the authority of the decisions last cited, it is clear that the question embracing the harbor improvement bonds is not inimical to the Constitution or the bond act on this point. The purposes included in the proposition voted on are not so distinct and independent as to preclude the submission of one proposition to incur a single indebtedness for all of them. The purpose intended was a single purpose—that of improving the harbor at San Pedro by the construction thereon of docks, wharves, and warehouses, with the streets and waterways necessary or convenient for their use and for access to them from the land on one side, and from the water on the other. All this constituted but one general plan or object. The fact that the estimated cost was stated in two sums, \$2,000,000 for the improvements on one side of the line described, and \$1,000,000 for those on the other side, does not render the two parts so distinct that they cannot be embraced in one scheme for improving the harbor, nor does it make each an entirely separate and distinct enterprise. The estimate might have given separately the cost of each dock, wharf, warehouse, street, and waterway, without affecting the character of the whole as a single scheme or object. The naming of warehouses does not show a double purpose. Warehouses are a necessary, or at least a convenient, adjunct to a wharf. We hold that the proceedings are not invalid in this particular.

[3] 2. The power of the city to construct and maintain these public harbor improvements is clear. Subdivision 8 of section 2 of the charter confers upon the city power to lay out, open, extend, widen, pave, repave, and improve streets. Stats. 1889, p. 457. Subdivision 7c of the same section, as amended in 1909, gives power "to acquire or construct and operate public wharves, docks, piers or moles along the seashore, in connection with the transportation of passengers and freight between the ocean and the city." Stats. 1909, p. 1291. This appears to cover, by implication at least, all the purposes designated in the ordinance. Warehouses, as stated, are convenient parts of a wharf, being necessary for the safe-keeping of goods thereon while awaiting shipment. Water-

ways are included in the term "dock"—a word defined by Webster as "(2) An artificial basin or inclosure in connection with a harbor, for the reception of vessels;" and "(3) The slip or waterway extending between two piers or projecting wharves, or cut into the land for the reception of ships." Section 258 of the charter, as amended in 1909, declares that: "The city of Los Angeles shall also have, throughout the whole of said city, including any such borough, the exclusive power to acquire, construct, own, operate and maintain docks, wharves, piers, canals and sea walls." Stats. 1909, p. 1303. This is not made dependent on the creation of any "borough" mentioned in the amendment, but is a clear grant of power to the city, and it sufficiently covers all the subjects mentioned in the ordinance, not included in section 2 of the charter, except, perhaps, the maintaining of the streets. Section 262 of the charter (amendment of 1909, Stats. p. 1305) gives power to incur a bonded debt for all the foregoing purposes, including the "maintaining" of the streets in question. From this the power to carry out such purpose and "maintain" the streets is necessarily implied. It is also implied from subdivision 23 of section 2, conferring all powers "necessary to the complete and efficient management and control of the municipal property."

All the other points urged, affecting the validity of the bonds, are considered and disposed of adversely to appellant's contentions in the case designated as "L. A. No. 2,794," entitled *Clark v. City of Los Angeles et al.*, 116 Pac. 722, decided on May 31, 1911, involving the bonds for electric works, voted on at the same election. The increased debt allowed by section 223 of the charter covers these harbor bonds, as well as the electric works bonds.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.

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16 Cal. App. 293

HUGHES BROS. v. RAWHIDE GOLD MINING CO. (Civ. 773.)

(District Court of Appeal, Third District, California. May 24, 1911.)

1. APPEAL AND ERROR (§ 714*)—RECORD—MATTERS NOT APPARENT BY.

Where, on appeal from an order granting a new trial, there is nothing in the record disclosing the specific reasons for the order, statements of counsel as to the specific ground on which the motion was granted cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2962; Dec. Dig. § 714.*]

2. APPEAL AND ERROR (§ 854*)—NEW TRIAL—REVIEW.

Where notice of motion for a new trial states one of several grounds on which the court could reasonably, and in the exercise of discre-

tion, grant a new trial, an order allowing a new trial will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3425, 3426; Dec. Dig. § 854.*]

3. APPEAL AND ERROR (§ 979*)—REVIEW—GRANT OF NEW TRIAL—INSUFFICIENCY OF EVIDENCE.

It is the duty of the trial court to grant a new trial whenever, in its opinion, the evidence on which the former decision has been made is insufficient to justify the same, and the exercise of its discretion in that behalf is not open to review, if there is any appreciable conflict in the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873; Dec. Dig. § 979.*]

4. APPEAL AND ERROR (§ 933*)—ORDER GRANTING NEW TRIAL—REVIEW—PRESUMPTION.

Where one of several grounds stated in a motion for new trial was that the evidence was insufficient to sustain the decision, it would be assumed on appeal that this was one of the grounds for making the order, which would be accordingly affirmed, unless the order, by direct language, excluded such ground as the basis of the determination.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3425, 3775; Dec. Dig. § 933.*]

5. BILLS AND NOTES (§ 68*)—DRAFT—ACCEPTANCE—"MAY BE MADE."

Civ. Code, § 3193, provides that an acceptance of a bill of exchange must be in writing, and "may be made" by the acceptor writing his name across the face of the bill, with or without other words. *Held*, that the phrase "may be made" indicates that the section is permissive, only, and that any other written acceptance clearly disclosing the drawee's intention to accept will constitute an acceptance.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 110-115; Dec. Dig. § 68.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4447-4449.]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by Hughes Bros. against the Rawhide Gold Mining Company. From an order granting plaintiff a new trial, defendant appeals. Affirmed.

Samuel M. Shortridge and C. M. C. Peters, for appellant. J. B. Curtin, for respondent.

HART, J. In this action, the court below awarded judgment to the defendant. Thereafter the court granted the motion of plaintiff for a new trial, and it is from the order allowing said motion that this appeal is prosecuted by the defendant.

The grounds upon which said motion was made are: (1) Insufficiency of the evidence to justify the decision and judgment; (2) that the decision and judgment are against law.

The action is in debt, and was brought to recover the sum of \$531.75, alleged by the complaint to be due and owing plaintiff from the defendant.

The circumstances under which the alleged obligation arose, according to the averments of the complaint, are, in brief, as fol-

lows: That the defendant corporation was indebted to a certain Charles Zany and one B. A. Valverde in a sum of money exceeding in amount the sum sued for; that said Zany was indebted to the plaintiff in the said sum of \$531.75, and that the former, for the purpose of paying said indebtedness, executed an acceptance of a bill of exchange drawn on said Zany and in favor of plaintiff, and the same was delivered to the defendant. Said bill was in the following language:

"\$531.75. Oakdale, Cal., Feb. 17, 1909.

"On demand pay to the order of Rawhide Gold Mining Co. five hundred thirty-one and $\frac{75}{100}$ dollars. Value received and charge the same to account of Hughes Bros.

"To Charles Zany, Quartz Mt."

Thereafter said Zany and Valverde executed and delivered to the defendant the following order in writing: "Feb. 25, 1909. To the Rawhide Gold Mining Company: Please pay to Hughes Bros., a corporation, \$531.75 and charge the same to our account. Chas. Zany. B. A. Valverde."

It is alleged that the defendant "promised and agreed to pay the same to plaintiff, but has since neglected and refused to do so." It is further alleged that the defendant has refused to return said draft to plaintiff, although the latter has demanded its return since defendant's refusal to pay the same.

The court, among other matters, found that the defendant "received and took said first-mentioned draft or bill of exchange and said second-mentioned draft or order from said plaintiff herein, for the purpose of the collection thereof for said plaintiff, and not otherwise, and in pursuance with an understanding and agreement had between said W. A. Nevills, president of said defendant, and said W. J. Hughes, president of plaintiff, that the same was to be held out of any moneys found due from defendant to Charles Zany in a settlement of accounts thereafter to be had between said defendant and said Zany;" that "said defendant upon either of said above-mentioned dates, or at any other time, never promised or agreed to pay said plaintiff said sum of \$531.75, or any other sum, except under the conditions and agreement mentioned in paragraph 111 hereof;" that "no settlement of the accounts between said Charles Zany and said defendant had been had up to the commencement of this action, nor has any settlement of said accounts been had up to the trial of this action, and up until said trial said defendant had not collected anything on account of the said draft or bill of exchange, or of said draft or order hereinabove set forth, and the said accounts between said Charles Zany and B. A. Valverde and said defendant were at the commencement and trial of this action still in process of litigation, and in the courts undetermined finally."

The position of the appellant in this case is as stated in the foregoing findings; the

contention being (to be more explicit) that the evidence without conflict shows that the agreement between plaintiff and defendant was simply that the former would assign to the latter its claim against Zany for the purpose of its collection only, and that defendant would collect the same if, upon the final settlement of the accounts between it and Zany and Valverde, there was found to be due from defendant to said Zany and Valverde a sum of money from which the claim could be paid in whole or in part.

The sole question to be examined and decided here is whether the court acted within its discretion, or abused such discretion, in granting the order appealed from.

Upon what particular ground, if upon only one of the two upon which the motion for a new trial was made, or whether upon both said grounds the motion was granted by the court, does not appear from the record. It is, however, asserted by counsel for the respondent that the court, in deciding the case for defendant, stated from the bench that "it could not understand how the plaintiff could maintain an action of debt to recover that much money; that it evidently had mistaken its remedy, and that it should have sued in trover for conversion of that sight draft, alleging its value," etc. From this statement in counsel's brief, the implication is that the court awarded judgment to defendant solely on the ground that the remedy of plaintiff was in conversion, and not in debt or assumpsit. Of course, if this be true, evidently, in the judgment of the court, as evidenced by its order granting a new trial, there was sufficient evidence to establish the claim of plaintiff, if the theory of the plaintiff as to the relations between it and the defendant were, by reason of the transactions set forth in the complaint, those of creditor and debtor, respectively.

[1] But, since, as seen, there is nothing in the record disclosing the specific reasons prompting the court to grant the order appealed from, we cannot obviously consider the mere statements of counsel as to the specific ground upon which the motion was allowed.

[2] "Where, however, there is stated in the notice one ground of several upon which the court could reasonably, and in the exercise of a sound discretion, grant a new trial, the order will not be disturbed." *Edinger v. Sigwart*, 13 Cal. App. 667, 672, 110 Pac. 521, 523.

[3, 4] In *Newman v. Overland Pac. Ry. Co.*, 132 Cal. 74, 64 Pac. 110, where the defendant's notice of motion designated as the grounds upon which the motion would be made "insufficiency of the evidence to justify the decision," and "errors of law occurring at the trial," and, as here, the statement of the case upon which the motion was heard contained specifications of particulars wherein it was claimed that the evidence was insufficient, and of various errors of law upon which the defendant relied, it is held: "The

rule is firmly established that the superior court is not only authorized, but that it is its duty, to grant a new trial whenever, in its opinion, the evidence upon which the former decision was made was insufficient to justify that decision. Its action in granting a new trial upon this ground is so far a matter within its discretion that, if there is any appreciable conflict in the evidence, it is not open to review (*Kauffman v. Maier*, 94 Cal. 269 [29 Pac. 481], 18 L. R. A. 124; *Domico v. Casassa*, 101 Cal. 441 [35 Pac. 1024]; *Harrison v. Sutter Street Railway Co.*, 116 Cal. 156 [47 Pac. 1019]); and when this is made one of the grounds of the motion, although other grounds are also presented, if the order does not by direct language exclude this from the grounds upon which the motion is granted, it will be assumed that it was one of the grounds for making the order, and the order will accordingly be affirmed."

As the order here does not, as seen, show that the court excluded from consideration, in granting the motion, the ground that the evidence is insufficient to support the decision, we may assume that this was one of the grounds upon which the motion was granted.

There is, in our judgment, a conflict in the evidence as to the nature of the legal relations established between the plaintiff and the defendant by the transactions described in the complaint, and referred to in the findings of the court hitherto quoted herein. While it is true that in giving his testimony the president of plaintiff, who personally conducted, on behalf of the latter, the transactions referred to in the complaint, made some statements which bear the appearance of being inconsistent with the theory upon which the complaint is drafted and the cause, on plaintiff's part, was tried, there is nevertheless *some* evidence tending to disclose that the two written instruments pleaded in the complaint were intended, respectively, as a bill of exchange and an acceptance thereof by the drawee. That such was intended to be the legal effect of said instruments, the language thereof seems quite clearly to imply. Zany's acceptance of the bill drawn by the plaintiff on the defendant is, it occurs to us, plainly evidenced by the order or draft on defendant, executed by Zany and Valverde, in favor of plaintiff, on the 25th day of February, 1909, for the precise sum specified in the bill.

[5] By the law of this state, it is provided that an acceptance of a bill of exchange must be in writing, but that it is a sufficient acceptance if the acceptor writes "his name across the face of the bill, with or without other words." Section 3193, Civ. Code. The manner of acceptance thus authorized is, obviously, merely permissive in legal effect; that is, the language that acceptance "may be made" as indicated does not exclude any other mode of acceptance, so long as it is in

writing and clearly discloses an intention on the part of the drawee to accept. See volume 4, Am. & Eng. Ency. of Law, p. 207 (2d Ed.), and cases cited in footnotes; *Parsons on Bills and Notes*, vol. 1, p. 231 et seq.

But we will briefly examine the testimony. It appears that Zany maintained a boarding house at the mine of the defendant, for the purpose of accommodating in that regard the employes of defendant; that the latter had entered into an arrangement with Zany by which the former was to pay the latter for the boarding of its said employes. Zany, as seen, was indebted to the plaintiff corporation, which was then engaged in the general merchandising business at Oakdale, in the sum mentioned in the said alleged bill of exchange described in the complaint. Hughes, president of plaintiff, having received information that Zany was about to retire from or abandon the boarding house business, met Capt. Nevills, president of defendant, at Oakdale and initiated negotiations by which he hoped to ultimately secure the payment of his claim through defendant. Nevills agreed to furnish information to Hughes as to the movements of Zany. After some correspondence between the secretary of defendant and Hughes, in which the latter was finally advised that, to protect himself against loss, he would have to take some steps looking to the collection of his account against Zany, as the latter was about to quit business, Hughes drew the order on Zany described in the complaint as a bill of exchange. It seems that Valverde, a creditor of Zany, had threatened to garnish the money due the latter from defendant, but finally secured from Zany an assignment to him of Zany's claim against defendant. Nevills said to Hughes that, before defendant would accept the order or bill of exchange, he (Hughes) would have to deliver to said defendant an order or an acceptance executed by both Zany and Valverde. This suggestion Hughes followed, and procured the order signed and executed by Zany and Valverde, already mentioned, and delivered the same with the bill of exchange to defendant. Hughes thereafter frequently communicated with the officers of defendant, inquiring when it was probable that he would receive the money due plaintiff and, after much correspondence on the subject, Hughes, for plaintiff, demanded from defendant a return of the bill of exchange and the acceptance thereof by Zany and Valverde. Defendant refused this demand, whereupon plaintiff instituted an action in claim and delivery for the recovery of said bill. (This suit was subsequently dismissed on plaintiff's motion.)

It further appears that Valverde sued defendant to recover the money it had in its possession due Zany, and of which he claimed ownership by virtue of the said assignment of said money to him by Zany. The defendant answered Valverde's complaint, and, among other averments, pleaded as a set-off

the bill of exchange mentioned in the complaint.

In its answer to plaintiff's complaint, in the action for the recovery of said bill, the defendant alleged: "That heretofore, to wit, about the 23d day of February, 1909, for value and in the due and ordinary course of business the said Hughes Bros., plaintiff above named, sold, assigned, and transferred the account and indebtedness mentioned in paragraph 2 of said complaint to the defendant, the Rawhide Gold Mining Company, which said company was the owner and holder thereof at the time of the commencement of the above-entitled action, and ever since has been, and still is, the owner and holder of said assigned claim as aforesaid."

The record shows that the sheriff took from the possession of defendant said bill upon a process issued upon plaintiff's complaint in replevin, but that subsequently defendant, demanding redelivery of the bill to it, executed to the sheriff an undertaking as required by section 514 of the Code of Civil Procedure, and thereupon the sheriff redelivered said bill into its possession.

Hughes testified that after the execution of the bill of exchange he met Nevills at the depot at Jamestown; that "he told me that Zany had turned everything over to Valverde, and that Valverde had sued him (Nevills), and he wanted me to go up with Mr. Peters (defendant's attorney) and commence suit against Zany—attach him. * * * I said, 'I will go and get an order.' He said, 'It will do no good.' * * * I went over and met Zany and Valverde together. I says to Zany, 'To save any trouble, you give me an order on the Rawhide mine; Mr. Valverde, too. Both of you sign it,' because Valverde was suing him; it was safe both ways. I went to the telephone and called up Mr. Nevills and told him I had this order. He says, 'If his lawyer says it is all right, I will accept it. If Mr. Peters says it is all right, it would be all right.' I got the order and came back; my bookkeeper made it, and I brought it with me." He further testified that he showed the order to Mr. Peters, defendant's attorney, and that the latter pronounced the order to be sufficient, and that defendant could pay it if it desired to. "I delivered these two documents to Mr. Lang (secretary of defendant), and from that time until now they have not been in my possession."

In reply to the contention of defendant, as shown by the testimony of Nevills, that the order was received by the defendant only for the purpose of collecting it for plaintiff, and that it was agreed that plaintiff was to wait for the money until a settlement between Zany and defendant was had, Hughes testified that no such understanding was had between them; that after he delivered the bill and order to defendant he expected the latter to pay him the money called for by said bill, and that that was the understand-

ing. He testified that when it appeared to him, after repeated demands on defendant for payment without success, that he was not going to receive the money, he demanded the redelivery of the bill, but that defendant refused to deliver possession of the same to plaintiff, and that thereupon he instituted the action to recover its possession to which we have made reference.

Of course, the testimony produced by defendant contradicts plaintiff's testimony; the theory of the defendant being, as seen, that it was merely made an agent by plaintiff to collect the money due the latter from Zany. This testimony, however, only results in a conflict—at least "an appreciable conflict"—upon the vital proposition in the case, and, as we have seen, under such circumstances we cannot say that the court's decision granting a new trial involves an abuse of the discretion which it is legally authorized to exercise in passing upon motions of this kind.

But counsel for appellant insist with much vigor that there is no conflict; that the testimony is all one way, and that it conclusively discloses that the defendant was merely the agent of plaintiff for the collection of the money from Zany. In support of this contention, attention is called to the averments of the complaint, in the action by plaintiff to recover possession of the bill of exchange or order from defendant, setting forth plaintiff's ownership of said bill or order. But those averments, considered as evidence in the case, as well as the fact of the bringing of that suit by plaintiff, were, like all the testimony in the case, to be given such weight, if any, as the court deemed them entitled to. It would not be a far-fetched conjecture to suggest that, in considering the motion for a new trial, the court concluded that the unqualified declaration in defendant's answer to plaintiff's action to recover the bill that it was the owner and holder thereof, that said bill had been sold and assigned to it by plaintiff, fully impeached or overcame plaintiff's averment of ownership. Besides, the court perhaps reached the conclusion that defendant's averment of ownership in its answer to that complaint of plaintiff was corroborated by the fact that, in the action against it by Valverde, it set up the bill drawn by plaintiff and accepted by the drawee, Zany, as an offset to any claim Valverde might undertake to establish against defendant on account of its indebtedness to Zany. In any event, it was, as we have suggested, for the court, in its consideration of the application for a new trial, to appraise the probative value of the testimony, and we doubt not that, as before declared, there is a sufficient conflict in the evidence upon the question whether the instrument was a bill of exchange or a mere assignment of the claim therein specified to defendant for collection only to render the court's order granting a new trial clear of just disturbance by this appeal.

There are some other legal propositions, only, however, in support of the main question submitted here, discussed in the briefs. In view of the conclusion at which we have arrived, these need not be noticed.

The order is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

16 Cal. App. 391

JOHNSTON v. BLANCHARD. (Civ. 979.)

(District Court of Appeal, Second District, California, May 27, 1911.)

1. GOOD WILL (§ 6*)—SALE—BREACH OF CONTRACT.

Where a defendant sold his business of distributing advertising in a certain district and covenanted not to engage therein for 30 years, on penalty of forfeiting a certain sum, a complaint alleging that he had re-engaged in the business within the time limited, and was soliciting trade, was sufficient without showing that he had succeeded in securing any of the plaintiff's customers.

[Ed. Note.—For other cases, see Good Will, Cent. Dig. §§ 2-5; Dec. Dig. § 6.*]

2. SPECIFIC PERFORMANCE (§ 58*)—CONTRACTS ENFORCEABLE—SALE OF GOOD WILL.

Where defendant sold his business and covenanted not to engage therein in the same district for 30 years, and that he should forfeit to the purchaser the sum of \$5,000 as liquidated damages for a violation of this agreement, the purchaser was entitled to specific enforcement of the agreement not to re-engage in the trade, under Civ. Code, § 3389, permitting a contract to be so enforced, though a penalty is imposed or damages are liquidated for its breach.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 179, 180; Dec. Dig. § 58.*]

3. SPECIFIC PERFORMANCE (§ 17*)—PERSONS ENTITLED.

Where defendant sold his business of distributing advertising matter in a certain section of the country and covenanted with the purchaser not to re-engage in the business for a certain length of time, an assignee of the purchaser was entitled to enforce the agreement, though the word "assignee" was not used in the defendant's contract of sale.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 38-46; Dec. Dig. § 17.*]

4. ASSIGNMENTS (§ 5*)—PROPERTY SUBJECT—GOOD WILL.

Under Civ. Code, § 993, by which the good will of a business is property, such right is transferable, and a purchaser of defendant's business, with an agreement by defendant not to re-engage therein, may assign his rights to one purchasing from him.

[Ed. Note.—For other cases, see Assignments, Dec. Dig. § 5.*]

5. SPECIFIC PERFORMANCE (§ 17*)—PERSONS ENTITLED TO ENFORCE CONTRACT.

Civ. Code, § 1674, provides that one who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business, so long as the buyer or any person deriving title from him carries on a like business. *Held*, that where defendant sold his business to W., covenancing not to re-engage therein, and W. sold to plaintiff, plaintiff was entitled to have the contract enforced for his protection, so long as he carried on a like busi-

ness, but such right could not be extended to his successors and assigns.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 38-46; Dec. Dig. § 17.*]

6. NEW TRIAL (§ 127*)—MOTION—SPECIFICATIONS OF ERROR.

A motion for a new trial, made on a statement containing no specifications of the particular errors relied on, must, under Code Civ. Proc. § 659, be disregarded.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 256-262; Dec. Dig. § 127.*]

Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by Daniel Johnston, doing business as the Los Angeles Distributing Company, against Calvin W. Blanchard. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

Haas, Garrett & Dunnigan, for appellant. Andrew M. Strong and E. T. Sherer, for respondent.

SHAW, J. Action to enjoin defendant from conducting the business of distributing advertising matter in the county of Los Angeles, in violation of the terms of an agreement, whereby he covenanted that he would not do so.

Judgment went for plaintiff, from which, and an order denying defendant's motion for a new trial, he prosecutes this appeal.

Defendant and one West were copartners in the city of Los Angeles, and, under the firm name and style of Los Angeles Distributing Company, conducted the business of distributing advertising matter for advertisers in the county of Los Angeles. On March 27, 1909, they sold said business, together with the good will thereof, to one W. W. Lee, and at the same time entered into a contract and agreement which contained a provision as follows: "It is further agreed that said parties of the first part (Blanchard and West) will not enter into a similar business such as the one contracted to be sold under this agreement, in any of the cities or territories above mentioned, for a period of thirty (30) years from the date of these presents, and on violation of this provision it is agreed by and between the parties of the first part and the party of the second part that they shall forfeit to the party of the second part the sum of five thousand dollars (\$5,000) as liquidated damages for the violation of this agreement." On July 2, 1909, Lee, by an instrument in writing, sold, transferred, and assigned all his right, title, and interest in said contract and the subject-matter thereof, and transferred the business to plaintiff. Plaintiff entered upon and continued in conducting the advertising business and the distributing of advertising matter so purchased by Lee from Blanchard and West and by Lee assigned to him. The complaint alleges that Blanchard, the defendant, not-

withstanding his contract, did, a few months after making said agreement, enter into a similar business to the one sold to Lee, and at the time of the instituting of the suit he was engaged in conducting an advertising distributing business in the city of Los Angeles. The only point argued by appellant is the sufficiency of the complaint tested by a general demurrer, which was overruled.

[1] 1. It is urged that the complaint fails to allege a breach of the contract. We are unable to perceive any merit in this contention. It clearly appears that defendant, in violation of the terms of his agreement, was at the time of filing the complaint engaged in a like business in the county of Los Angeles, and was engaged in soliciting the distribution of advertising matter from advertisers in said county, and soliciting business from the customers of plaintiff, as a result of which acts it was alleged he would suffer irreparable damage. The purpose of the action was to specifically enforce a negative covenant, the violation of which must necessarily constitute an invasion of plaintiff's rights. The specific point urged by appellant is that it is not alleged that defendant has succeeded in securing any of plaintiff's customers. In such case as this, the right to enforce a covenant does not depend upon a showing of the actual loss of customers who might in any event have discontinued their patronage, but upon the conclusion of the court, justified by the facts alleged, that injury to plaintiff would very probably result from defendant's acts, and that such injury would be irreparable. The re-entry of defendant in the active management of a business in Los Angeles county of like character to that which he had sold would necessarily result in depriving plaintiff of the good will of the business purchased, and hinder and obstruct the latter's successful conduct and management thereof. That defendant was actually engaged in soliciting plaintiff's customers was, not only a breach of his implied warranty (section 1776, Civ. Code), but, in effect, an impending threat of injury to the latter, for which injury, inconvenience, and perplexity the law afforded no adequate remedy. The facts alleged are ample to show not only a breach of the contract, but that plaintiff would by reason of a continuance thereof be irreparably damaged.

[2] 2. The contract contained a clause to the effect that, in case of a violation of the provision whereby defendant agreed that he would not engage in a like business to that sold, he should forfeit to plaintiff's assignor \$5,000 as liquidated damages. Appellant contends that plaintiff was limited in his rights to an action at law to recover the sum specified in the contract as liquidated damages. From our point of view, it is unnecessary to determine whether the amount specified in the contract should be deemed liquidated damages or a penalty exacted for violation

of the contract, in which latter case, but not the former, it is conceded the remedy by injunction would lie. It is likewise unnecessary to discuss or attempt to distinguish the numerous authorities cited by appellant in support of his contention. Whatever may be the law elsewhere, the question, so far as this state is concerned is concluded by the Code. Section 3389, Civil Code, provides: "A contract otherwise proper to be specifically enforced, may be thus enforced, though a penalty is imposed, or the damages are liquidated for its breach, and the party in default is willing to pay the same." Under the provisions of this section it is therefore immaterial whether the sum specified in the contract be regarded as liquidated damages or as a penalty, for in either case the plaintiff had a right to waive an action at law and resort to equity for specific performance. *Glock v. Howard, etc., Co.*, 123 Cal. 9, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17.

[3] 3. The suit was instituted by plaintiff to whom Lee, the purchaser from defendant, had sold, transferred, and assigned the business and contract, the breach of which is made the subject of the action. Appellant contends that such transfer and assignment imposed no obligation upon defendant enforceable at the suit of such assignee, for the reason that the word "assignee" does not appear to have been inserted in the contract; in other words, that the rights acquired by Lee under defendant's covenant were not subject to assignment. The courts have repeatedly held to the contrary, where the assignment, as here, was made in connection with the business it was designed to protect and going with the business.

[4] The good will of a business is property and, like other property, transferable. Section 993, Civ. Code. We are unable to find any provision of the Codes which prohibits such an assignment; hence, like other property, it may be transferred. Section 1044, Civ. Code. In discussing a like question, the court, in *Francisco v. Smith*, 143 N. Y. 488, 38 N. E. 980, says: "Such an agreement is a valuable right in connection with the business it was designed to protect, and, going with the business, it may be assigned, and the assignee may enforce it just as the assignor could have enforced it, had he retained the business." In *Hedge, etc., Co. v. Lowe*, 47 Iowa, 141, it is said: "It is urged by appellant that the contract is a personal one, and that it cannot be assigned. If the agreement not to engage in the agricultural implement business was of sufficient value to constitute in part an inducement to Vorse to purchase, it must be admitted that it might be equally valuable to a vendee of Vorse. The question here is, not whether this agreement may be the subject of transfer in the abstract, but whether it may be transferred with the business to which it originally pertained." To the same effect,

see vol. 22, Cyc. p. 866; Up River Ice Co. v. Denler, 114 Mich. 296, 72 N. W. 157, 68 Am. St. Rep. 480; Webster v. Buss, 61 N. H. 40, 60 Am. Rep. 317. In the event of Lee's death, without assignment, there can be no doubt, we think, that his executor in taking over the business could have enforced the contract in protecting the same, and if this be true it must follow that Lee's assignee would have the same right. The case of Hillman v. Shannahan, 4 Or. 163, 18 Am. Rep. 281, cited by appellant, if an authority to the contrary, should not be accepted against the great weight of authority holding otherwise. The action there, however, was to recover liquidated damage upon a bond, conditioned that defendant would not violate his covenant, not, as here, to enforce a covenant, the performance of which was necessary to protect the business.

4. Another ground of objection to the complaint is that it appears therefrom that defendant was not engaged in business on his own account, but merely as the employé of others. It appears that defendant was conducting the business under the name of Rynerson-Blanchard Company, and that he, together with his wife and her father, owned the business, and that he was manager and executive head thereof. The complaint thus clearly shows that defendant had "entered into a similar business to that contracted to be sold." Conceding that he possessed no pecuniary interest in the enterprise, nevertheless engaging in soliciting business for the Rynerson-Blanchard Company, who was a competitor of plaintiff, was a violation at least of the spirit of his covenant. In the case of Kramer v. Old, 119 N. C. 1, 25 S. E. 813, 34 L. R. A. 389, 56 Am. St. Rep. 650, the court says: "It is the duty of the court to restrain the contracting parties from violating the spirit, as well as the letter, of the agreement. Under a fair and just interpretation of its terms, the stipulation meant that the three defendants would not engage in business, so as to bring their skill, names, and influence to the aid of any competitor carrying on the same trade within the prohibited limits." See, also, Richardson v. Peacock, 28 N. J. Eq. 155; Salzman v. Siegelman, 102 App. Div. 406, 92 N. Y. Supp. 845; Meyers v. Merillion, 118 Cal. 357, 50 Pac. 662; Pittsburg Co. v. Pennsylvania Co., 208 Pa. 37, 57 Atl. 77; Whitney v. Slayton, 40 Me. 231.

[5] 5. While appellant does not direct our attention to the fact or make any point thereon, reference to the judgment discloses that it is erroneous in this: That by its terms defendant is enjoined from engaging in or carrying on the business of the distribution of advertising matter in the county of Los Angeles (not exceeding, however, the term specified in the contract), so long as

plaintiff, "or his successors or assignees," continue the business of the distribution of advertising matter in Los Angeles county. Section 1674, Civil Code, provides that "one who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part thereof, so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein." Under the provisions of this section of the Code, plaintiff, who derived his title to the good will of the business by a transfer from W. W. Lee, who was the buyer from defendant, is entitled to have the contract enforced for his protection, so long as he carries on a like business in the county, but such right cannot be extended to his successors and assigns. It therefore follows that the judgment, in so far as it has reference to the successors and assignees of plaintiff, is unwarranted and to that extent erroneous. As thus indicated, the judgment should therefore be modified.

[6] 6. No argument is presented in support of a reversal of the order denying the motion for a new trial. It is not improper to say, however, that the motion was made upon a statement which contains no specifications of the particular errors relied upon; and hence, under the provisions of section 659, Code of Civil Procedure, the same must be disregarded. De Molera v. Marti, 120 Cal. 544, 52 Pac. 825; McLennan v. Wilcox, 126 Cal. 53, 58 Pac. 305.

The cause is remanded to the trial court, with instructions to modify the judgment by striking therefrom the words "or his successors or assignees," and also striking therefrom the words "or his assignees or successors," and, as thus modified, the judgment and order appealed from are affirmed, at appellant's cost.

We concur: ALLEN, P. J.; JAMES, J.

16 Cal. App. 310

COREY v. STRUVE et al. (Civ. 838.)

(District Court of Appeal, Third District, California. May 24, 1911. Rehearing Denied by Supreme Court July 22, 1911.)

1. CROPS (§ 1*)—CONTRACTS—"CROP"—"CROP OF BEETS."

The word "crop," in its general significance, means the product of cultivated plants while growing, or the product after it has been harvested or severed from the stock or root to which it is attached, and the phrase "crop of beets" may be interpreted to include the tops of the beets.

[Ed. Note.—For other cases, see Crops, Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 2, pp. 1755, 1756.]

2. LANDLORD AND TENANT (§ 326*)—RENTING ON SHARES—CROPS—LEASE—CONSTRUCTION.

A lease of a farm provided that a part should be devoted to the growing of a crop of

sugar beets, and that at the proper time, and when directed by a sugar company, the tenant would harvest, top, haul, and deliver the beets to the company, and when so delivered one-fourth of the beets in weight should be delivered in the name of the landlord, as his property as yearly rental. The lease made no provision for the disposition of the tops. *Held*, that under Civ. Code, § 1636, requiring the court to give effect to the mutual intention of the parties to a contract as it existed at the time of the contract, the lease did not give the tops to the tenant, in view of the evidence that the landlord in such leases always kept the tops.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1367-1378; Dec. Dig. § 326.*]

3. LANDLORD AND TENANT (§ 326*)—RENTING ON SHARES—CROPS—LEASE—CONSTRUCTION—“FARMING.”

A lease of a farm for the growing of beets required the tenant to deliver, when directed by a sugar company, beets to it, and that one-fourth should be delivered in the name of the landlord as yearly rentals, and provided that the tenant should farm the beet land in accordance with the customs and directions of the sugar company, or its field superintendent. The undisputed evidence showed that one of the customs of the sugar company was to leave the beet tops on the ground, to be plowed under as fertilizer. *Held*, that under Civ. Code, § 1641, requiring the court, construing a contract, to take the whole contract together and give effect to every part, if practicable, the beet tops did not pass to the tenant, but must remain on the land; the custom of the company being a part of the “farming,” which includes the cultivation and fertilization of the soil, as well as caring for and harvesting the crops.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1367-1378; Dec. Dig. § 326.*]

For other definitions, see *Words and Phrases*, vol. 3, p. 2700; vol. 8, p. 7661.]

4. CUSTOMS AND USAGES (§ 15*)—EVIDENCE—ADMISSIBILITY.

Under Civ. Code, § 1646, providing that a contract must be interpreted according to the law and usage of the place where it is to be performed or made, and Code Civ. Proc. § 1870, subd. 12, providing that evidence is admissible of usage to explain a contract, evidence of usage is admissible where the parties to a contract omitted to state important parts of their agreement, and the usage is consistent with the express terms, and the adoption of the usage can clearly be presumed to have been intended by the parties.

[Ed. Note.—For other cases, see *Customs and Usages*, Cent. Dig. §§ 30-33; Dec. Dig. § 15;* *Evidence*, Cent. Dig. §§ 1945-1952.]

5. CUSTOMS AND USAGES (§ 12*)—EVIDENCE—ADMISSIBILITY.

Before evidence of usage can be given any effect in the construction of a contract, it must appear that the parties thereto were aware of the existence of the custom.

[Ed. Note.—For other cases, see *Customs and Usages*, Cent. Dig. §§ 23, 24; Dec. Dig. § 12.*]

6. CUSTOMS AND USAGES (§ 12*)—EVIDENCE—ADMISSIBILITY.

A tenant, in a lease of a farm for the growing of crops of sugar beets, claimed to be unacquainted with the custom in the locality which required that the tops of the beets should be left on the land, except so far as his knowledge was limited to a single lease obtained from a sugar company; but the tenant knew that the company required the tops to be left on the land. About 12,000 acres were farmed to beets in the locality in which the sugar company

farmed and leased about 7,000 acres. *Held*, that the general usage must be presumed to have been known by the tenant, and he was bound thereby, and the tops must remain on the land.

[Ed. Note.—For other cases, see *Customs and Usages*, Cent. Dig. §§ 23, 24; Dec. Dig. § 12.*]

Appeal from Superior Court, Monterey County; M. T. Dooling, Judge.

Action by Hiram Corey against James P. Struve and another. From a judgment for defendants, plaintiff appeals. Reversed.

Daughert & Lacey, for appellant. J. H. Andresen and W. S. White, for respondents.

BURNETT, J. The appeal is from the judgment and the order denying plaintiff's motion for a new trial.

On October 4, 1907, plaintiff leased to defendants, for the term of five years, a large tract of farming land in the Salinas valley, by a written lease, which provided that during each year of the term not less than 250 acres should be devoted to the growing of sugar beets. It is alleged in the complaint “that during the year 1908 the defendants planted about 278 acres of said land to sugar beets, and a large part of the crop of sugar beets raised thereon has been harvested by said defendants. That in harvesting the said crop of sugar beets the defendants caused the tops of said beets to be cut therefrom and placed upon the surface of said land. That plaintiff is the owner of said beet tops, and by the terms of said lease said beet tops were to remain upon said land, and it is necessary, to prevent impoverishment of the soil, that said beet tops remain upon said land as fertilizer.” That under the terms of said lease a part of the rental to be paid plaintiff consists of a share of the crop of sugar beets. “That the defendants, without any right whatever, have removed from said lands a large part of said beet tops, and have sold and otherwise disposed of the same, and they assert and give out and threaten that they intend to and will remove from said lands the beet tops now remaining thereon,” as well as those to be grown hereafter. Wherefore plaintiff prayed for an injunction to restrain the defendants from removing any beet tops from the premises during the term of said lease.

Appellant states that his cause of action “is based upon three propositions: (1) That the removal of the beet tops would impoverish the soil, and would therefore be in violation of the provision of the lease against waste. (2) That the removal of the beet tops would be in violation of the following provision of the lease: ‘Said lands so farmed to beets to be farmed in accordance with the customs and directions of the Spreckels Sugar Company, or its field superintendent.’ (3) That the plaintiff as landlord is the owner of the beet tops.”

In accordance with its findings of fact and conclusions of law, the trial court "ordered, adjudged, and decreed that the defendants be and they are hereby enjoined from removing from the lands described in the lease referred to in the complaint any of the beet tops cut from sugar beets grown on said premises during the term of said lease. That the plaintiff is the owner of one-fourth of said beet tops, and the defendants are the owners of three-fourths of said beet tops; and each of said parties may dispose of his share of said beet tops by feeding them to cattle on said premises, and retain all moneys or benefits received therefrom without accounting to the other party therefor; but if said beet tops are fed to stock they shall be fed upon the lands whereon said beet tops are grown, in the manner in which beet tops are usually fed; that is to say, they shall not be gathered from the rows in which they are deposited when cut, but may be scattered upon said lands."

It is not disputed that when the beets are ready for harvesting they are ploughed out of the ground; the tops are then cut off and deposited in rows alongside of the rows of beets. The beets are then loaded into wagons and hauled to the Spreckels sugar factory, and the tops are customarily left upon the ground, to be plowed under for fertilizing purposes, or fed upon the ground to cattle turned therein. The evidence, it may be remarked, shows a conflict as to whether it is more beneficial to the soil to plow the tops under or to feed them to cattle upon the land, thereby obtaining the ordure for fertilization.

The trial court based the conclusion as to the ownership of the beet tops upon its construction of the following provision in the lease: "And at the proper time or times, and when directed by the said Spreckels Sugar Company, they (the lessees) will harvest, top, haul and deliver said beets to the Spreckels Sugar Company at Spreckels, California, and when so delivered, one-fourth of said beets, in weight so delivered, are to be delivered in the name of, and for the use of the party of the first part herein, as his property and as the yearly rentals for such portion of said lands farmed each year to beets, and said party of the first part hereby reserves to himself the one-fourth of the crop of beets raised each year as the property of the lessor." It is stated by appellant that the learned trial judge declared in his opinion that, "so far as the ownership of the tops is concerned, it is determined by this provision, and under it the plaintiff cannot be held to be the owner of more than one-fourth of such beet tops." We think the contract has not been construed according to the intention of the parties as gathered from all the terms of the instrument, viewed in the light of the familiar rules of construction.

[1, 2] It is no doubt true that the phrase "crop of beets" might be interpreted to include the tops, as the word "crop," in its general signification, means the product of cultivated plants while growing, or that product after it has been harvested or severed from the stock or root to which it was attached. Volume 8, Am. & Ency. of Law, p. 302. It seems clear, though, that the parties here used the term in the latter and more restricted sense. There can be, indeed, no uncertainty as to what they intended should be delivered to the Spreckels Sugar Company. The defendants agree to "harvest, top, haul and deliver said beets to the Spreckels Sugar Company." A distinction is here recognized between the beets and the tops. The said agreement simply means, and can mean nothing else than that, after harvesting and cutting off the tops, they are to deliver the esculent roots to the company. Indeed, there is no contention that the defendants were to deliver the tops to the company. It is plain, therefore, that the rent consisted of a proportion of the beets after they had been topped, for the provision continues, "and when so delivered, one-fourth of said beets, in weight so delivered are to be delivered in the name of and for the use of the party of the first part herein, as his property and as the yearly rental of such proportion of said lands farmed each year to beets." It requires nothing more than a transposition of the foregoing to make it appear as follows: The yearly rental of the land farmed each year to beets shall be one-fourth of said beets in weight after they have been harvested, the tops removed, and the beets then delivered to the Spreckels Sugar company.

The succeeding clause would seem to be a mere repetition of the provision as to the rent. "One-fourth of the crop of beets" had already been described as the beets without the tops. If we were to construe the latter provision as including the tops, we would then have two inconsistent provisions, one providing that the rent should consist of the beets without the tops, and the other reserving for the rent the beets, including the tops. As used, therefore, in the provision in question, the term "crop of beets" seems to mean simply the yield of beets, or the beet product of the soil, and there would be no difference in signification if the reservation had been of "one-fourth of said beets" as described in the preceding clause.

Again, it was not the intention of the parties to make provision in the lease for the division of the beet tops, and it was their understanding that no provision of the kind had been made. James P. Struve, who conducted the negotiations for the defendants and the only one of the latter who testified, was asked on cross-examination: "When it says in this lease 'that Mr. Corey, the lessor, reserves to himself the one-fourth crop of beets,' etc., did you understand that the word

'crop' included tops?" He answered: "I did not." Again, he was asked this question: "Was it your understanding that there was some provision about tops in the lease?" His answer was: "No; it never occurred to me until Mr. Armstrong approached me first."

While the appellant was not asked the direct question as to his understanding of the lease in this respect, it is a fair inference from his testimony that he understood there was no such provision. He refers to written leases to other parties, and declares "there was never any provision with reference to beet tops," and also, "the beet tops from the land were never sold and moved from the land." Again he says: "The landlord always kept the tops. I do not know of one who does not." Indeed, the attitude of both parties was consistently opposed to the view that there was any provision in the lease as to the division of the beet tops. The defendants, at the trial, relied upon the custom prevailing in Pajaro Valley, where they had farmed for years, and the plaintiff upon the custom in Salinas Valley, and also upon a subsequent provision of the lease hereinafter to be noticed. It can hardly be gainsaid, therefore, that the construction placed upon the lease by the court below is directly opposed and contrary to the intention and understanding of the parties. Of course, the basic principle of all interpretation of contracts is "to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Section 1636, Civ. Code. If the contract had been free from any doubt, manifestly, in the absence of mistake or fraud, no extraneous evidence would be admissible as to the understanding or intention of the parties. That is not the case here, and it may be said that no objection was made to such evidence.

Another principle, somewhat allied to the foregoing, may also be invoked. Each party undoubtedly understood that the other assumed that the lease made no provision as to the division of the beet tops. Defendants, for instance, so believing themselves, would naturally conclude that plaintiff had the same view. This is strengthened by the consideration that they knew it was the custom of the Spreckles Sugar Company and all of its tenants to leave the beet tops upon the ground and plow them under; that beet tops were never mentioned in any conversation with plaintiff about the lease; that at the time the lease here was made the respondents had a similar lease of adjoining lands from the Spreckels Company upon the same terms (one-fourth of the crop), which provided that the beet tops belonged to the landlord and should be left upon the ground, and the lease itself provided that the beet land should be farmed in accordance with the customs and directions of the Spreckels Sugar Company, which customs required the tops to be left upon the ground and to be

plowed under. Viewed in this aspect, it would not be improper to consider defendants as promisors, and apply to them section 1649 of the Civil Code, providing that: "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." Giving effect to this rule, we must accept one of two interpretations, either that no provision was made for the beet tops or that they were to belong to the landlord.

[3] But we think the latter construction is required by the application of another familiar rule that "the whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Section 1641, Civ. Code. Assuming that the provision as to the reservation of "one-fourth of the crop of beets" introduces an element of uncertainty, it is entirely eliminated by the due consideration of the agreement to farm said beet lands in accordance with the customs and directions of the Spreckels Sugar Company or its field superintendent. It is manifest that there is a distinction between "customs" and "directions." They are familiar terms, and it is not necessary to define them. One of the customs, or, in other words, the common practice of the Spreckels Company, was to leave the beet tops upon the ground, to be plowed under as a fertilizer. The evidence shows this without conflict. In fact, the said James Struve testified that he knew "that in this valley the Spreckels Sugar Company required the beet tops to be left on the land." If this custom is to be considered a part of the "farming," it would seem to follow that defendants had promised to thus leave the tops. The word "farming," as suggested by appellant, certainly includes the cultivation and fertilization of the soil, as well as the caring for and harvesting of the crops. It is submitted that the condition is exactly the same as though the lessee had promised to farm the land as it had been farmed by the lessor, and the latter—as really appears to have been the case—for years had plowed the beet tops under. This practice surely would be considered a part of the contract, and the lessee would be bound to pursue a similar course. To accept respondents' interpretation of this clause would be to ignore the significance altogether of the term "customs." Their contention is that they were bound merely to follow the directions of the field superintendent, given by him pursuant to beet-growing contracts, a copy of which appears in the record. Appellant points out that this contract shows that the field superintendent is authorized to direct the lessee as follows: (1) To cultivate up and resow where the crop is not satisfactory. (2) To commence and proceed with the harvesting of the crop and to deliver the same. (3) To select the date of

delivery and the amount to be delivered each day according to the requirements of the factory. If the parties, however, had intended no more than this, they should not have used the word "customs," which, as we have seen, comprehends an additional circumstance of moment. As far as the "directions" are concerned, it was probably contemplated that they should be given through the field superintendent, as agent of the Spreckels Sugar Company, but the "customs," which were to be recognized, relate to the said practice of the Spreckels Company.

[4] But if we admit that the clause under review has no bearing upon the question as to the disposition of the beet tops, then we have a contract with no provision concerning them. The situation would then call for the application of section 1646 of the Civil Code, providing that: "A contract is to be interpreted according to the law and usage of the place where it is to be performed; or if it does not indicate a place of performance, according to the law and usage of the place where it is made." By subdivision 12, § 1870, of the Code of Civil Procedure, it is also provided that evidence is admissible of "usage to explain the true character of an act, contract or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation." The rule has also been stated as follows: "Evidence of usage is admitted to annex incidents to contracts where it is apparent that the parties have omitted to state important parts of their agreements, and the incident so annexed is consistent with the express terms, and its inclusion can fairly be presumed to have been intended by the parties." *Am. & Eng. Ency. of Law*, vol. 29, p. 432.

In *Kilgore v. Bulkley*, 14 Conn. 391, it is said: "Experience and observation prove that the engagements of individuals are in fact entered into with reference to the customs and usages which prevail in the community where they are made; they therefore tacitly agree to conform to them, and, so far from doing injustice by regarding such customs and usages, it is the only mode by which justice can be obtained."

It may not be amiss to cite a few of the many examples of the application of this principle given by appellant in his brief: Where a lease is silent as to the disposition of crops growing at the termination of the tenancy—or "away-going crops"—a local custom, whereby the tenant is entitled to such crops, forms a part of the lease. *Foster v. Robinson*, 6 Ohio St. 90. A contract providing for the sale of "all the timber 6 ins. in diameter," but silent as to "laps," the "laps" passed also by local custom and usage of lumbermen. *Allen v. Crank* (Va.) 23 S. E. 772. Evidence is admissible to show that by custom the term "dry goods," used in a written contract, did not include clothing, hats, caps, or notions. *Wood v. Allen*, 111

Iowa, 97, 82 N. W. 451. In *Callahan v. Stanley*, 57 Cal. 479, it is said: "If there was an existing usage among farmers as to the meaning of the word 'stubble' where this contract was made, it must be inferred that the contracting parties, being farmers, contracted with reference to it, and that they used the word in the broader meaning which was given to it by that usage, and not in the ordinary or popular sense. Evidence of such usage and meaning was therefore admissible to define and explain the peculiar or local meaning of the word as it was used in the contract." And in *Higgins v. Cal. Petroleum, etc., Co.*, 120 Cal. 629, 52 Pac. 1080, it was held that parol evidence was admissible to show that the term "gross ton" had a peculiar local significance, and meant a long ton of 2,240 pounds, and not the statutory ton of 2,000 pounds.

The evidence was quite clear as to the custom in Salinas Valley that the landlord owns the tops. As stated, though, by the witnesses, a provision to that effect was generally contained in the lease; the counsel for defendants stating, in reply to a question by the court, that probably 90 per cent. of all these leases contained a clause providing that the beet tops belonged to the landlord. The plaintiff testified that by custom the landlord always gets the tops, and that he did not know of one who does not; that he always got the tops from former tenants, though their written lease made no mention of them; and that he didn't know of a farmer in the valley who does not leave the tops.

[5, 6] Of course, for evidence of this character to have any potency, it must appear that the parties to the contract were aware of the existence of the custom. It could not be said with any show of reason that they contracted with reference to a custom of which one of the parties was ignorant. "Evidence of usage is admissible only on the ground that the parties who made the contract were both cognizant of the usage, and must be presumed to have made their engagements with reference thereto." *Pennell v. Delta Transportation Co.*, 94 Mich. 247, 53 N. W. 1049. And it is claimed by respondents that they had farmed all their life in Pajaro Valley, and were thus unacquainted with the customs of Salinas Valley, and that their knowledge of local practices was limited to a single lease which they had received from the Spreckels Sugar Company, which would not import knowledge of a general custom. But defendant James P. Struve testified, as we have already seen, that he knew when he came that the said company required the beet tops to be left on the land. It appears in the evidence that about 12,000 acres altogether were farmed to beets, and of this acreage the said company farmed and leased about 7,000 acres. He therefore knew the practice as to a very large part of the whole. It may be said, also, that he no-

where states that he was not familiar with the custom in this respect, although he declares that he was "not familiar with the farmers in Salinas Valley." It is unreasonable to assume that defendants would make no inquiry concerning the matter. It was of considerable importance, and to seek information concerning the custom as to the beet tops would naturally occur to one who had been in the business before, and we think it is a case for the application of the principle that the general usages of a particular trade or business are presumed to be known to those engaged in them. *Smith v. Russell Lumber Co.*, 82 Conn. 116, 72 Atl. 577; *Waring v. Grady*, 49 Ala. 465, 20 Am. Rep. 286; *Ankeny v. Young*, 52 Wash. 235, 100 Pac. 736. And if known there is no doubt that the parties are held to have contracted with reference to them, unless the contrary appears, and such usages form a part of the contract. *Union Insurance Co. v. American T. I. Co.*, 107 Cal. 327, 40 Pac. 431, 28 L. R. A. 692, 48 Am. St. Rep. 140.

In the view we take of the record, the position of respondents is untenable, and the judgment and order are therefore reversed.

We concur: CHIPMAN, P. J.; HART, J.

16 Cal. App. 329

SPAETH v. OCEAN PARK REALTY, MINING & INVESTMENT CO. et al.
(Civ. 947.)

(District Court of Appeal, Second District, California. June 2, 1911.)

1. APPEAL AND ERROR (§ 803*)—DISMISSAL OF APPEAL—EFFECT.

The dismissal, by consent, of an appeal from a judgment has the effect of affirming the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3169-3173; Dec. Dig. § 803.*]

2. PLEADING (§ 127*)—ANSWER—ADMISSIONS.

The complaint, in an action upon a contract providing that defendant on plaintiff's request was to return money paid by plaintiff for the purchase of corporate stock, averred that demand was made for a return of the money, and that at the same time an offer was made to return and surrender the stock, and the answer denied any demand or offer to return the stock excepting a demand made by plaintiff's attorney just before the commencement of the action. *Held*, that the answer admitted a demand and offer to surrender the stock by plaintiff's attorney.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 264-268; Dec. Dig. § 127.*]

3. CONTRACTS (§ 213*)—PERFORMANCE—TIME.

Where the terms of an agreement do not limit the time within which it is to be performed, the law implies that it is to be performed immediately, or at least within a reasonable time.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 957-979; Dec. Dig. § 213.*]

4. CONTRACTS (§ 176*)—CONSTRUCTION—QUESTION FOR JURY.

When facts are undisputed as in the construction of a written instrument or in apply-

ing a rule where the circumstances of the parties are conceded, it is for the court to determine as to the reasonableness of time within which parties may insist upon rights given or reserved.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 767-770, 1097; Dec. Dig. § 176.*]

5. APPEAL AND ERROR (§ 882*)—ESTOPPEL TO ALLEGE ERROR—SUBMITTING ISSUES TO JURY.

Where the court, at the request of both parties to an action on a contract, left it to the jury to determine the question of reasonableness of time, and defendant's recognition of liability in one of a series of similar transactions on one of which plaintiff's action was brought was shown, neither party is in a position to complain of the submission of such issue to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

6. APPEAL AND ERROR (§ 1010*)—REVIEW—FINDINGS.

In an action to recover money under a contract for the purchase of stock on condition that the purchaser would have a right to return the stock if he wished, and receive back his money, an implied finding that the purchaser offered to return the stock in a reasonable time will not be disturbed in the absence of any evidence showing that the delay was so unreasonable as to render the contract oppressive or injurious to the defendant.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1010.*]

7. APPEAL AND ERROR (§ 867*)—REVIEW—DISCRETION OF LOWER COURT—NEW TRIAL—INSUFFICIENCY OF EVIDENCE.

An objection to any evidence being received on the ground that no cause of action was stated in the complaint is, in effect, a demurrer to the complaint on that ground, and cannot be reviewed on an appeal from an order denying a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476-3486; Dec. Dig. § 867.*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Edward Spaeth against the Ocean Park Realty, Mining & Investment Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. M. Palmer and Anderson & Anderson, for appellants. L. G. Susemihl, for respondent.

ALLEN, P. J. [1] The action was for money. Verdict and judgment in favor of plaintiff. Appeal by defendants from an order denying a new trial. An appeal from the judgment was heretofore, by consent, dismissed, the effect of which was to affirm the same. The only matter for review then remaining is as to the action of the court in denying the motion for a new trial.

The principal issue involved relates to the terms and conditions of the contract through which plaintiff acquired 3,000 shares of mining stock from defendants. The terms of this contract were determined by the jury in their affirmative answer to the following special interrogatory: "Did the defendants, at

the time plaintiff purchased the stock, promise the plaintiff to return to him the sums paid by him, viz., \$1,000 and \$500, if he at any time thereafter became dissatisfied or wanted his money back?" The contracts were entered into in August, 1907.

[2] It is averred in the complaint that demand was made for a return of the money, and at the same time an offer was made to return and surrender the stock. The answer denied any demand or offer to return the stock, except a demand made by plaintiff's attorney just prior to the commencement of the action. Construing this answer under the rule, it, in effect, admits a demand and offer to surrender the stock by plaintiff's attorney. Upon the trial the authority of the attorney in the premises was shown. The record discloses, from the remarks of the court and statements of counsel upon both sides, that the trial proceeded upon the theory that two issues only were to be determined and both were matters for the jury: First, the terms of the original contract; and, second, the reasonableness of time within which the rescission was sought by plaintiff. As to the first issue, the evidence was conflicting, but there is enough in plaintiff's testimony to support the answer to the special interrogatory and the verdict based thereon. It is true the questions asked the plaintiff were involved and confusing, and the answers indicated that plaintiff lacked somewhat in intelligence and ability to properly express himself, yet the jury probably made no mistake in arriving at their conclusion. This was the opinion evidently of the trial court, as evidenced by its denial of the motion for a new trial, and we are not prepared to say that the verdict is unsupported.

It is urged by appellants that, assuming the contract to have been as contended by plaintiff and found by the jury, nevertheless, as a matter of law, the plaintiff was not entitled to recover, because he did not attempt to rescind within a reasonable time; and, assuming that the question was one for the jury, no evidence appears to warrant such implied finding.

[3] It is settled law in this state that "when the terms of an agreement do not limit the time within which it is to be performed, the law implies that it is to be performed immediately, or at least within a reasonable time."

[4] We think it may be said that the current of authority is to the effect that, when the facts are undisputed, as in the construction of a written instrument, or applying a rule where the facts and circumstances surrounding the parties are conceded, it is for the court to determine as to the reasonableness of time within which parties may be permitted to insist upon rights given or reserved.

[5] We think, however, under the circum-

stances of this case, where the court at the request of both parties instructed the jury to determine the question of reasonableness of time, that neither party is in a position to question the action of the court in submitting such issue to the jury. It appears from plaintiff's testimony that, at the time of the purchase and promise to return the money, whenever plaintiff at any time became dissatisfied, defendants assured plaintiff that the stock would increase in value, and that he never would exercise his right. In addition, it appears that altogether there were three transactions involving the purchase of stock, in one of which, shortly before the suit, upon demand, defendants returned the consideration. From the finding of the court, all of these contracts were similar in their nature, and the payment and recognition of liability in connection with one purchase was a circumstance which the jury might take into consideration as being a construction placed upon the contract by the parties connected therewith. The peculiar character of this contract and the circumstances connected therewith may be said to indicate that the parties understood that plaintiff should be permitted to hold the stock with all rights reserved until some future date, when the condition of the property or of the market would indicate an increase in value.

[6] We recognize a difference between a contract to pay on demand, or where no time is fixed, which implies that such demand shall be made within a reasonable time, or within such time as by our Code is provided in proper instances, and the contract under consideration through which a future date, indefinite, it is true, was fixed, within which time the plaintiff might determine as to his desire to retain or return the stock; and, in the absence of any showing that the delay was so unreasonable as to render the contract oppressive, or through which an injury resulted to the defendants, the implied finding by the jury that the time was reasonable should not be disturbed. *Quill v. Jacoby*, 37 Pac. 524.¹

[7] Appellants assign as error the action of the court in overruling their objection to any evidence being received, because no cause of action was stated in the complaint. This objection was, in effect, a demurrer to the complaint upon that ground, and cannot be reviewed upon an appeal from an order denying a new trial. *Moore v. Douglas*, 132 Cal. 400, 64 Pac. 705.

We are not satisfied that prejudicial error is apparent in the record, and the order denying a new trial is affirmed.

We concur: JAMES, J.; SHAW, J.

¹ Reported in full in the *Pacific Reporter*; reported as a memorandum decision without opinion in 103 Cal. xviii.

16 Cal. App. 350

LATHROP v. NATIONAL SUGAR CO. et al.
(Civ. 936.)(Court of Appeal, Second District, California.
June 5, 1911.)**1. TRIAL (§ 404*)—FINDINGS—CONSTRUCTION.**

Where the complaint alleges that the sellers of corporate stock falsely represented that the corporation owned valuable patents of machinery, devices, and processes for manufacturing and refining a high grade of marketable sugar from wood charcoal, that the process was entirely practicable, that it had been tested, and that great profits could be made, a finding that each and all of the allegations of the complaint touching the matter of false representations were untrue, is a finding that the statements made were not false but true.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957-962; Dec. Dig. § 404.*]

2. FRAUD (§ 66*)—ACTION—FINDINGS.

A finding in an action for fraud that the seller of corporate stock represented to the buyer that the seller thought the process for the manufacture of sugar from charcoal owned by the corporation was the greatest invention in existence, and that he thought there could be great dividends and profits made in the purchase of stock, and advised the buyer to purchase the stock, was insufficient to sustain a judgment for the buyer in the absence of findings that the statements made were not an honest expression of opinion.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 75; Dec. Dig. § 66.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by Charles Lathrop against the National Sugar Company and others. From a judgment for plaintiff and an order denying a new trial, defendant C. P. Stewart and others appeal. Reversed.

Woodruff & McClure, for appellants.
George P. Adams, for respondent.

SHAW, J. Action for damages on account of fraud and deceit alleged to have been practiced by appellants upon plaintiff in the sale to him of certain shares of corporate stock of the National Sugar Company. From the judgment entered in favor of plaintiff, and an order denying their motion for a new trial, defendants appeal.

[1] The action as originally brought included among the defendants the National Sugar Company, as to which, however, and other defendants not appealing, the same was dismissed at the time of the trial. Defendant Stewart was the president of the corporation and a stockholder therein. Defendants Wayne and McGraw were copartners doing business as stockbrokers in Los Angeles under the firm name of Wayne & McGraw. In July, 1907, plaintiff purchased from Wayne & McGraw certain shares of the capital stock of said corporation, for which he paid the sum of \$740, and received a certificate therefor. The complaint alleges that in order to persuade and induce plaintiff to purchase the stock the defendants Stewart, Wayne and McGraw made certain representations to

plaintiff and upon which he relied and was thereby induced to make the purchase, and that said representations were false and untrue, and when made by defendants known by them to be false and untrue. Briefly stated, these alleged false representations were to the effect that the National Sugar Company owned valuable patents and patent rights of machinery, devices, and processes for manufacturing and refining a high grade of marketable sugar from wood charcoal at a cost below that of any other known process for the manufacture of sugar; that said process was entirely practicable, that it had been in every way tested, and that its results were a certainty, and by the use thereof great profits could be made; that the proceeds of the sale of stock in said corporation were to be used in the installation and equipment of a plant for carrying out the purposes of the corporation, and that defendant Stewart exhibited to plaintiff a machine and device in operation, whereby sugar was apparently, but not in fact, being produced from wood and carbon, or charcoal; that it was falsely claimed that the sugar was made from wood and charcoal; that the stock of said corporation would be of great value and far in excess of the amount paid by plaintiff therefor; that defendants conspired together for the purpose of falsely making such representations to plaintiff, with the intent to use the corporation as a scheme and device in the selling of stock to this plaintiff.

[2] The court found, "That on account of the statements of C. P. Stewart and Herbert N. Wayne, of the firm of Wayne & McGraw, the said plaintiff was induced to purchase and did purchase of and from Herbert N. Wayne stock of the National Sugar Company in the sum of seven hundred and forty dollars (\$740);" but each and all of the allegations of the complaint touching the matter of false representations claimed to have been made by defendants are found to be untrue. Hence, it follows the statements made to plaintiff, and which the court found induced him to purchase the stock, were not false, but true. The court further found that "Wayne, of the firm of Wayne & McGraw, did represent to plaintiff that the said Wayne thought it (the process for the manufacture of sugar from charcoal) was the greatest invention in existence, and that he thought there could be great dividends and profits made in the purchase of stock, and also advised the said plaintiff to purchase stock in the National Sugar Company." Even if this finding could be regarded as material or responsive to any issue, and it is neither, it is not found that the same was not an honest expression of Wayne's opinion upon the future success of the enterprise. On the contrary, since the court found that the company owned a patented device and process

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

entirely practicable which enabled it to manufacture a high grade of marketable sugar out of wood charcoal and water at a cost below that of any other process for producing sugar, and that by means thereof great profits could be made, it would seem that Mr. Wayne was fully justified in the belief that the National Sugar Company was destined to become a strong factor in destroying the alleged controlling power of the so-called sugar trust. As to defendant Stewart, the court found that he "did not at any time induce the plaintiff to purchase stock of said corporation, or any corporation; nor did the said Stewart offer to plaintiff or advise plaintiff to purchase stock from said corporation, or any person or individual."

The fact that respondent's able and learned counsel presents no argument, either oral or written, in support of the court's ruling, leads to the conclusion that no reason can be assigned for affirming the order and judgment. In this we concur.

Judgment and order reversed.

We concur: ALLEN, P. J.; JAMES, J.

16 Cal. App. 302

CARPENTER v. ASHLEY. (Civ. 803.)

(District Court of Appeal, Third District, California. May 24, 1911. Rehearing Denied by Supreme Court July 22, 1911.)

1. APPEAL AND ERROR (§ 1001*)—REVIEW—VERDICTS—CONCLUSIVENESS.

A verdict upon sufficient evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3928; Dec. Dig. § 1001.*]

2. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL OF INSTRUCTIONS.

The refusal of instructions upon matters covered by other instructions is proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

3. TRIAL (§ 296*)—INSTRUCTIONS—EFFECT AS A WHOLE.

In an action for slander, where the court, having instructed the jury that the words alleged to have been spoken were not privileged, charged them that the defendant claimed that the words alleged to have been spoken were privileged, the latter statement did not prejudice the plaintiff, for the court had distinctly told the jury that defendant's claim was not correct.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713; Dec. Dig. § 296.*]

4. LIBEL AND SLANDER (§ 124*)—TRIAL—INSTRUCTIONS.

An action of slander was brought against defendant, who was district attorney, for words alleged to have been spoken by him in a prosecution where plaintiff was attorney for accused. On trial plaintiff testified that some of the slanderous words complained of were spoken in a prosecution where plaintiff was tried for perjury. The court instructed the jury upon the duty of the prosecuting attorney, upon the discovery of crime, or upon his having reasonable cause of suspecting the crime had been committed. Held that, as the instruction was obviously drawn to inform the jury that the words spoken in the prosecution where plain-

tiff was the accused were privileged, the instruction could not have misled the jury into believing that the words spoken in the case where plaintiff was counsel were privileged.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 365-373; Dec. Dig. § 124.*]

5. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS.

Where the court, in an action for slander, had charged that the slanderous words alleged in the complaint were actionable "in themselves," and that express malice need not be proved, it was not improper for the court to refuse an instruction telling the jury that the words charged were actionable "per se."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

6. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS.

In an action for slander, where the court had in terms charged that it was not necessary to prove all the words to have been spoken, it being sufficient to prove the words in any one of the statements of slanderous words contained in the complaint, and that, when one person utters words concerning another which in their common significance impute the crime of perjury or subornation of perjury, it is presumed that they were used in that sense, a requested instruction, charging the jury that, if defendant spoke of plaintiff in the presence of others any of the slanderous words charged, the import of which was to accuse plaintiff of the crime of perjury or subornation of perjury, plaintiff was entitled to a verdict, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

7. APPEAL AND ERROR (§ 1048*)—REVIEW—HARMLESS ERROR.

In an action for slander, where a witness was asked whether he heard anything further than was said by defendant, the sustaining of an objection to that question was not prejudicial when the witness answered that he remembered nothing else.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1048.*]

8. APPEAL AND ERROR (§ 1214*)—DECISION ON APPEAL—EFFECT ON RETRIAL.

In an action for slander, where the Supreme Court, in a previous appeal in the same action, had held that a newspaper report was not admissible, such report could not be admitted upon being identified by the reporter who wrote it, although it was properly used by the reporter to refresh his memory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4715; Dec. Dig. § 1214.*]

9. LIBEL AND SLANDER (§ 104*)—EVIDENCE—MALICE.

In an action for slander, where the words charged were slanderous per se, it was not error to exclude evidence tending to show express malice, as such malice was implied by the language used.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 284-291; Dec. Dig. § 104.*]

10. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for slander, where defendant was entitled to show that some of the words charged were privileged, being uttered in a case in which plaintiff was the accused and defendant district attorney, the admission of the indictment in that case to prove the fact of privilege was not prejudicial error, though the proof might have been made in briefer form.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.*]

11. LIBEL AND SLANDER (§ 103*)—EVIDENCE—ADMISSIBILITY.

In an action for slander, where defendant had shown that some of the words charged were uttered in a prosecution for perjury in which plaintiff was the accused and defendant had been the prosecuting attorney, evidence that the indictment was fictitious, and was fraudulently obtained, was not pertinent to the issue and was properly excluded.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 103.*]

12. WITNESSES (§ 255*)—REFRESHING MEMORY—USE OF WRITINGS.

Where the district attorney, who was present at the trial of a criminal case, had the official reporter take down the testimony of the witnesses and what occurred at the trial, the district attorney in a later case could use those notes to refresh his memory to enable him to testify to the facts; the reporter having died in the meantime.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 874-890; Dec. Dig. § 255.*]

13. CONSTITUTIONAL LAW (§ 24*)—CONSTRUCTION—EFFECT AS TO EXISTING LAWS.

The libel and slander act (St. 1871-72, p. 533), having been passed before the adoption of the Codes, and the present Constitution, is not unconstitutional as requiring the plaintiff to file an undertaking for the payment of costs, and a defendant, having been successful, is entitled to a reasonable attorney's fee as an item of his costs.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 21-29; Dec. Dig. § 24.*]

Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Action by A. H. Carpenter against A. H. Ashley. From a judgment for defendant, plaintiff appeals. Affirmed.

See, also, 83 Pac. 444.

A. H. Carpenter, for appellant. Nicol & Orr, G. F. McNoble, and A. H. Ashley, for respondent.

CHIPMAN, P. J. Action for slander. Plaintiff complained that defendant, on January 23 and 24, 1901, spoke and published certain defamatory words of and concerning plaintiff, in the presence and hearing of divers persons, to his damage in the sum of \$10,000. Defendant denied, in his answer, that he uttered the words attributed to him or any words other than as defendant set forth; that they were spoken under circumstances which he described and while defendant, as district attorney, was prosecuting one Ennis in a justice's court whom plaintiff was defending; that the language used by defendant had its origin in connection with certain testimony being given by one Sennett, whom defendant accused of committing perjury and whom he declared his intention to have arrested and prosecuted therefor; that the language addressed to plaintiff and which he used of and concerning him was entirely different from that attributed to him by plaintiff and was not intended to and did not charge plaintiff with having committed the crime involved in the

alleged slanderous words; and that what defendant did say was true and was spoken in the discharge of his duty as district attorney and was privileged.

This is the second trial of the action by a jury, in both of which defendant had the verdict. The judgment on the verdict at the first trial was reversed on appeal, the Supreme Court holding, against the view taken by the trial court in the instructions given and refused at that trial, that the words alleged to have been uttered by defendant were not privileged. *Carpenter v. Ashley*, 148 Cal. 422, 83 Pac. 444.

[1] The issues at the second trial were the same as at the first trial and met like fate at the hands of the jury upon sufficient evidence. Unless, therefore, the trial court erred either in its instructions to the jury or its refusal to give such as were asked by plaintiff, or in its rulings upon the evidence, the judgment must stand.

The burden of appellant's complaint of the instructions is that the court ignored the law of the case as laid down by the Supreme Court on the first appeal, namely, that under the disclosed facts the words alleged to have been spoken were not privileged. Plaintiff requested 28 instructions. The court gave 11 of these as requested and 7 after some modification not pointed out nor complained of. In at least two of these instructions—numbered 6 and 15—the court distinctly and unequivocally told the jury that the words spoken by defendant were not privileged, and, in No. 15, the court stated "that plaintiff is entitled to a verdict against the defendant without proof of special damage," if the jury "believe from the evidence that the defendant spoke or uttered the words."

[2] Instruction No. 16 was refused probably, and certainly might well have been, because given in Nos. 6 and 15. For like reason the court properly refused No. 22. The instructions given were favorable to plaintiff in all respects and covered every phase of the case substantially as requested by plaintiff.

[3] In the thirty-first instruction the court briefly referred to the issues presented by the pleadings, in course of which the court stated, among other things, that the defendant "claims that such publication (the words alleged to have been spoken) was privileged." Complaint is made of this. But we do not see that harm could have thus come to plaintiff's case, for it was but stating what defendant claimed and what the court had distinctly told the jury was no defense because not privileged.

[4] Instructions numbered 32 and 33 had reference only to the duty of the district attorney, upon the discovery of crime or upon his having reasonable cause for suspecting that a crime has been committed amounting

to felony, to bring the same to the attention of the grand jury. It appeared from plaintiff's testimony, when on the witness stand, that some of the slanderous words complained of were spoken by defendant when he was addressing the jury at the trial of *People v. A. H. Carpenter* (plaintiff here) on the charge of perjury. The instruction was drawn doubtless to inform the jury that words spoken under such circumstances were privileged. These instructions could not, we think, have been understood by the jury as in any wise weakening the force of the instructions given with reference to the words which were spoken at the trial of *People v. Ennis*, which were the words referred to in the complaint.

Instructions 12, 14, and 24 "are," as stated in appellant's brief, "to the effect that where the words are actionable per se the plaintiff is entitled to recover without proof of special damage."

[5] The court, in its instruction 5, given at plaintiff's request, told the jury that the words charged in the complaint "are actionable in themselves" and that "express malice need not be proved." The point made by appellant seems to have been covered, except that the court used the words "actionable in themselves" instead of "actionable per se." It is altogether probable that the jury would not have been further enlightened by giving the language in Latin.

[6] Instruction 23 was that if the jury believed that "defendant spoke of plaintiff, in the presence of others, any of the slanderous words charged in the complaint, the import of which would be to charge the plaintiff with the crime of perjury or subornation of perjury, the plaintiff is entitled to a verdict in his favor, unless the defendant has established the truth of the slanderous words so proved to have been spoken by him and charged in the complaint." If the instructions given had left room for doubt as to whether it was necessary for plaintiff to show that all the alleged slanderous words had been spoken by defendant before plaintiff could recover, there would be force in the claim that this instruction should have been given. But the court had instructed the jury, in No. 9, that "it is not necessary to prove all the words that are charged to have been spoken. It is sufficient to prove, substantially, the words in some one or more of the statements of the slanderous words contained in the complaint." In the instruction No. 8, the jury were told "that when one person utters words concerning another, which, in their ordinary and common significance, impute the crime of perjury, or subornation of perjury, it is presumed it was in that sense they were used and understood by the bystanders who heard them," etc.

Instruction numbered 25 was fully covered in other instructions.

[7] There are numerous assignments of

error in ruling upon evidence offered. Some of these do not call for notice, and none of them import prejudice if error be conceded. We will notice such as appear to call for remark.

Witness Haynes, for plaintiff, had testified to the words spoken as charged, and was then asked, "What else did you hear him say outside of these direct charges of perjury?" An objection was sustained, but the witness stated that he remembered nothing further that was said.

[8] Witness Davis, for plaintiff, was a newspaper reporter and reported to his paper, the *Evening Mail*, one of the cases where the alleged words are said to have been spoken. Plaintiff undertook to prove by the witness that he wrote the article published in that paper and to identify the report as plaintiff's Exhibit 1. Plaintiff tried in several ways to get this report before the jury, but objection was sustained, and finally the court said to counsel: "I call your attention again to the ruling of the Supreme Court in this case (on the first appeal), and I do not want to be called upon to continue repeating my rulings. * * * I don't want you to undertake to do indirectly what the Supreme Court has said you cannot do directly." The Supreme Court had ruled that these newspaper articles were inadmissible. The witness testified that he considered his notes made at the time a memorandum, but did not so consider the full report written out afterwards. He was allowed to refresh his memory from looking over the report, but was not allowed to read the report. He then stated what he remembered. We think the ruling was correct.

[9] Plaintiff was a witness in his own behalf and apparently conducted his own examination. He was asked what he heard defendant say of him at the Ennis trial, and answered: "He addressed you, and he said that you are worse than Stennett, for—(Defendant's counsel moved to strike out the answer on the ground that it is no part of the actionable words in the complaint.)" The motion was allowed. Plaintiff claims that the evidence was intended to show malice. So far as the element of malice was concerned, it was implied by the language charged, and the court so instructed the jury, and that it was not necessary to prove malice. The witness proceeded to testify very minutely to all that he heard said which formed part of the charge made in the complaint.

It was not erroneous to strike out the further answer of the witness: "He said in the justice's court of Stockton township that I should be disbarred."

[10] Witness Carpenter had testified in chief that defendant had said to him: "You have sworn to either 13 or 16 lies and have made the Stennetts perjurers." On cross-examination defendant interrogated witness

to show that this occurred at his trial under an indictment for perjury which defendant was prosecuting. Defendant's counsel stated that his purpose was to show the circumstances under which the statements were made by defendant. It was, perhaps, unnecessary to introduce the indictment to accomplish defendant's purpose; but its introduction could not have made prejudicial what in briefer form might have been brought to the jury's attention.

[11] On re-direct, witness Carpenter put to himself a series of questions the purpose of which he said was to show that the indictment "was fictitious and fraudulent and obtained by defendant through felonious means." Of course, such inquiry was not pertinent.

[12] Defendant Ashley was a witness in his own behalf. He was asked to narrate the colloquy occurring between him and plaintiff during which the alleged slanderous words, or whatever they were, were uttered. He testified that he, as district attorney, directed the official reporter, E. E. Hood, to take down the testimony of the witnesses and what occurred during the hearing, and that Hood did take down all the proceedings and write them out soon thereafter, and that he, the witness, examined the transcription, and that it was a true and correct statement of the proceedings. "The Court: Do you know the transcription made by him under your direction, handed to you, to be a true and correct statement of the proceedings that were taken? A. I do. The Court: I think Mr. Ashley may refresh his memory from it. I don't think they are admissible as independent evidence." Mr. Hood was dead at the time of the present trial. The ruling was not error.

[13] A cost bill was filed by defendant amounting to \$513.90. Among the items was a charge of \$100, counsel fees. This and some other items were objected to by plaintiff. The court taxed defendant's costs at \$317. The only complaint now made is that the allowance of attorney's fees was unconstitutional, citing *Builders' Supply Depot v. O'Connor*, 150 Cal. 265, 88 Pac. 982, 17 L. R. A. (N. S.) 909, 119 Am. St. Rep. 193. That was a case involving the constitutionality of the mechanic's lien law, which gives to the plaintiff reasonable attorney's fees but allows no fees to the defendant should he prevail. The argument against the constitutionality of the act proceeds upon the principle that the parties are entitled to the equal protection of the law, under the national Constitution, which is violated because a right is given one and denied the other. And it violates the state Constitution, which prohibits special laws and requires that general laws shall be uniform.

The libel and slander act was passed March 23, 1872 (St. 1871-72, p. 533), prior

to the adoption of the Codes and prior to the adoption of the new Constitution. It was held, in *Smith v. McDermott*, 93 Cal. 421, 29 Pac. 34, that the section of the act requiring plaintiff to file an undertaking for the payment of costs was constitutional; that the Constitution did not repeal prior legislation. In *Caffey v. Mann*, 3 Cal. App. 124, 84 Pac. 424, the question was whether the defendant was entitled to recover \$100 as attorney's fees, in an action for slander, where the action had been dismissed by plaintiff. The lower court disallowed the item. The appellate court held that it was a proper charge as costs. See, also, same case, 5 Cal. App. 712, 91 Pac. 172. In both cases petition to have the cause heard in the Supreme Court was denied. The mechanic's lien law was passed after the adoption of the Constitution in 1879 and was thus brought within its controlling provisions.

We discover no error in the record.

The judgment and order are therefore affirmed.

We concur: HART, J.; BURNETT, J.

16 Cal. App. 358

PEOPLE v. RODERIQUEZ et al. (Cr. 190.)
(District Court of Appeal, Second District,
California. June 6, 1911.)

1. LARCENY (§ 64*)—POSSESSION OF STOLEN PROPERTY—EVIDENCE.

The mere possession of property recently stolen is not of itself sufficient evidence on which to convict one of theft, but it is at most a circumstance tending to show guilt, and accused must account for his possession.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 170-178; Dec. Dig. § 64.*]

2. BURGLARY (§ 41*)—EVIDENCE—SUFFICIENCY.

On the trial of two defendants jointly charged with burglary, evidence held to sustain conviction of one only.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. §§ 94-109; Dec. Dig. § 41.*]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

V. Roderiquez and Francisco Morano were convicted of burglary, and they appeal. Affirmed as to Morano, and reversed as to Roderiquez.

E. F. Brittan, for appellants. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. Defendants were jointly prosecuted upon an information charging them with the crime of burglary. From a judgment based upon a verdict of guilty, and from an order denying a new trial, defendants jointly appeal.

The evidence presented by the state tended to show that a barn belonging to one Goode, located near Bakersfield, was burglarized and a set of harness stolen therefrom. The

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

following morning Goode and an officer discovered that whoever committed the crime had used a small wagon in removing the stolen articles. This wagon was traced from the barn, as were the tracks of a single individual who evidently propelled the wagon, to a point near what is denominated a shack occupied by defendant Roderiquez and a woman and from this wagon to such shack surface markings upon the ground indicated that something had been dragged from the wagon along the ground to the shack. Outside of this shack, lying upon the ground, Goode and the officer found defendant Morano. Upon inquiry, he disclaimed any knowledge of the taking of the harness or of its whereabouts. He, however, was taken in charge by one of the parties, and Goode proceeded to call to his assistance the sheriff of the county. This officer entered and examined other shacks in the vicinity of the one occupied by Roderiquez and found no harness therein. During this examination Roderiquez, who had been asleep in his own shack, came out and went into an adjoining tent where his breakfast was being served. The sheriff then said to Goode and those present that, having found nothing in the other shacks, he was going to enter the one of Roderiquez and make an examination therein. Thereupon, Roderiquez spoke up and said, "You will find the harness in there under a canvas." They entered and found the harness so covered with canvas, and thereupon the arrest of Roderiquez and Morano followed. The matters above recited, testified to by several witnesses, comprised the evidence offered on behalf of the people.

Morano offered no testimony in his defense, while Roderiquez and the woman occupying the tent with him were both examined in behalf of Roderiquez. The woman testified that the little wagon was the property of Morano; that about 10 o'clock on the night of the burglary Morano dragged the harness so contained in a sack into Roderiquez's tent and covered it with the canvas. Roderiquez testified that he was asleep at the time Morano was said to have brought in the harness and knew nothing of it, and that his only knowledge connected therewith was derived from the statement of the woman to him in the morning, and that his statement to the officers that the harness was inside the tent was based upon such information. He disclaimed any connection with the burglary. It will be observed that there was no evidence tending to connect Morano with the crime, except that of the woman; the stolen property was not in his possession, and in support of the verdict finding Morano guilty it must be assumed that the jury accepted the statement of such woman to be true. Upon such theory, there is ample evidence in the record to sustain

the verdict of guilty as to Morano. We find nothing in the record, however, assuming Morano's guilt sufficient to warrant the jury in finding a verdict of guilty against Roderiquez.

[1] The mere possession of property recently stolen is not of itself sufficient evidence on which to convict a defendant of theft. It is at most but a circumstance tending to show guilt. The duty, however, devolved upon Roderiquez to account for such possession. That he accounted therefor to the satisfaction of the jury is evident from their verdict finding Morano guilty. That but one person was actively engaged in the burglary is made to appear. Roderiquez was informed against as a principal. If Morano be guilty, there is nothing in the record tending to show that Roderiquez was present, or aided or abetted in the commission of the offense, and therefore a principal under section 971 of the Penal Code. Nor is there anything indicating that Roderiquez concealed the crime from a magistrate, or harbored or protected the person charged with or convicted thereof, under section 32 of the Penal Code. He, however, was not informed against as an accessory, but as a principal alone. Were the conviction of Morano not involved, we should be inclined to the opinion that the circumstances were such as to support a verdict of guilty as against Roderiquez.

[2] It is obvious from the evidence that both were not actively engaged in the commission of the crime, and that in the opinion of the jury Morano was the active participant; that it was Morano who propelled the wagon; that it was Morano's wagon which was used in the transportation of the harness; that it was Morano who dragged the harness from the wagon into the tent of Roderiquez; and, in the absence of any testimony tending to show that Roderiquez was an accessory before the fact, we think that the verdict as against Roderiquez cannot be justified.

The judgment and order upon the appeal of defendant Morano are affirmed, while the judgment and order as to defendant Roderiquez are reversed, and as to defendant Roderiquez the cause is remanded to the superior court of Kern county for further proceedings.

We concur: JAMES, J.; SHAW, J.

16 Cal. App. 347

PEOPLE v. GIBSON. (Cr. 189.)

(District Court of Appeal, Second District, California. June 5, 1911.)

1. LARCENY (§ 64*)—EVIDENCE—POSSESSION OF PROPERTY.

That, three or four days after a theft, accused had possession of part of the stolen property, all of which was taken from a trunk,

and that he asserted ownership thereof, warranted a finding that he took all the property.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 170-178; Dec. Dig. § 64.*]

2. LARCENY (§ 68*)—EVIDENCE—POSSESSION OF PROPERTY.

Where one accused of larceny is shown to have had possession of the stolen property, when it had been recently stolen, slight corroborative evidence of inculpatory circumstances will justify submission of the case to the jury, in the absence of evidence on accused's part.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 180, 181; Dec. Dig. § 68.*]

3. LARCENY (§ 77*)—INSTRUCTIONS—POSSESSION OF PROPERTY.

It was proper to instruct that, if the property was stolen and received into accused's possession shortly after being stolen, his failure to account for such possession was a circumstance tending to show guilt; that he was bound to explain the possession, in order to remove its effect as a circumstance to be considered with other suspicious facts, if the evidence showed any, but that mere possession of property recently stolen is not sufficient to convict.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 199-204; Dec. Dig. § 77.*]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Terry Gibson was convicted of grand larceny, and he appeals. Affirmed.

Alfred Siemon, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. By information filed by the district attorney, defendant was charged with the crime of grand larceny, and upon trial therefor he was convicted. The appeal is from the judgment and an order denying defendant's motion for a new trial. He contends for a reversal upon two grounds, namely, that the evidence is insufficient to justify the verdict, and errors of the court in instructing the jury.

The subject of the larceny was a watch, of the value of \$35, and \$65 in coin, which were stolen from the trunk of the prosecuting witness. The evidence tends to show that at the time of the theft this trunk was in a bunkhouse occupied by defendant, the prosecuting witness, and two or three others, all of whom were engaged in constructing oil rigs in the McKittrick oil fields; that the watch and \$65 in coin were in the trunk at noon on July 15th, and that defendant ceased work as an employé and left the bunkhouse on the afternoon of that day, going to the town of McKittrick; that on the day following the owner discovered that the property had been stolen; that on July 19th defendant presented the watch alleged to have been stolen by him to a pawnbroker in the city of Los Angeles and, claiming to own it, negotiated a loan thereon. The defendant offered no evidence whatever.

[1] The possession by defendant of a part of the stolen property three or four days after the theft was in itself, in the absence

of any explanation on his part, a circumstance tending to show guilt. Standing alone, it was not sufficient to justify a conviction, but added to this is the fact that he asserted ownership thereof, a circumstance which, when taken in connection with the fact that both the coin and watch were in the same receptacle and missed at the same time, not only warranted the jury in concluding that defendant had stolen the watch which he claimed to own, but had likewise and at the same time stolen the \$65 in coin. *People v. Melvane*, 39 Cal. 614.

[2] Where, in the absence of any evidence on his part, it appears that a defendant is found in possession of recently stolen goods, slight corroborative evidence of other inculpatory circumstances will justify the submission of the case to the jury. *People v. Vidal*, 121 Cal. 221, 53 Pac. 558. "Whether or not it constitutes proof is a question, in the first instance, for the jury, and, in the second, for the trial judge upon hearing the motion for new trial." *People v. Ward*, 10 Cal. App. 524, 102 Pac. 679; *People v. Cain*, 7 Cal. App. 163, 93 Pac. 1037; *People v. Wong Chong Suey*, 110 Cal. 117, 42 Pac. 420.

There is no merit in appellant's contention that the watch identified by the prosecuting witness as the one stolen from him was not the same watch identified by witness Cohn as the one upon which he made the loan to defendant. Suffice it to say that the evidence tended to establish the fact.

[3] "But the chief cause of complaint and the most potent reason for a reversal of the case," says appellant, is the alleged error of the court in giving to the jury the following instruction: "If the jury believes from the evidence, beyond a reasonable doubt, that the property mentioned in evidence was stolen from the premises described in the evidence, and received into the possession of the defendant shortly after being stolen, the failure of the defendant to account for such possession, or to show that such possession was honestly obtained, is a circumstance tending to show his guilt, and the accused is bound to explain the possession, in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, if the evidence discloses any such." In connection with this, the jury were further instructed as follows: "You are further instructed that the mere possession of property recently stolen is not of itself sufficient evidence upon which to convict the defendant of theft. It is a circumstance tending to show guilt, but not of itself sufficient to warrant conviction." The giving substantially in the form here used of instructions in like cases has been so often approved by the Supreme Court that it may be said the propriety thereof has become settled law in this state. *People v. Horton*, 7 Cal. App. 34, 93 Pac. 382; *People v. Etting*,

99 Cal. 577, 34 Pac. 237; *People v. Abbott*, 101 Cal. 646, 36 Pac. 129. If there is anything in the case of *People v. Abbott*, 34 Pac. 500, cited by appellant, contrary to this view, it must be deemed overruled by these later decisions.

We find no reversible error in the record; hence the judgment and order denying defendant's motion for a new trial are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

16 Cal. App. 333

ZANONE v. SPRAGUE et al. (Civ. 839.)
(Court of Appeal, Third District, California.
June 3, 1911.)

1. HOMESTEAD (§ 91*) — CONSTRUCTION OF HOMESTEAD STATUTES.

Homestead statutes are not designed to protect debtors against the performance of their just obligations, but to provide for the conservation of homes and to protect them against business misfortunes or the improvidence of the heads of families, and are to be given a liberal construction to effect these purposes.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 129; Dec. Dig. § 91.*]

2. HOMESTEAD (§ 158*) — FORFEITURE — DIVORCE.

Where the husband has filed a declaration of homestead of his separate estate, a divorced wife retains no interest therein unless she procures an assignment to her by the court rendering the decree, under Civ. Code, § 146, subd. 4, providing that a court rendering a decree of divorce shall assign the homestead to the former owner, subject to the power of the court to assign it for a limited period to the innocent party.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 310; Dec. Dig. § 158;* *Divorce*, Cent. Dig. § 825.]

3. HOMESTEAD (§ 158*) — FORFEITURE — PRESUMPTION—DIVORCE.

Where a decree of divorce is silent as to the divorced wife's homestead rights, it will be presumed that the court, at the time of granting the divorce, made no order with reference to such homestead, having assigned it neither to the former owner nor to the wife for a limited period, as authorized by Civ. Code, § 146, subd. 4.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 310; Dec. Dig. § 158;* *Divorce*, Cent. Dig. § 825.]

4. HOMESTEAD (§ 158*) — FORFEITURE — DIVORCE.

Where a homestead has been selected by the husband from his separate estate, the whole of the homestead interest vests in him on his divorce, without a decree, assigning such homestead to him, and if not assigned to the wife under Civ. Code, § 146, subd. 4, the property impressed with a homestead right remained in its former owner, freed from any homestead claim which the former wife might have had therein.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 310; Dec. Dig. § 158;* *Divorce*, Cent. Dig. § 825.]

5. HOMESTEAD (§ 158*) — FORFEITURE — DIVORCE — POWER TO ASSIGN HOMESTEAD — "FOR A LIMITED PERIOD."

While the Legislature can authorize the assignment of a homestead upon the granting of

a divorce to either party absolutely, whether such homestead is carved out of the separate property of one or selected from the community, yet, under Civ. Code, § 146, subd. 4, which limits the right of such party in a homestead selected from the separate property of the other to its enjoyment "for a limited period," there may be enjoyment or occupation by the innocent party for a long period of years, even during the life of such party, but it does not mean that the court has the power of vesting the homestead absolutely in such party unless he is the former owner of property from which the homestead was selected.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 310; Dec. Dig. § 158.*]

6. HOMESTEAD (§ 158*) — FORFEITURE — DIVORCE—POWER OF COURT.

Under Civ. Code, § 146, subd. 4, the power of the court to assign a homestead which has been selected from the separate property of either husband or wife to the innocent party to a divorce action may not be exercised arbitrarily, but it is only where the circumstances of the case justly demand such assignment that the power should be exercised.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 310; Dec. Dig. § 158.*]

7. HOMESTEAD (§ 135*) — RIGHTS OF SURVIVING HUSBAND OR WIFE—STATUTORY PROVISIONS—"HUSBAND"—"WIFE"—"SURVIVOR."

Under Code Civ. Proc. § 16, declaring that words and phrases must be construed according to the context and the approved usage of the language, but that technical words and phrases or those which have acquired a peculiar meaning are to be construed according to such peculiar meaning, and Code Civ. Proc. § 1474, providing that if a homestead, selected by the husband and wife or either during coverture and recorded while both were living, was selected from the community or from the separate property of the one selecting it or joining in its selection, it vests, on the death of the husband or wife, absolutely in the survivor. The words "husband" and "wife," as used in section 1474, mean, respectively, a man who has a wife and a woman who has a husband, and do not mean an unmarried man or woman; and the word "survivor," as therein used, refers to the husband and wife as such, and means that, upon the death of the husband as a husband or the wife as a wife, the homestead shall vest absolutely in the survivor of such marriage relation, so that the survivor must be a surviving spouse, and the surviving individual after the dissolution of the marriage is not within the statute.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 246, 248; Dec. Dig. § 135.*]

For other definitions, see *Words and Phrases*, vol. 4, p. 3375; vol. 8, pp. 7459, 7460; vol. 8, pp. 6825-6832.]

8. CONSTITUTIONAL LAW (§ 42*) — PERSONS ENTITLED TO RAISE CONSTITUTIONAL QUESTIONS.

Where the only rights that plaintiff in an action to establish homestead rights could have shown were those arising under Civ. Code, § 146, subd. 4, the plaintiff cannot urge the unconstitutionality of that section so as to require its determination, since, were it constitutional, plaintiff would not be prejudiced thereby.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 39, 40; Dec. Dig. § 42.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Sadie Zanone, as administratrix of the estate of Catherine A. Powers, decas-

ed, against John R. Sprague, as administrator of the estate of Jane M. Sprague, etc., and John R. Sprague, her husband. Judgment for defendants, and plaintiff appeals. Affirmed.

Robert P. Troy and Andrew Thorne, for appellant. W. H. Morrissey, for respondents.

HART, J. This is a suit to quiet title to certain real property situated in the city of San Francisco. The court granted defendant's motion for a nonsuit and rendered and caused to be entered judgment accordingly. The appeal here is by the plaintiff from said judgment.

There is no dispute as to the important facts, which are: Alfred Coad and plaintiff's intestate, Catherine A. Powers, intermarried in the month of July, 1869. The real estate in dispute was the separate property of said Alfred Coad, it having been devised to him by his father, Samuel Coad, prior to his said marriage to plaintiff's intestate. On the 6th day of January, 1870, Alfred Coad filed with the county recorder of the city and county of San Francisco a declaration of homestead on said property. In the declaration so filed it was stated that the family of the declarant consisted of himself and wife (plaintiff's intestate), and that, at the time of the filing of said declaration, they were residing on the premises upon which the declaration of homestead was so filed. On the 14th day of April, 1881, Alfred Coad was, by the superior court in and for the city and county of San Francisco, granted a decree of divorce from plaintiff's intestate. On the 12th day of October, 1890, Alfred Coad and Jane Mary Sprague, defendant's intestate, intermarried and remained husband and wife up to the time of said Coad's death, which occurred on the 13th day of April, 1906. Coad and defendant's intestate, as husband and wife, resided on the premises in dispute at the time of his death. Subsequently to the death of Coad, his widow married John R. Sprague, the marriage ceremony having been performed on the 29th day of September, 1907. After the trial of this action, both Catherine A. Powers and Jane M. Sprague died intestate, and the plaintiff and the defendant were duly appointed administratrix and administrator, respectively, of the estates of the deceased women, and were thereupon substituted as parties plaintiff and defendant, respectively, to this action.

The claim of the plaintiff is that her intestate, Catherine A. Powers (mother of plaintiff by Alfred Coad), is the owner in fee of the premises in controversy by reason of the declaration of homestead filed thereon by Alfred Coad during their coverture (section 1474, Code Civ. Proc.), said homestead never having been abandoned during the life of said Coad by the mode prescribed by law. Section 1243, Civ. Code.

The contention of the defendant is: (1)

That no valid homestead was ever declared and filed on the premises; (2) that, assuming that there was a homestead declared and filed on the premises according to the requirements of the law (sections 1263, 1264, Civ. Code), the interest of Catherine Powers therein terminated with the decree dissolving the marriage relation between her and Coad.

The decree of divorce is absolutely silent as to the homestead or other property, and, manifestly, in such case, if either or both of the propositions contended for by the defendant are maintainable, Catherine Powers had no interest of whatsoever kind or nature in the property in dispute at the time of the commencement of this action.

We are of opinion that the second proposition urged by defendant, viz., that whatever interest in or rights under the purported homestead acquired by plaintiff's intestate were lost upon the entry of the decree granting Coad a divorce from her, is sound and must be sustained. It will, therefore, not be necessary to examine and decide the question whether the attempt to impress the disputed property with the character of a homestead was successful or futile.

[1] "The policy of homestead laws," says Waples, in his work on Homestead and Exemption, page 29, "is the conservation of homes for the good of the state; the mischief to be prevented by those laws is the breaking up of families and homes to the general injury of society and of the state; the remedy provided is the exemption of occupied family homes from the hammer of the executioner," and therefore, as to "homestead statutes, liberal construction is the rule so far as concerns exemptions." *Id.* In other words, homestead statutes are not designed to screen debtors or to protect them against the performance of their just obligations, but to provide for the conservation of homes in the interest of the general welfare, and to that end to protect homes against the business misfortunes or the improvidence of heads of families. While homestead rights are purely creatures of the Legislature, they are, nevertheless, as stated, to be given a liberal construction in order to fully effectuate their beneficent purposes. With this rule in view, we shall consider the respective contentions of the parties to this controversy.

[2, 3] As the property involved here is of the separate estate of Coad, it is manifest, as will be seen, that the only way by which plaintiff's intestate could have retained any interest in the homestead in question, after the divorce was granted, was by an assignment of said homestead to her by the court for a "limited period" at the time the decree granting the divorce was rendered and entered. Subdivision 4, § 146, Civ. Code. Said subdivision of said section provides that, upon the dissolution of the marriage by the decree of a court of competent jurisdiction, in case the homestead has been selected from

the separate property of either, the same "shall be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the innocent party."

As we have seen, the decree of divorce is silent as to the homestead, and it is, therefore, to be presumed that the court, at the time of granting the divorce made no order with reference to said homestead, having assigned it neither to the "former owner" of the property (Coad) nor to the wife "for a limited period." *Brady v. Kreuger*, 8 S. D. 464, 66 N. W. 1083, 59 Am. St. Rep. 771, 775. Indeed from the fact that Coad was the plaintiff in said action and from the further fact that plaintiff's intestate made no appearance therein, but allowed the proofs to be heard and the judgment to be entered upon her default, it may be assumed that the evidence must have disclosed that she did not come within the description of the party, as set forth in that section, to whom a trial court is authorized, in such case, to assign a homestead carved out of the separate property of the other spouse "for a limited period." At any rate, it is very evident that the circumstances developed at the hearing of the suit for divorce were not, in the judgment of the court hearing said action, such as to justify an order awarding the homestead, "for a limited period," to plaintiff's intestate.

If, as we conceive to be the correct rule, the only interest which plaintiff's intestate could have in said homestead, after the divorce was granted, is limited to that interest which she might have acquired had the court found (and made an order accordingly) that the exigencies of the action for divorce warranted it in assigning said homestead to her for a "limited period," then, the court not having so found or made such assignment of the homestead, it seems to us that it of necessity follows that whatever rights she might have claimed under said homestead terminated, ipso facto, with the entry of the decree of divorce.

[4] Nor, since the homestead was selected from his separate property, was it necessary, in order to vest in Coad the whole of the homestead interest, that the court should have expressly and by its decree or otherwise assigned to him said homestead. The "family" for whose benefit the homestead was selected from the separate property of the husband having been destroyed by the decree of the court divorcing the parties, the homestead necessarily ceased to exist as to that family, and, the homestead not having been assigned to the wife at the time of the making and entry of the divorce decree, the property so impressed remained in its former owner freed from and unincumbered by any claim which the former wife might have had to it by reason of said homestead. *Waples on Homestead and Exemption*, p. 67, et seq.; *Brady v. Kreuger*, supra; *Bahn v. Starcke*,

89 Tex. 203, 34 S. W. 103, 59 Am. St. Rep. 40.

[5] Of course, no one will gainsay the right or power of the Legislature to authorize the assignment of the homestead, upon the granting of a divorce, to either spouse absolutely, whether such homestead is carved out of the separate property of either spouse or selected from the community. But, in this particular instance, the Legislature of this state has not so provided. The right of the "innocent party" to an action for divorce to the enjoyment of the homestead, selected from the separate property of the other spouse, after a divorce has been granted, is limited by the express language of the statute, and, while the phrase "for a limited period" may entitle the "innocent party" to the enjoyment or possession or occupancy of such homestead for a long period of years, even perhaps during the life of such party, according to the circumstances of the particular case (*Hutchinson v. McNally*, 85 Cal. 619, 24 Pac. 1071; *Neary v. Godfrey*, 102 Cal. 341, 36 Pac. 655), it does not mean that the court has the power of vesting the homestead absolutely in such party, unless such party happens to be the "former owner" of the property from which said homestead has been selected.

The rule that the homestead, where selected from the separate property of one of the spouses, terminates, upon the granting of a divorce, in so far as are concerned the rights therein of the spouse from whose separate estate it has not been taken, unless such rights are preserved, as far as they may be, by the decree, is recognized and applied in many other jurisdictions, whose homestead laws vary only in immaterial particulars from ours.

In South Dakota the statute (section 93 of the Civil Code [section 2585, Comp. Laws]) provides, among other things, that "the court in rendering a decree of divorce, may assign the homestead to the innocent party, either absolutely or for a limited period, according to the facts in the case," etc. It will be noted that the code section in that state goes farther than subdivision 4 of section 146 of our Code, for it is there provided, generally and without any qualification as to whether the property from which the homestead is selected is of the separate estate of one of the spouses or of the community, that the court may, upon granting the divorce, assign such homestead to "the innocent party," absolutely, if "the facts in the case" warrant it. Here, as seen, the court has no such power.

In *Brady v. Kreuger*, supra, the decree of divorce made no disposition of the homestead—in fact, it was absolutely silent upon that subject—but it was, nevertheless, contended by the appellants in that case that "after a divorce the wife retains her interest in the homestead, and that, under the facts proven in this case, she was entitled to retain possession of the premises occupied by herself and husband at the time the divorce was granted." The Supreme Court of South Dakota

disposes of this proposition adversely to the contention of the appellants as follows: "Appellants contend that this court will presume, in the absence of evidence to the contrary, that the decree gave her the right to retain possession of the homestead. But this we cannot do. Courts will sometimes indulge in presumptions to support a judgment of a court, but never to reverse it. In the absence, therefore, of any proof as to the contents of the decree of divorce we cannot presume it contained anything favorable to the defendants. The relation of husband and wife having terminated, the wife ceased to have any claim upon or right in the husband's property, whether homestead or otherwise, unless such rights were preserved by the decree of the court. If the decree of the court preserved her rights to the homestead, or conferred upon her any other privileges in, or interests in or to, the property of the husband, the burden was upon her to establish such rights by the decree, as she clearly would have no right to the possession of the homestead after a decree of divorce had been granted, unless saved by the decree. There being in this state no right of dower, or other absolute claim of the wife upon the property of the husband, except under the law of succession, as his widow, or under a homestead claim which exists in favor of a wife or widow, and which depends solely upon the fact that she is such wife or widow, she can only avail herself of these claims by showing that she occupies either one or the other of these relations named to the husband. As the wife, upon a dissolution of the marriage, ceases to be the wife, and can never be the widow, of her divorced husband, her claims upon his property, necessarily, also cease and terminate upon the divorce. *Rosholt v. Mehus*, 3 N. D. 513, 57 N. W. 783, 23 L. R. A. 239. It was undoubtedly for these reasons that the Legislature of this state has conferred upon the courts, in which a decree of divorce may be obtained, such comprehensive powers for regulating and settling the rights of the wife in the property of the husband. Comp. Laws, §§ 2581-2585. The rights of the wife, therefore, in her husband's estate after a divorce is granted, are regulated and determined exclusively by the provisions of the decree of divorce, unless there is some valid contract between the husband and wife. When a wife, after the divorce, seeks to assert any claim to any part of the husband's property—homestead or otherwise—she must establish that right by the decree, or by a valid contract between herself and husband."

[6] As in South Dakota and in many other states, so in California, the law has provided the courts with ample power, in cases where the marriage relation has been dissolved by a decree of divorce, to justly and equitably adjust homestead and other property rights as between the parties for whose benefit homesteads may be declared or created. But such power cannot be applied without regard

to the facts of the case. The power of the court, for instance, under subdivision 4 of section 146 of the Civil Code, to assign the homestead, which has been selected from the separate property of one of the spouses, to the "innocent party" to the divorce action, may not be exercised arbitrarily. It is only where the circumstances of the case justly demand such assignment that the power should be invoked and applied. For illustration, it may be suggested, as some of the reasons which may interpose against the exercise of that power, that the "innocent party" may be found to have ample separate means for his or her own purposes, while the "former owner" of the property may have no other means than those represented by the homestead; or, it may be that the community interest of such party may, under all the circumstances, be sufficient and just. Again, it may have transpired that the parties themselves have reached an amicable and satisfactory agreement by which they have apportioned their property rights without the necessity of disturbing or interfering with the "former owner's" absolute right to the possession and occupancy of his separate property from which the homestead has been selected. But, while this power must be exercised by the court reasonably and according as the facts of each case demand that it shall be applied, it must, as suggested, be put into operation in a case like this if the wife would retain, after the divorce, any interest whatsoever in the homestead selected from the separate estate of the husband. The court, in other words, would have to take some affirmative action to that end, or, as is declared in *Brady v. Kreuger*, supra, her rights under the homestead declaration would have to be preserved by the decree, otherwise they are destroyed forever. The court not having done so in this case, the homestead, as before asserted, so far as plaintiff's intestate is concerned, ceased to exist with the granting of the decree of divorce and the same, therefore, remained in the former owner free from any homestead claim, right or privilege of the former wife.

Whether, under such circumstances, such property would still retain the essential characteristics of a homestead, so far as the "former owner" is concerned, need not be decided here, although such has been declared to be the rule in this state. *City Store v. Cofer*, 111 Cal. 482, 44 Pac. 168.

[7] But counsel for appellant insist that the provisions of section 1474 of the Code of Civil Procedure are absolutely controlling in the matter of the devolution of homesteads, after the death of one of the spouses, regardless of whether or not the family, as it originally stood when the homestead was filed, had, prior to such death, been destroyed by a decree of divorce. That section reads: "If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living,

was selected from the community, or from the separate property of the person selecting or joining in the selection of the same. It vests, on the death of the husband or wife, absolutely in the survivor." The argument in support of this proposition is that the word, "survivor," as used in said section, means the one of the two spouses that outlives the other, without regard to whether, at the time of the death of the one or the other, the marriage relation between them had been duly dissolved by the decree of a court. Of course, it must be manifest, from the views we have ventured as to the effect of the decree of divorce on the rights of the plaintiff's intestate under the declaration of homestead, that we do not agree to such construction of section 1474 of the Code of Civil Procedure.

Indeed, applying, in the ascertainment of the true import of section 1474 of the Code of Civil Procedure, the very rule of construction, as promulgated by section 16 of said Code, invoked by counsel for the appellant to establish their conception of the meaning and intention of said section 1474, the result must be, it seems clear to us, that said section does not, nor was it intended to, bear the interpretation which counsel ascribe to it.

Section 16, *supra*, declares that "words and phrases" must be "construed according to the context and the approved usage of the language; but technical words and phrases, and such other words as have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar and appropriate meaning or definition."

The words "husband" and "wife," as applied to domestic relations, each has but one meaning. The technical meaning of those words is identical with their common or colloquial meaning, and the law can use them in no other sense. It is therefore not necessary to refer to and examine law or other dictionaries to ascertain their legal or only signification. They are generic terms that describe human beings of a certain class, and the mere mentioning or use of the words will as readily suggest or convey to the mind the kinds of the human family they describe as the mentioning of the word "horse" will portray to the mind the kind of quadruped that term describes. They obviously mean, respectively, as they are most tritely defined by Bouvier, "a man who has a wife" and "a woman who has a husband." As used in section 1474 of the Code of Civil Procedure, these words mean and can only mean, as descriptive of the domestic relation, just what they naturally imply, and, of course, do not mean an unmarried man and an unmarried woman. As all the other words in said section refer to the words "husband" and "wife," as so employed, we have only to look to the context of said section for the precise signification of all the vital words

therein used for the purpose of defining or prescribing any rights which the Legislature by said section intended to confer upon either the husband or wife or both, and, so examining the section, it becomes very clear that the word "survivor," as therein employed, refers to the "husband" and "wife," *as such*—that is, it applies to those individuals with reference to the legal status they bear toward each other, and not, as counsel's construction of the section would have it, as mere individuals or strangers sustaining toward each other no legal relation. In other words, the true meaning of the language of the section is that the homestead selected as therein prescribed shall, upon the death of the husband *as a husband* or the wife *as a wife*, vest absolutely in the survivor of such marriage relation. Obviously, if the marriage relation was dissolved at the time of the death of either the one or the other, the deceased would have passed away not *as a husband* or *as a wife*, as the case might be, but, in contemplation of law, as a perfect stranger to the one who, in point of time, was the survivor. The irresistible result of this construction is that, in order that the homestead contemplated by said section may, upon the death of the one or the other of the spouses by whom and for whose benefit such homestead was selected, vest absolutely in the "survivor," such death must have occurred when the parties were still spouses, or, in other words, the "survivor" must be the *surviving spouse* and not merely the *surviving individual* whose character *as a spouse* had previously to the death of the other been destroyed by a decree of divorce.

[8] Counsel for the appellant make the further point that section 146 of the Civil Code is unconstitutional in that the act within which said section was embraced was, as passed by the Legislature of 1873-74, in violation of section 25 of article 4 of the Constitution of 1849. Said section of our first Constitution reads: "Every law enacted by the Legislature shall embrace but one object, and that shall be expressed in the title; and no law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length."

The Legislature of 1873-74 attempted to amend, if it did not succeed in amending, a large number of the sections of each of the four Codes. See Stats. 1873-74. The title of the act amending certain sections of the Civil Code is as follows: "An act to amend the Civil Code."

The objections urged against the constitutional validity of said act are that its title expresses no subject whatever, and that it fails to re-enact and publish at large the law which it purports to amend. In other words, as to the latter objection, it is the contention that, to make the act conform to the provision of the Constitution referred to,

in the place of publishing in the body of the act only such sections as were amended, the entire Civil Code, which constitutes one act, should have been embodied in and re-enacted by the amendatory act.

Section 146 of the Civil Code, as well as the other sections of said Code, as amended by the act of 1873-74, have been the accepted law of this state on the subjects to which they respectively relate for nearly 40 years, and there can be no doubt that, under many of said sections, there have grown up and been established rights of the most substantial kind which might be seriously jeopardized, if not completely destroyed, by a ruling at this late date holding said sections to be void for the reasons suggested or for any reason. Even if there be merit in the points urged against said sections, it is not for a moment supposable that any court would, under the circumstances, give its sanction to a proposition whose inevitable result would be to produce at least endless confusion and perhaps the destruction of vested property rights. But, if our views as to the meaning and intent of section 146 of the Civil Code and of section 1474 of the Code of Civil Procedure are correct, it is immaterial whether the first-mentioned section is valid or invalid. It is very clear, as we have declared, that the only right which plaintiff's intestate could have acquired to the homestead involved here was that with which the court might have invested her for a limited period under the power conferred upon it by said section 146, and, manifestly, if said section is void for the reason urged here against its validity, she could not, at the time the divorce was granted, even have acquired or been entitled, as the "innocent party," if such she had been found to be, to the enjoyment of said homestead for "a limited period."

We have found no expression in any of the cases cited by counsel for appellant in conflict with the conclusion reached here. The cases cited were where, either after the death of one or the divorce of the parties for whose benefit the homesteads were created, an ineffectual attempt was made to enforce the payment of the claims of certain creditors by a seizure of the premises upon which the homesteads were filed, the contention of such creditors being that the peculiar facts from which the right to such homesteads arose were such as to relieve the premises of their homestead character either upon the death of one of the parties to the homestead or the divorce of such parties. See *City Store v. Cofer*, supra; *Roth v. Insley*, 86 Cal. 134, 24 Pac. 853.

The result of the conclusion at which we have arrived is, manifestly, that plaintiff's intestate has no title of any kind to the homestead in dispute, and that, as a necessary consequence, the judgment of the court below that she is not entitled to the relief

sought by the complaint cannot be disturbed. The defendant asked for and was, therefore, awarded no affirmative relief.

While the proposition is not involved here, there can be no impropriety in suggesting, if, indeed, suggestion of the proposition is necessary, that, Coad having died intestate and, there having been, so far as we are advised by the record, no new declaration of homestead filed on the property in controversy after his marriage to defendant's intestate, the plaintiff, being the only child of said Coad, so far as the record shows, would be entitled to her share, according to our law of succession, in whatever estate, including the property here involved, of which her father died seised. Of course, it will not be contended that the homestead in question here could inure to the benefit of the second wife. *Estate of Clavo*, 6 Cal. App. 774, 93 Pac. 295.

Necessarily, the views ventured herein dispose of the points urged against the rulings of the court in excluding as evidence the declaration of homestead and in granting the motion for a nonsuit.

For the reasons stated herein, the judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

16 Cal. App. 353

BRUCE v. BRUCE. (Civ. 808.)

(District Court of Appeal, Third District, California. June 5, 1911.)

1. DIVORCE (§ 169*)—CONSTRUCTION—RECITALS—SURPLUSAGE.

Where findings were expressly waived by both parties to a divorce action, in which the complaint averred acts of extreme cruelty, and facts relating to the selection of a homestead from property of the parties, a recital in the judgment that it appeared "that all of the material allegations of the complaint herein are true" is not an essential part of the judgment, and is entitled to no consideration in determining its effect on the property rights of the parties.

[Ed. Note.—For other cases, see *Divorce*, Dec. Dig. § 169.*]

2. DIVORCE (§ 286*)—PRESUMPTIONS—EVIDENCE AND FINDINGS TO SUSTAIN JUDGMENT.

Where an interlocutory judgment for the plaintiff, in an action for divorce, in which findings were expressly waived, and in which the complaint contained no direct averment that the homestead was taken from the community, but alleged that it was selected from property acquired by defendant after the marriage, recitals in the judgment that all of the material allegations of the complaint were true, and that the homestead was selected by plaintiff from the separate property of the defendant, if treated as findings, will, as to the finding relating to the homestead, be presumed to have been supported by evidence sufficient to overcome the effect of the allegation as to the homestead, and that finding will prevail over the finding as to the truth of material allegations; and on allegations that the value of defendant's property was \$28,000, and the amount of his annual

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

rents and profits was \$3,500, it will be presumed, in support of an award of a lump sum of \$4,500 as alimony, that it was justified by the evidence, and represented an equitable adjudication of the plaintiff's property rights.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 286.*]

Appeal from Superior Court, Kings County; John G. Covert, Judge.

Action for divorce by Alice Bruce against H. S. Bruce. Interlocutory decree granting plaintiff a divorce, assigning the homestead to defendant, and awarding to plaintiff a lump sum as alimony, and from the part of the decree relating to homestead and alimony, plaintiff appeals. Affirmed.

M. L. Short and Dixon L. Phillips, for appellant. Chas. G. Lamberson and H. P. Brown, for respondent.

HART, J. This is an action by the plaintiff for a divorce from the defendant. The parties intermarried in the month of March, 1896, the defendant having previously been married and raised a family of children by his former wife. An interlocutory decree, adjudging plaintiff to be entitled to a divorce, was rendered and entered. The decree, however, assigned to the defendant the homestead of the parties, and awarded to the plaintiff, as alimony for her permanent support and maintenance, the lump sum of \$4,500, with interest thereon at the rate of 7 per cent. per annum, from the date of the rendering of said judgment until said sum is paid, the same to be a lien on the homestead property referred to. This appeal is by plaintiff from said last stated portion of the decree.

The sole ground for the divorce, as set out in the complaint, is extreme cruelty, charged to have been committed by the defendant on the plaintiff for a series of years by various and numerous alleged violent acts and words on the part of the former. The complaint further alleges that the defendant "is the owner and possessor of a large amount of real and personal property of the value of about \$28,000, from which he received a large amount of rents and profits, which amount plaintiff is unable to state exactly, but on information and belief alleges that it amounts to as much as \$3,500 annually." Proceeding further, the complaint declares that, since the intermarriage of plaintiff and defendant, the latter acquired a certain piece of real property, situated in Kings county, and upon which the plaintiff, after the acquisition of the same by defendant, duly made, executed and caused to be duly recorded a declaration of homestead, etc., but that, since the 20th day of June, 1908, defendant has prevented plaintiff from residing upon said premises or any part thereof; that said defendant "has received the rents, issues, and profits of said property, and is now receiving the same, and has appropriated and now

appropriates the whole thereof to his own uses and purposes, the amount of which, plaintiff alleges, upon information and belief, is the sum of about \$3,000 annually." The answer specifically denies all the material averments of the complaint.

[1] Findings were expressly waived by both parties; but the judgment contains, among other things, the following recital: " * * * And it appearing and having been satisfactorily proven to the court that *all of the material allegations of the complaint herein are true*," etc., and upon this counsel for appellant advance the proposition that, such recital being in effect a finding that all the material facts stated in the complaint are true, that portion of the decree declaring that the homestead mentioned therein was selected from the separate property of the defendant and assigning the same to him is not only without support, but directly antagonistic to the findings. In other words, the contention is that said recital in effect constitutes a finding that the homestead was selected from the community property.

This contention is clearly devoid of merit. Said recital was no doubt intended by the court to refer to those averments which involve a statement of the facts constituting the ground upon which the divorce is asked and was allowed, and, as it was not necessary to insert it in the judgment, being no essential part thereof, it may be regarded, as it certainly is, in view of the waiver of findings by the parties, as surplusage, and, therefore, entitled to no consideration in the determination of the effect of the interlocutory judgment on the property rights of the parties.

[2] But if the recital referred to may be treated or regarded as a finding of the facts, equally so may the recital in the judgment that said homestead was selected by plaintiff from the separate property of the defendant be regarded. Conceding both recitals to be the equivalents of findings of fact, that which finds that the homestead was selected from defendant's separate estate would have to prevail. There is no direct averment in the complaint that the homestead was taken from the community. The allegation in the complaint as to the homestead is merely that said homestead was selected from property acquired by defendant *after* the intermarriage of the parties. The effect of this allegation is only to raise a disputable presumption that the property so acquired belonged to the community. Of course, it does not necessarily follow as a fact that, because the homestead may have been selected from property acquired by one of the spouses during their coverture, such homestead has been selected from the community property. Therefore, treating, for the present purpose, as findings of fact the recitals in the judgment that all the material averments of the complaint are true and that the homestead

was selected from the separate property of the defendant, said "findings," construed by the light of the presumptions in favor of the judgment, necessarily mean that, while it is true that the homestead was selected from property acquired by the defendant during his marriage relation with the plaintiff, it was, nevertheless, selected from his separate estate, the property so selected having been acquired by his separate means. In other words, the finding that the homestead was of the separate property of the defendant presupposes the introduction and reception of proof sufficient to overcome and dissipate the presumption, arising from the allegation of the complaint, that said property was acquired during the coverture of the parties, that the same was selected from the community. But this is, in reality, only to state, in a different form, the rule that, where findings are expressly waived by the parties, every intendment is in favor of the judgment. As is said in *Long v. Saufley*, 89 Cal. 438, 26 Pac. 902, "as findings were waived, we must assume that the court found all the facts that were necessary to sustain its judgment." See, also, *Blanc v. Paymaster Mining Co.*, 95 Cal. 530, 30 Pac. 765, 29 Am. St. Rep. 149; *Breeze v. Brooks*, 97 Cal. 77, 31 Pac. 742, 22 L. R. A. 257; *Ames v. City of San Diego*, 101 Cal. 390, 35 Pac. 1005; *Warren v. Hopkins*, 110 Cal. 506, 42 Pac. 986; *Krasky v. Wollpert*, 134 Cal. 338, 66 Pac. 309; *Griffin v. Pacific Electric Ry. Co.*, 1 Cal. App. 680, 82 Pac. 1084.

It is, as we have seen, further objected that that portion of the decree awarding to plaintiff, for her permanent support and maintenance, the lump sum of \$4,500, only, constitutes an unjust and inequitable adjustment of her rights in that respect, when compared to the value of defendant's property. But we perceive no ground upon which we would be justified in disturbing the judgment in that particular.

The complaint, as has been shown, declares that the defendant was, at the time of the commencement of this action, the owner of property of the value of \$28,000, from which he received, as rents and profits, the sum of \$3,500 annually; but it is not alleged that said property or any part thereof belongs to the community, nor is it stated that said property was acquired after the intermarriage of the parties.

The presumption is, as before declared, that every fact essential to the support of the judgment was proved and found by the court, and it, therefore, of necessity follows that the action of the court, as crystallized in its judgment, awarding plaintiff the sum of \$4,500, must be presumed to have been justified by the evidence, and that that sum represents a just and equitable adjustment and adjudication of her rights in that regard.

We have been shown no legal reason why

the judgment should not stand, and it is therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

160 Cal. 349

POTTER v. COUNTY OF SANTA BARBARA et al. (L. A. 2,709.)

(Supreme Court of California. July 8, 1911.)

1. HIGHWAYS (§ 90*)—ESTABLISHMENT OF ROAD DIVISION—PETITION AND AFFIDAVIT—PUBLICATION.

Under Pol. Code, §§ 2746, 2747, which set on foot the formation of a road division by a petition accompanied by an affidavit stating that the affiant has compared valuations, etc., and section 2748, which provides that such petition shall be published at least once a week, that the accompanying affidavit is prerequisite to jurisdiction does not make its publication essential, nor is its publication contemplated by the law, as the publication of the petition conveys constructive notice to the parties interested.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 301, 302; Dec. Dig. § 90.*]

2. HIGHWAYS (§ 95*)—BONDS—FORM AND CONTENTS—COUPONS—NUMBER.

Where the supervisors of a road district, in compliance with the provisions of Pol. Code, § 2764, prescribed a sufficient form of coupon as to bond No. 1 of a series, and further prescribed that "coupon numbered 1 on bonds numbered 2 to 100, inclusive, shall be in the same form except as to the number of the respective bonds to which each of said coupons shall be attached," there is a sufficient provision as to what bond number shall be inserted in the coupons on the bonds following bond No. 1; and where proper coupons are attached to each bond it is not essential that the coupon should have any number.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 311, 312; Dec. Dig. § 95.*]

3. HIGHWAYS (§ 107*)—ESTABLISHMENT BY STATUTE—ROADS IN DIFFERENT JURISDICTIONS.

Pol. Code, § 2773 which relates to permanent road divisions and declares that the act is

not to repeal any other acts providing for the improvement of roads, streets, or other public highways not within the boundaries of a municipal corporation, is intended to provide an alternative method for road construction, operating concurrently without repeal of other acts of similar tenor upon highways not within municipal corporations.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 339-345; Dec. Dig. § 107.*]

4. HIGHWAYS (§ 95*)—COUNTY SUPERVISORS—AUTHORITY OVER HIGHWAYS.

Authority over public highways lying outside of municipal corporations is vested in the boards of supervisors of the respective counties in which such highways lie.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 309; Dec. Dig. § 95.*]

5. STATUTES (§ 47*)—VALIDITY—CERTAINTY—"DISTRICT."

Under Pol. Code, § 2763, which empowers the board of supervisors of a road division to issue the bonds of said "division," payable out of the funds of such division, and provides that the money shall be raised by taxation upon the property in said "district" for the redemption of the bonds, but that the total amount of bonds issued should not exceed 15 per cent. of the taxable property of the division, "district" means division, the district in fact becoming a division, and, so construed the section is not void for uncertainty.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 47; Dec. Dig. § 47.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2136-2138; vol. 8, pp. 7639, 7640.]

6. HIGHWAYS (§ 127*)—TAXES—MODE OF ASSESSMENT.

Under Pol. Code, § 2763, of the law relating to the creation of road districts, directing the road supervisors to pay bonds and interest, and Pol. Code, § 4041, subd. 12, authorizing a tax levy for such purpose, the mode of taxation is that set forth in Pol. Code, §§ 3607-3900, dealing with the subject of taxation; but, if this were not so, the power to incur a debt and make provision for its payment by taxation having been granted, any reasonable mode of taxation would fall within the granted power.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 384; Dec. Dig. § 127.*]

7. ELECTIONS (§ 18*)—RIGHT OF SUFFRAGE—PROPERTY QUALIFICATION OF PETITIONERS FOR ROAD DISTRICT.

Pol. Code, §§ 2745-2773, relating to the formation of road divisions, and which, by section 2746, provide that the petition for the formation of the districts shall be signed by a majority of the landowners within the proposed district, do not deal with elections or suffrage; and hence do not violate Const. art. 1, § 24, declaring that no property qualification shall ever be required for the right of suffrage.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 13; Dec. Dig. § 18.*]

8. HIGHWAYS (§ 90*)—CREATION OF HIGHWAY DISTRICTS—LEGISLATIVE POWERS.

The Legislature may create highway districts without giving any person a voice or hearing upon the matter or by giving such persons as it may think best an opportunity to be heard.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 301, 302; Dec. Dig. § 90.*]

9. COUNTIES (§ 24*)—LEGISLATIVE CONTROL.

The Legislature may create municipal agencies within counties, and may use the county agencies to execute the purpose in hand.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 24; Dec. Dig. § 24.*]

10. HIGHWAYS (§ 91*)—HIGHWAY DISTRICTS AND OFFICERS—CREATION OF BOARD OF SUPERVISORS.

The Legislature may use county and municipal agencies for the purposes of legislation as to road divisions, and may make the boards of road supervisors its agency for the purpose of executing the provisions of the law.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 303; Dec. Dig. § 91.*]

11. STATUTES (§ 123*)—SUBJECT AND TITLE OF ACT—HIGHWAYS.

Pol. Code, §§ 2745-2773, held not objectionable as embracing subjects not within its title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 176-183; Dec. Dig. § 123.*]

In Bank. Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Milo M. Potter against the County of Santa Barbara and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Henley C. Booth, for appellant. W. S. Day, Dist. Atty., and George H. Gould, for respondents.

HENSHAW, J. In form this is an action to restrain the county treasurer from cashing a certified check and paying the money into the county treasury, which check was deposited with plaintiff's bid for the purchase of bonds of the "Permanent Road Division of Goleta." In substance the action is one to determine the validity of the organization of this permanent road division, and the validity of its bond issue for road improvements. The specific law touching the creation and operation of such road divisions is found in title 6, pt. 3, art. 9, of the Political Code, §§ 2745 to 2773, inclusive.

[1] 1. The formation of a road division is set afoot by the presentation of a petition to the board of supervisors (section 2746), accompanied "by an affidavit stating that the affiant has compared the valuations," etc. Section 2747. "Such petition shall be published at least once a week," etc. Section 2748. No attack is made upon the sufficiency of the petition, but when published the publication did not embrace the accompanying affidavit. It is contended that by the terms of the statute the affidavit accompanying the petition is made a part thereof, and that a publication which does not include the affidavit is vitally defective. The fact that the accompanying affidavit is prerequisite to acquiring jurisdiction does not make its publication essential, nor is its publication contemplated by the law. The publication of the petition proper conveys the constructive notice to the parties interested. The irrigation act (St. 1897, p. 254, § 2) provides in similar terms that the petition shall be first presented to the board of supervisors, "accompanied with a good and sufficient bond." This bond, in like manner, is a jurisdictional prerequisite, but it has not been contended,

and could not successfully be contended, that its publication was contemplated, much less required.

[2] 2. In compliance with the provisions of section 2764 the supervisors by order prescribed the form of the bonds and of the interest coupons attached thereto. The language of the order is as follows:

"It is further ordered, that coupon No. 1 on bond No. 1 shall be in the following form, to wit: Coupon. \$60. The Treasurer of Santa Barbara County, No. 1, State of California, will pay to the holder hereof out of the Permanent Road Fund of the Permanent Road Division of Goleta in said county, on the 4th day of October, 1910, at his office in the city of Santa Barbara, in said county, the sum of \$60, for interest due on Bond No. 1 of the issue of the bonds of said Permanent Road Division of Goleta in the sum of \$100,000, issued October 4th, 1909. This coupon is payable in gold coin of the United States. Chairman of the Board of Supervisors. County Clerk and Ex Officio Clerk of the Board of Supervisors. County Auditor.

"That coupon No. 1 on bonds numbered 2 to 100, inclusive, shall be in the same form, except as to the number of the respective bonds to which each of said coupons shall be attached.

"That coupon No. 2 on bonds numbered 6 to 100, inclusive, shall be in the same form, except numbered 2 and payable on the fourth day of October, 1911, and except as to the number of the respective bonds to which each of said coupons shall be attached," etc.

It is conceded that the form of the coupons as to bond No. 1 is sufficient. But it is said that there is no provision as to what bond number shall be inserted in the coupons on the bonds following bond No. 1. This would seem to be made sufficiently clear, however, by the statement that "coupon numbered 1 on bonds numbered 2 to 100, inclusive, shall be in the same form, except as to the number of the respective bonds to which each of said coupons shall be attached." But even if this language be not utterly free from doubt, still, to each bond are attached its proper coupons, and it is not an essential matter that the coupons should have any number at all.

[3] 3. Section 2773 of the Political Code declares: "This act is intended to furnish an alternative method for accomplishing the road construction and improvement provided for herein, and does not repeal, modify or abridge any other act or acts having for their object the construction or improvement of roads, streets, or other public highways not within the boundaries of a municipal corporation."

Appellant construes this to mean that the design and effect of the act is to repeal all street laws operative within municipal cor-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

porations. It will be conceded that to convey the meaning actually intended the language of the section is susceptible of easy improvement. But from the whole scope of the act, and from the section itself, what was intended was to provide an alternative method for road construction, which should *not* operate within municipal corporations at all, but which should operate concurrently, and without repeal or modification of other acts of similar tenor, upon highways not within municipal corporations.

[4] The authority over public highways lying outside of municipal corporations is, of course, vested in the boards of supervisors of the respective counties in which such highways run. *People v. County of Marin*, 103 Cal. 226, 37 Pac. 203, 26 L. R. A. 659; *Devine v. Board of Supervisors*, 121 Cal. 673, 54 Pac. 262; *Miller v. County of Kern*, 137 Cal. 519, 70 Pac. 549.

[5] 4. When a bond election has been carried, section 2763 provides that the board of supervisors shall be authorized and empowered "to issue the bonds of *said division* to the number and amount provided for in such proceedings, payable out of the funds of *such division*, and the money shall be raised by taxation upon the property in *said district* for the redemption of said bonds and the payment of interest thereon, but the total amount of bonds so issued shall not exceed fifteen per cent. of the taxable property of the *division* shown by the last equalized assessment roll of the county."

Appellant finds such inextricable confusion and uncertainty in this language as to destroy the section, since, it is said, the section itself distinguishes between district and division, and declares that the bonds shall be payable out of the funds of the division, but that the money shall be raised by taxation upon the district, and that no district is defined. Again, it may be conceded that the language, to convey its meaning, could be readily improved upon. But the meaning we think to be still clear enough. Said "district" means nothing more, other, or different from "said division." The district, in fact, becomes a division—the territory with boundaries delimited for certain specific purposes. Indifferently, it is a district or a division. It may have been that "district" was used in place of "division" from some excess of caution, to meet the supposed grant of power in section 4041 of the Political Code, which empowers boards of supervisors to levy taxes "upon the taxable property of any district for the construction and repair of roads and highways," etc.

[6] 5. Appellant next urges that the law contemplates the imposition of a tax for bond redemption and interest, but fails to state upon what basis the tax is to be levied—whether it is to be added to the county assessment roll, or have a special assessment, and fails further to state by whom the tax is to be collected; and, finally, fails to pre-

scribe a penalty for delinquency. The law calling for a tax, the tax will be based ad valorem. *Holley v. County of Orange*, 106 Cal. 420, 39 Pac. 790. The supervisors are directed to pay the bonds and the interest (section 2763), and they are authorized to levy the tax for such purposes (Pol. Code, § 4041, subd. 12). The subject of taxation is dealt with in the Political Code from sections 3607 and 3900, inclusive. The Legislature has thus made ample provision authorizing the supervisors to incur a debt and to levy a tax upon specified property for the payment of that debt. The mode of levy and collection is fully set forth in the provisions of the Code above mentioned. But if this were not so, still, the power having been granted to incur the debt and make provision for its payment by taxation, any reasonable mode of taxation would fall within the granted power. *United States v. New Orleans*, 98 U. S. 393, 25 L. Ed. 225; *Loan Association v. Topeka*, 20 Wall. 660, 22 L. Ed. 455; *Dillon, Mun. Corp.* (4th Ed.) § 854.

[7] 6. It is contended that the act is special legislation, forbidden by section 24, art. 1, of the Constitution, which provides that no property qualification shall ever be required for the right of suffrage. Herein the argument is that, as the petition is to be signed by landowners residing within the district, nonlandowning persons, and non-resident landowners are disfranchised, and resident landowning aliens and resident landowning women are given the suffrage. But the answer which has so often been made is that, by this and like provisions, the Legislature is not dealing with elections, with suffrage, or with the ballot, within the meaning of the Constitution and the election laws of the state.

[8] The formation of this and similar districts is a function pertaining purely to the legislative branch of the government. The Legislature can create them, or cause them to be created, without giving any person a voice or hearing upon the matter. Wherefore, it may do so by giving such persons as it may think best an opportunity to be heard. *Dean v. Davis*, 51 Cal. 406; *Hughes v. Ewing*, 93 Cal. 417, 28 Pac. 1067; *Laguna v. Martin*, 144 Cal. 209, 77 Pac. 933; *People v. Sacramento Drainage District*, 155 Cal. 373, 103 Pac. 207.

[9, 10] 7. It is argued that a permanent road division under this act is not a corporate entity, has no corporate existence, and cannot, therefore, issue bonds. But the answer to this is that it does not issue bonds. The agency for the bond issue is the board of supervisors, and the tax for the payment of the bonds is imposed upon the property of the division. As was said of reclamation districts in *People v. Reclamation District*, 117 Cal. 121, 48 Pac. 1016, "the district (here division) is part of the scheme for conducting a public work, and not for self-government"; and as elaborately considered and

discussed in *Re Madera Irrigation District*, 92 Cal. 308, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106, the Legislature may legislate directly upon local districts, or may intrust such legislation to subordinate bodies of a public character. "It may create municipal organizations or agencies within the several counties, or it may avail itself of the county or other municipal organizations for the purpose of such legislation." In the instance of this law the Legislature has availed itself of the board of supervisors for the purpose of giving it effect and carrying it into execution.

[11] 8. It is contended that the act declares upon subjects not embraced within its title. Herein reference is made to the power of taxation and the use of the indefinite word "district" instead of "division." The title of the act, however, declares it to deal with one subject, namely, permanent road division. All the matters treated under that subject are strictly germane to it. The objection is without merit. *S. F. & N. P. Ry. Co. v. State Board*, 60 Cal. 12, 29.

We have now considered every proposition advanced by appellant against the validity of the law, of the organization of the district, and of the bond issue, and for the reasons given the judgment appealed from is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; MELVIN, J; LORIGAN, J.

160 Cal. 357

Ex parte CASEY. (Cr. 1,688.)

(Supreme Court of California. July 11, 1911.)

1. CRIMINAL LAW (§ 1216*)—SENTENCE.

The time during which one sentenced to state prison was at liberty on parole must be credited to him as time served on the sentence he was serving when paroled.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1216.*]

2. CRIMINAL LAW (§ 1216*)—JUDGMENT—CURRENT JUDGMENTS.

Pen. Code, § 105, provides that a second term of imprisonment imposed for escaping from a state prison shall commence from the time the prisoner would otherwise have been discharged, and section 669 provides that, when one is convicted of two or more crimes before sentence is imposed for either, a sentence upon the second or subsequent conviction must commence at the termination of the first term of imprisonment or at the termination of the second or subsequent term as the case may be. *Held*, that judgments run concurrently, except in the cases specified by the statute, so that where one was sentenced to a term in state prison and released on parole, and while on parole was convicted of another felony and sentenced, which latter term he served, he could not afterwards be retained in custody upon the theory that the judgments did not run concurrently; he having been imprisoned, after the expiration of the second term, for a longer time than the term prescribed by the first judgment, including the time while paroled.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3310-3319; Dec. Dig. § 1216.*]

In Bank. Application of Joseph Casey for habeas corpus. Petitioner discharged from custody.

Joseph Casey in pro. per.

PER CURIAM. From the return made to the court by the warden of the California state prison at Folsom, in response to the writ of habeas corpus issued herein, and the matters alleged in the petition for the writ, which were admitted by the Attorney General to be true, it was confessed by the Attorney General and satisfactorily appeared to the court that the petitioner was entitled to be discharged from custody. It was accordingly so ordered. That the reasons for such action may appear of record, this opinion is filed.

The petitioner was convicted of a felony, and adjudged to be imprisoned therefor for a specified term in the state prison. He was accordingly imprisoned in the state prison for a portion of such term, and then allowed his liberty on parole. While at large on parole he was charged with another felony, and convicted thereof. Upon this conviction, he was again adjudged to suffer imprisonment in the state prison for a term of years. He served this term in the state prison. At the expiration thereof, he had been imprisoned in the state prison, including the time he had been at large on parole, for a time longer than the term prescribed by the first judgment. He was nevertheless retained in custody upon the theory that the two judgments did not run concurrently and that there was still unsatisfied by imprisonment a portion of such original judgment.

[1] It cannot be disputed that the time during which the petitioner was at liberty on parole must be credited to him as time served on the original judgment. It may be conceded that his parole was revoked when he was arrested for the subsequent offense. But when again imprisoned in the state prison, after conviction of such subsequent offense, he was imprisoned not only under the second judgment, but also under the first judgment.

[2] In this state, there are apparently only two cases in which judgments of imprisonment in the state prison do not run concurrently. These are the cases specified in sections 105 and 669, Penal Code. Neither of these sections is applicable under the facts of this case. It is settled by the decisions that in all other cases the judgments run concurrently. *Ex parte Morton*, 132 Cal. 346, 64 Pac. 469; *Ex parte McGuire*, 135 Cal. 339, 67 Pac. 327, 87 Am. St. Rep. 105.

It follows that at the date of this petition, the petitioner had actually satisfied both judgments, and there was no legal ground for his retention in custody.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

15 Cal. App. 190

BEAVER v. CONTINENTAL BUILDING & LOAN ASS'N. (Civ. 838.)

(District Court of Appeal, Second District, California, Jan. 20, 1911.)

1. BROKERS (§ 43*)—EMPLOYMENT—CONTRACTS IN WRITING—STATUTES.

An agreement by a landowner whereby the other party, on securing a purchaser of real estate, shall receive all the money above a specified sum which the purchaser may pay to the owner therefor, is an employment of an agent to sell real estate, and under Civ. Code, § 1624, subd. 6, is invalid, unless in writing.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. § 43.*]

2. BROKERS (§ 43*)—EMPLOYMENT—CONTRACTS IN "WRITING"—STATUTES.

A memorandum made by the owner of real estate which shows the price of the property, but which does not set forth any agreement or terms of any agreement, is not a sufficient writing, within Civ. Code, § 1624, subd. 6, providing that an agreement employing an agent to sell real estate for compensation must be in "writing."

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. § 43.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7541, 7542.]

3. CONTRACTS (§ 238*)—WRITTEN CONTRACTS—MODIFICATION.

Under Civ. Code, § 1698, providing that a contract may be altered by a contract in writing or by an executed oral agreement, an executory parol agreement, modifying an agreement in writing, is invalid.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1117, 1123; Dec. Dig. § 238.*]

4. BROKERS (§ 31*)—CONFIDENTIAL RELATIONS—TRANSACTIONS FOR AGENT'S OWN BENEFIT.

An agent employed by an owner to secure a purchaser of real estate, who, while pretending to act for the owner, acquires, without the knowledge of the owner, any interest in the property, violates his obligations as agent, and the interest acquired is held by him as trustee for the owner.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 24; Dec. Dig. § 31.*]

Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

Action by W. J. Beaver against the Continental Building & Loan Association. From a judgment for defendant, plaintiff appeals. Affirmed.

C. W. Pendleton, for appellant. Frank G. Finlayson, for respondent.

JAMES, J. This action was brought to recover from defendant the sum of \$3,000. The cause of action was set forth by plaintiff in his complaint in the form of a common count for money had and received. The answer contained a specific denial of the allegations of the complaint, and, in addition thereto, a counterclaim was pleaded upon which judgment was asked against plaintiff for the sum of \$2,231.77. It was adjudged that neither party recover in the action. The findings of the court were against the plaintiff on all of the issues tendered by his

complaint, but in favor of defendant on its counterclaim, except that it was held that the indebtedness of plaintiff to defendant was barred by the statute of limitations. A statement of the case was settled and used on the hearing of a motion made by plaintiff for a new trial, and this appeal is taken from an order denying said motion, and also from the judgment.

On June 1, 1903, a deed of trust was executed by one J. W. Harvey, conveying to the California Safe Deposit & Trust Company, as trustee, a certain lot of land located at Fourth and Fremont streets in Los Angeles city. This trust deed was made for the benefit of defendant and as security for a loan of \$10,000 made by it to Harvey. At that time and subsequent thereto, plaintiff was acting as an agent of defendant in the city of Los Angeles, looking after matters of loan investments for the latter. Prior to August, 1904, payments due from Harvey under the terms of the loan agreement made with plaintiff had become delinquent, and the property furnishing the security for the repayment of the \$10,000 loan had become charged with liens and incumbrances asserted by mechanics and other persons. The plaintiff thereupon wrote to defendant, suggesting that it would be agreeable to the owner of the property to have defendant institute a "friendly" foreclosure suit to "wipe out a lot of lien claims." This suggestion he wrote in a letter to defendant, addressed to its office at San Francisco. In response to this suggestion, the following letter was written to plaintiff by the general manager of defendant: "San Francisco, June 23, 1904. W. J. Beaver, Esq., Los Angeles, Cal.—Dear Sir: Referring to the J. W. Harvey loan for \$10,000, beg to state that should we foreclose the property on friendly lines in order to kill the liens, we would expect the owner of the property to put up the cost of the foreclosure and the delinquent payments, and then let them take a new deed of trust for the same amount as the original one. Yours truly, William Corbin, Secretary and General Manager." A second letter from Corbin, dated early in July following, contained the information that foreclosure had been ordered to be made, and a request that Harvey send \$200 to pay attorney's fees and costs of advertising. Some time later a check for \$150 on this account was sent to defendant by plaintiff. Due proceedings were had for the sale of the property covered by the trust deed, and on August 16, 1904, the trustee, after sale, by deed transferred title thereto to defendant. There the title remained until November 29, 1905, when a deed passed it from defendant to one Tichenor, another agent of defendant, who held the property as trustee until June 26, 1906, when it was sold for a consideration of \$15,500 to J. E. Ellison and wife. From the time

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the trustee's deed was made to defendant, down to the time when the property passed to the Ellisons, there had been no offer on the part of Harvey, or any successor of his to the title to the property, to discharge delinquent payments which were in arrears when the "foreclosure" was had. No demand was ever made upon defendant that it comply with the understanding expressed in Corbin's letter, first quoted. It is true that \$150 had been paid toward foreclosure expenses, but nothing more had been paid and no deed had been demanded back, and no new trust deed had been offered to be executed.

The plaintiff here, notwithstanding that he had acted throughout the various proceedings as an agent of defendant, through a secret agreement with Harvey, became, on April 14, 1904, prior to the date of the deed from the trustee to defendant, the owner of Harvey's interest in the property. He had had the title transferred for him by Harvey to one Galoron, and later, on April 27, 1904, another deed was executed from Galoron to one Craig, who, plaintiff claimed, was also his trustee. By these means plaintiff, nominally at least, succeeded to whatever rights the owner of the property acquired through the agreement with defendant respecting the sale which was had under the trust deed. It was not claimed in this action that the plaintiff was entitled to enforce any right at all based upon the agreement mentioned and resting for authority upon the letter of Corbin written prior to the making of the sale under the trust deed. Indeed, it would seem to appear that any right attempted to be conferred by the first agreement, so called, would have become lost when the owner of the property should fail to offer within a reasonable time after the trustee's sale to perform all of the things he became obligated to perform, which included the making of payments delinquent on the loan and the execution of a new trust deed. None of these things were done, and nearly two years passed before the property was sold by defendant.

[1] Plaintiff must rest his claim to a right to recover solely upon an alleged agreement made subsequent to the date of the deed from the trustee to defendant. This agreement, he testified, was to the effect that, if he succeeded in securing a purchaser for the property, he was to receive all money over and above the sum of \$12,000 which might be paid by the purchaser therefor. He stated in his testimony, that his demand was upon this subsequent oral agreement claimed to have been entered into by him with Tichenor. On this subject he testified: "The contract between Tichenor and myself, in which I was to get all over \$12,000, was also oral, and that is the contract under which I claim \$3,000 in this case." The date upon which the latter agreement was made was more than 1½ years prior to the time when the property was sold. In June, 1906, plain-

tiff did produce a purchaser for the property, but Tichenor refused to deal with him, claiming that all business arrangements between defendant and plaintiff had been terminated and were at an end. Through another agent, however, a sale of the property was consummated to the same persons who proposed to purchase through the plaintiff. We consider this second agreement, conceding it to have been made with a person having authority to act for defendant, to be one merely of employment of plaintiff as an agent to sell real estate. Such an agreement is invalid, unless expressed in writing. Civ. Code, § 1624, subd. 6.

[2] A memorandum made on a card by Tichenor, showing prices fixed on the Harvey property in 1904, is of no service as establishing a sufficient writing in and of plaintiff's claim on the second agreement. This memorandum set forth no agreement, or terms of any agreement; it contained merely these words and figures: "Price given McKnight \$11,321.75; price given Bank \$11,104.55."

[3] If the agreement sued on is considered as a modification only of the first agreement, the terms of which were expressed in Corbin's letter, then it, too, is invalid, because not expressed in writing. Section 1698 of the Civil Code provides as follows: "A contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise."

[4] It may be added that this is not a case where the requirement of the statute making it necessary to the validity of certain contracts that they be expressed in writing works any apparent injustice or hardship when applied as a bar to a recovery by plaintiff. Plaintiff's conduct toward defendant in the matter of the Harvey loan was not characterized by that attitude of good faith and fair dealing expected to be evidenced in the deportment of an agent toward his principal. He did not inform defendant during the dealings had with respect to the Harvey property that he had acquired Harvey's title to the same until after sale had been made under the trust deed. While pretending to act for defendant, he was at the same time endeavoring to so manipulate the transaction as to profit himself by the outcome. If it were necessary to pass upon that question, it would be proper to hold that any interest acquired in the Harvey property by the plaintiff, while acting as agent for the defendant, became the property of defendant; that is, that plaintiff, by reason of the confidential relation existing between himself and the defendant, could not acquire any interest for himself in the property without the consent of defendant, and that any interest he did so acquire would be held by him as trustee for the benefit of defendant.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

16 Cal. App. 361

COALINGA PAC. OIL & GAS CO. v. ASSO-
CIATED OIL CO. (Civ. 832.)(District Court of Appeal, Third District,
California. June 8, 1911.)1. MINES AND MINERALS (§ 79*)—OIL LEASE—
SALE OF PRODUCT—CONTRACTS—CONSTRUC-
TION.

A lease of oil lands required the develop-
ment of the lands for oil, and called for one-
sixth of the gross product of oil to be paid to
the lessor, or, at his election, one-sixth of the
gross proceeds of the sale of the oil, and gave
the lessor the right to elect to take the total
output at market prices. A sublessee contract-
ed to sell a specified quantity of oil, subject to
the lease, and the contract permitted the buyer
to take possession of the premises and operate
them and make the deliveries contracted for, un-
der certain circumstances. *Held*, that the con-
tract did not require, the buyer not having tak-
en possession, that the buyer should turn over
any part of the deliveries to the lessor; the pro-
vision making the contract subject to the lease
being intended merely to release the sublessee
from further deliveries, if the lessor should
elect to take the entire product.

[Ed. Note.—For other cases, see Mines and
Minerals, Dec. Dig. § 79.*]2. MINES AND MINERALS (§ 79*)—LEASE—
CONSTRUCTION.

An oil and mineral lease required the les-
see to prospect for petroleum on land describ-
ed, and to remove and sell the product obtain-
ed, and to pay as rent one-sixth of the gross
product to the lessor, or one-sixth of the
gross proceeds of the sale thereof, at the op-
tion of the lessor, to be exercised when settle-
ments should be made, and gave the lessor the
right to purchase all the oil produced. *Held*,
that, in the absence of an election by the lessor
to exercise his option to purchase the product,
and in the absence of any direction given to the
lessee as to the disposition to be made of the
one-sixth royalty, the lessee could sell all the
product on the leased premises.

[Ed. Note.—For other cases, see Mines and
Minerals, Dec. Dig. § 79.*]3. MINES AND MINERALS (§ 79*)—CONTRACTS
OF SALE—CONSTRUCTION—"PRODUCTION."

A sublessee under an oil lease contracted to
sell oil. The contract recited that it was its
desire to sell its "production" to the buyer and
the desire of the buyer to purchase the "pro-
duction." The sublessee contracted to sell 300,000
net barrels of oil, to be delivered in installments
before a designated date, the contract to ter-
minate when the total net barrels had been de-
livered. The contract referred to the lease,
which gave the lessor the option to take as rent
one-sixth of the product, or one-sixth of the pro-
ceeds, and gave the lessor the right to purchase
all the oil produced at the ruling market price,
and made the lease a part thereof. *Held*, that
the word "production" in the contract did not
refer merely to the five-sixths part of the pro-
duction which the seller was authorized to mine
and sell, but the seller was required to deliver
the quantities called for, though it might re-
quire the delivery of the rental in kind, to
which the lessor was entitled, unless the lessor
should exercise his option to purchase, or give
direction as to the disposition to be made of its
royalty.

[Ed. Note.—For other cases, see Mines and
Minerals, Dec. Dig. § 79.*]For other definitions, see Words and Phrases,
vol. 6, p. 5656.]4. EVIDENCE (§ 455*)—CONSTRUCTION—MEAN-
ING OF WORDS.

Under Civ. Code, § 1638, providing that the
language of a contract governs its construction
where it is clear and explicit, extraneous evi-
dence to determine the meaning of unambiguous
words in a contract is inadmissible.

[Ed. Note.—For other cases, see Evidence,
Cent. Dig. § 2104; Dec. Dig. § 455.*]5. MINES AND MINERALS (§ 79*)—LEASES—
CONSTRUCTION.

Where an oil lease required the lessee to
pay as rent one-sixth of the gross amount
of oil produced or one-sixth of the gross pro-
ceeds of the sale thereof, at the option of the
lessor, to be exercised when settlements were
made, and the lessor gave no notice that it de-
sired the royalty paid in kind, the lessee could
sell all the oil as his own property, under Civ.
Code, § 1449, providing that, where a party hav-
ing the right of selection between alternative
acts does not give notice of his selection, the
right of selection passes to the other party.

[Ed. Note.—For other cases, see Mines and
Minerals, Dec. Dig. § 79.*]6. MINES AND MINERALS (§ 73*)—OIL LEASE
—OWNERSHIP OF PRODUCT—CONTRACTS—
CONSTRUCTION.

An owner leased land described for a term
of years to mine and sink and develop for pe-
troleum and other minerals. The agreement re-
quired the lessee to commence work within a
specified time, and to pay a specified part of
the product as rent, or a specified part of the
gross proceeds of the product, at the lessor's
election, and gave the lessor the right to pur-
chase the product at the ruling market price.
Held, that the agreement created the relation
of landlord and tenant, and, in the absence of
any provision to the contrary, the product was
the property of the tenant until delivery to the
landlord.

[Ed. Note.—For other cases, see Mines and
Minerals, Dec. Dig. § 73.*]7. MINES AND MINERALS (§ 83*)—SALES—AC-
TIONS—EVIDENCE.

In an action on a contract of sale of a
designated quantity of petroleum, a letter to the
buyer by its representative, in line with what
the writer had communicated to plaintiff and
indicating that the contract was about com-
pleted, was admissible as notice to the buyer of
the near completion of the contract.

[Ed. Note.—For other cases, see Mines and
Minerals, Dec. Dig. § 83.*]8. MINES AND MINERALS (§ 83*)—SALES—AC-
TIONS—EVIDENCE.

In an action by a sublessee of oil lands,
on a contract for the sale of a designated quan-
tity of oil, a letter by a representative of the
lessor to the buyer, written after the sublessee
had ceased to have any relations with the buyer
under the contract of sale, was properly exclu-
ded, because the dealings between the buyer and
the lessor could not bind the sublessee.

[Ed. Note.—For other cases, see Mines and
Minerals, Dec. Dig. § 83.*]Appeal from Superior Court, Fresno Coun-
ty; H. Z. Austin, Judge.

Action by the Coalinga Pacific Oil & Gas
Company against the Associated Oil Compa-
ny. From a judgment for plaintiff, defend-
ant appeals. Affirmed.

Frank H. Short and F. E. Cook, for appel-
lant. Sutherland & Barbour, for respondent.CHIPMAN, P. J. This is an action to re-
cover the sum of \$2,251.95 for 11,852.40 bar-

rels of petroleum at 19 cents per barrel, being the balance due on a contract by the terms of which plaintiff agreed to sell and defendant to buy 300,000 barrels of petroleum. For a second cause of action, plaintiff claims the further sum of \$3,597.62, alleged to be due for 8,994.06 barrels of petroleum sold and delivered to defendant by plaintiff under a contract entered into on or about January 28, 1908, at the rate of 40 cents per barrel.

Defendant denies that plaintiff delivered any petroleum greater in amount than 250,138.24 barrels of oil; denies the alleged indebtedness, or any indebtedness, to plaintiff on account of the first alleged cause of action; denies that it entered into any contract with plaintiff on or about January 28, 1908, or at all; and denies any indebtedness to plaintiff on account of any such contract as is alleged. By way of cross-complaint, defendant alleges the execution of the contract referred to in plaintiff's first cause of action; that plaintiff delivered thereunder 250,138.24 barrels of crude petroleum, and no more, and has failed and refused to deliver the balance due on said contract, to wit, 49,861.76 barrels, to defendant's damage in the sum of \$20,443.32.

Plaintiff had findings of fact substantially as set forth in the complaint and judgment as therein prayed for. Defendant appeals from the judgment and from the order denying its motion for a new trial.

There was considerable evidence taken for the purpose of showing the construction put upon the written contract which is the foundation of plaintiff's first cause of action. The second cause of action rests in parol. Both parties seem to think that the contract needs no extraneous facts in explanation of its true intent. They both, however, resort to the evidence in aid of their argument, and we may feel obliged to follow them.

On August 20, 1902, the Southern Pacific Railroad Company, as party of the first part, entered into a lease designated "Lease No. G74," with one G. E. Shore, by which it leased and demised to him a certain 80-acre tract of land situated in Fresno county, "To have and to hold the above described lands and premises, with all the appurtenances, unto the party of the second part, for the term of ten years from the 20th day of August, 1902, for the following uses and purposes, to wit: To mine, excavate, bore, drill and sink for and otherwise collect and develop asphaltum, petroleum, natural gas, tar, gypsum, coal or other minerals, substances or products under or upon said lands and premises; also to remove and sell said minerals, substances and products so obtained therefrom;" erect buildings, machinery, dig canals and ditches, and do many other things mentioned in the course of the mining operations; said second party to commence work within a given time and prosecute the same diligently and to dig a certain number of

wells within a certain time; if within a time named second party should obtain the mentioned substances in paying quantities, "then the party of the second part shall thereafter faithfully operate all productive wells and shall continue boring as hereinafter provided, and shall pay to the said party of the first part as rent for and during said term hereby granted, the one-sixth (1-6) part of the gross amount of all (naming said substances), or the gross amount of moneys received from the sale of said minerals, substances, and products at the option of the party of the first part exercised whenever settlements are made, as hereinafter mentioned." The share of the first party is to be delivered to it "as rent of said premises, and not otherwise," and the weights and measurements "shall be by the weights and measurements of the railroad company shipping the same, or when otherwise shipped or sold, by actual weights and measurements." Second party is to collect and store said products on the premises in tanks, where the same may be examined by first party and second party shall keep a correct account of all products of said land, which shall be open to the inspection of first party at all times, and "for the purpose of fixing the amount of rent to be paid" second party shall, on or before the 10th day of each month, furnish written statements to first party's land agent of all the said products of said land, "and the delivery of said minerals and substances or payment therefor as rent as aforesaid shall be made on or before the fifteenth day of each calendar month." It was also provided that second party should not let or sublet any of the premises, nor assign the lease, except by the written consent of first party. Second party was given the right to take and use the oil for development work. "The one-sixth part of the oil, minerals or other substances and products reserved herein by the Southern Pacific Railroad Company as rent, shall be delivered on board the cars of said company, free of expense to it at the nearest or most convenient station on the line of the company's railroad. The party of the first part shall have the privilege, if it so desires, of purchasing at the ruling market rate all the oil produced from said land and belonging to the party of the second part, his successors and assigns."

By the consent of the railroad company, Shore made a sublease of a 40-acre tract of the land to plaintiff, on August 23, 1903, and a 40-acre tract to one Myers, at a prior date, each of which sublettings contains the following: "Subject to all the conditions mentioned in lease of the Southern Pacific Railroad Company to G. E. Shore marked No. G74, dated August 20, 1902"—copy of which lease was attached and made part of said sublease. The consent of the railroad company was also given, subject to the terms and conditions mentioned in said lease No. G74.

On September 30, 1906, plaintiff and de-

fendant entered into a written agreement reciting that, whereas, said seller (plaintiff) holds certain lands, describing them, "and is operating the same and producing crude petroleum therefrom, and has now four wells drilled thereon, and all of which are producing oil, and said seller desires to sell its production to said buyer (defendant); and whereas, said buyer is engaged in the business of producing and marketing crude oils and desires to purchase the production of said seller: * * * Said seller hereby agrees to sell and deliver to said buyer and said buyer agrees to purchase and receive from said seller three hundred thousand (300,000) net barrels of crude petroleum, in bulk, each barrel to contain forty-two (42) gallons; said petroleum to be of a gravity of not less than fourteen (14) degrees Beaume at a temperature of sixty (60) degrees Fahrenheit. Said oil is to be delivered by said seller to said buyer into buyer's storage tanks located on section 18, township 20 south, range 15 east, M. B. D. & M., Fresno county, California, at the rate of a minimum quantity of seven thousand five hundred (7,500) net barrels per month and said total quantity of three hundred thousand (300,000) net barrels shall in any event be delivered in such minimum monthly quantities and completed on or before the 1st day of October, 1909. Said buyer agrees to maintain a pipe line from seller's present wells to storage tanks of the buyer on section eighteen, township twenty south, range fifteen east, M. B. D. & M. In the event that the production from said premises at any time or times during the period of this contract, commencing on the 1st day of June, 1906, and ending on the 1st day of October, 1909, shall exceed said minimum quantity of seventy-five hundred (7,500) net barrels per month, said production shall be delivered by said seller to said buyer as fast as such excess quantity is produced from said premises up to a maximum quantity of thirty thousand (30,000) net barrels per month, it being the true intent and meaning hereof that the total quantity of petroleum produced from said premises up to a maximum quantity of thirty thousand (30,000) net barrels per month shall be delivered as the same is produced from said premises by said seller to said buyer under the terms and conditions hereof. This contract shall in any event terminate and be completed when said total of three hundred thousand (300,000) net barrels have been delivered by said seller to said buyer. Runs are to be made in not less than one thousand (1,000) barrels each. Quantities of deliveries shall be based upon gauge capacities of storage tanks of said seller and run tickets shall be issued by said buyer in duplicate, the original to be retained by the buyer and the duplicate to be delivered to the seller. * * * It is further understood and agreed that this contract is made subject to the terms and conditions of lease G74 and between said Coalinga Pacific

Oil & Gas Company and the Southern Pacific Company. Said buyer agrees to pay said seller at the office of the buyer in the city and county of San Francisco in gold coin of the United States nineteen (19) cents per net barrel of forty-two (42) gallons each for all oil delivered hereunder and to make such payments on the twenty-fifth (25th) day of each month for all deliveries made during the preceding calendar month. Run tickets issued to the seller by the buyer shall be surrendered to the buyer as payments are made. Said seller agrees to in good faith operate the wells upon said premises and any that may be drilled thereon during the period hereof for the purpose of producing the quantities of petroleum covered by this agreement and agrees to drill additional wells thereon for that purpose in the event the monthly quantity required to be delivered monthly by said seller to said buyer as hereinbefore stated, but nothing herein contained shall be construed to obligate said seller to deliver to buyer hereunder any oil other than that produced or capable of being produced from the premises hereinabove described."

There is no dispute of the fact that about January 28, 1908, plaintiff had delivered to defendant the 300,000 barrels of oil. But defendant contends that there should be deducted from the deliveries the one-sixth royalty oils belonging, as it claims, to the lessor, the Southern Pacific Railroad Company, as provided in the lease No. G74. Plaintiff claims that it had the right as a subtenant to sell all the products of the wells, accounting only to the lessor, the railroad company; that when its deliveries amounted to 300,000 barrels of oil its contract obligations with defendant were fulfilled. At no time during the delivery of oil by plaintiff to defendant did the lessor, the railroad company, make any demand on plaintiff for any of the oil or for any settlement in relation thereto, and all this time it had knowledge of the deliveries being made to defendant.

[1] Without doubt, this lease No. G74 became a part of the sublease to plaintiff and also a part of the contract between plaintiff and defendant, so far as applicable to their mutual engagements. Plaintiff, as subtenant, took its sublease burdened with all the covenants of the lessee, and it also took the sublease with all the rights and privileges given by it to the lessee. Defendant, in its contract with plaintiff, reserved to itself "at its option * * * to enter into the said premises * * * and proceed to operate the wells thereon," should plaintiff "refuse or neglect to operate said property or make deliveries as hereinbefore provided," or if the cost of producing oil from said premises should make it unprofitable to continue the work, but this was only optional with defendant and it did not, by any of the terms of its contract with plaintiff, agree to take up plaintiff's burden as a subtenant or bind itself in any way to perform the contracts

undertaken by the lessee; and if it should elect to operate the property it reserved the right to charge the operating expenses to plaintiff "to and including a maximum of nineteen cents per barrel." It seems to us that the main purpose of making this contract subject to the lease, so far as it affected defendant, was that, should the lessor, the railroad company, make its election to take all the oil produced by plaintiff, it would relieve plaintiff from further deliveries to defendant under the contract.

[2] What, then, were the rights or privileges given plaintiff as subtenant under his lease No. G74? The lease seems to answer this question in plain and unambiguous language: "To mine, excavate, bore, * * * sink for and * * * develop * * * petroleum * * * upon said lands; also to remove and sell said minerals, substances and products so obtained therefrom." The right "to remove and sell" is not restricted to the share of the oil to which the lessee is entitled by the terms of the lease; this right the lessee would have without its being given in terms. As we read this clause, the right is given to sell all of the substances mentioned when taken from the wells. This view is strengthened by the provisions that the lessee shall pay as rent "one-sixth part of the gross amount of all * * * petroleum * * * obtained from said land, or the one-sixth part of the gross amount of moneys received from the sale of said minerals, substances and products at the option of the party of the first part (lessor) exercised whenever settlements are made as hereinafter mentioned." There is nothing in the provisions for settlements (given above) which places any limitation or restriction on the right given the lessee to sell all the products of the wells. The lessor was amply protected by having an agent present to whom full returns should be made of oils produced, and it was careful to provide that all shipments should be over its lines. We are unable to discover any question of doubtful construction arising upon the point being discussed. In the absence of an election by the lessor to exercise its option to purchase all the oil produced on said land, and in the absence of any direction given to the lessee as to the disposition to be made of its one-sixth royalty, the lessee had the clear right to sell to defendant all the oil produced on the leased premises.

[3] We are next to discover the intention of the parties plaintiff and defendant as expressed in their contract of sale and purchase. Here, too, the intention seems to be made clear and explicit by the language used, and is easily ascertainable without resort to extraneous facts or circumstances. In their preamble it is declared to be the desire of the seller "to sell its production to said buyer," and the desire of said buyer "to purchase the production of the said seller." We cannot agree with defendant that the terms "its production" refer only to the five-

sixths part of the production, which the defendant was by the lease authorized to mine and sell.

It is next provided that, in consideration of the premises, the seller "agrees to sell and deliver to said buyer and said buyer agrees to purchase and receive from said seller, three hundred thousand net barrels of crude petroleum," to be delivered at the buyer's tanks "at the rate of a minimum quantity of 7,500 barrels per month, and said total quantity of 300,000 barrels shall in any event be delivered in such minimum monthly quantities and completed on or before the 1st day of October, 1909;" and it was provided that, "in the event that the production from said premises * * * shall exceed said minimum quantity of 7,500 barrels per month, said production shall be delivered by said seller to said buyer as fast as such excess quantity is produced from said premises up to a maximum quantity of 30,000 barrels per month. * * *" And it was then provided that: "This contract shall in any event terminate and be completed when said total of 300,000 net barrels have been delivered by said seller to said buyer." Clearly, by these provisions, the seller covenanted to deliver this minimum of 7,500 barrels monthly and 30,000 barrels, if so much was produced, though it might require the delivery of the entire products of the property, and though it might require the delivery of the rentals to which the lessor was entitled, unless the lessor exercised its option to purchase, or gave some direction as to the disposition to be made of its royalty. The lease was referred to in the contract and made part of it, by which defendant must have known that plaintiff had the right to sell the entire products of the wells. It was also agreed that plaintiff should operate the wells in good faith, and should drill additional wells if necessary to make the deliveries provided for. We do not see how or why it became necessary to resort to extraneous facts to determine the intention of the parties; nor can we see how or why, having done so, the evidence could or should be held to vary or change or aid in ascertaining the meaning of what is set down in the contracts in plain and unambiguous terms.

[4] The code rule for the construction of contracts is that the language used is to govern, if clear and explicit and does not involve an absurdity (Civ. Code, § 1638); and where the words used are unambiguous it is not permissible to resort to extraneous evidence to determine their meaning. *Pierce v. Merrill*, 128 Cal. 464, 61 Pac. 64, 79 Am. St. Rep. 56; *Moreing v. Weber*, 3 Cal. App. 14, 84 Pac. 220.

[5] The lessee was to "pay rent" to the lessor "1-6 part of the gross amount" of oil produced, "or the 1-6 part of the gross amount of moneys received from the sale thereof," at the option of the lessor, "exercised whenever settlements are made." Thus the lessee was either to pay in kind or in

money, at the option of the lessor, and nowhere in the lease is the lessee required to deliver the rentals in kind, unless, at the option of the lessor, it was required to sell, as contended by defendant. Section 1449 of the Civil Code, it seems to us, is applicable here: "If the party having the right of selection between alternative acts does not give notice of his selection to the other party within the time, if any, fixed by the obligation for that purpose, or if none is so fixed, before the time at which the obligation ought to be performed, the right of selection passes to the other party." The lessor gave no notice to plaintiff that it desired the royalty paid in kind, in the absence of which plaintiff had the right under the lease to sell the oil as its own property.

[6] There is another view of the matter suggested by respondent which has some force. The lease was very careful to define the relation between the parties to it to be that of landlord and tenant, in which case there must be some appropriate words in the lease to indicate that the product of the land is to be held in cotenancy, "or such conclusion will not be reached. If there is nothing in the lease to indicate that intention, then the products to be delivered to the landlord after the harvest by the tenant will be deemed to be the property of the tenant until that time, and treated as rent to be then paid." *Clarke v. Cobb*, 121 Cal. 597, 54 Pac. 75. If the title to the oil is in the tenant until it is produced and delivered, the right to sell it would follow as a necessary incident, and whatever this right would seem to be a question which the landlord alone could raise, and in this case the landlord is not complaining. However this may be, the contract of lease seems to settle the question definitely, for it expressly gives to the lessee the authority "to remove and sell said minerals, substances and products."

The court found and the evidence was that, on or about January 28, 1908, plaintiff had delivered to defendant 300,000 barrels of oil, and defendant had paid plaintiff for 288,147.60 barrels, at 19 cents per barrel, and no more, leaving due plaintiff \$2,251.95 for 11,852.40 barrels. By this time oil had advanced to 40 cents per barrel at the wells, and hence arose the controversy here; defendant claiming that the deliveries under the contracts amounted only to 250,138.24 barrels, on the assumption that it had the right to deduct from the deliveries the 1-6 royalty belonging to the Southern Pacific Railroad Company.

While we think the contract of the parties needs no extraneous evidence in aid of its correct interpretation of meaning, some facts will help to show how it was executed and how the business was conducted. Plaintiff received from defendant, daily, what are called "run tickets." They read: "Received from tank No. 271, from Coalinga Pacific O. Co. the following crude oil in bulk of 42 gal-

lons per bbl." Then follow certain details of gravity, measurements, etc., ending: "Net amount received 1021.71 bbls." Signed by defendant by its gauger. Also containing the following: "The undersigned certify and guarantee that they are the legal owners of the above described oil, the number of barrels stated being correct." Signed by plaintiff, by its gauger.

There was also received in evidence the form of account rendered by plaintiff. Omitting the immaterial heading, it read:

"Hanford, Cal., October 2, 1907.

"Associated Oil Company. Received San Francisco, October 3rd, 1907. Dear Sirs: Enclosed find oil tickets Nos. (then follow the numbers) for the September run.

Total amount of oil sold to Associated	\$15,150 44
Amount used for fuel.....	190 00
	\$15,340 44

"The S. P. R. R. Co. is entitled to 1-6 royalty on amount sold to A. O. Co. and also on amount used for fuel, making 1-6 royalty on 15,340.44, total due S. P. R. R. Co..... 2556.74 bbls.

"Please send check as soon as possible.

"Yours truly,

"Coalinga Pacific Oil & Gas Co.,

"By Geo. L. Bliss, Secretary.

"Associated Oil Company. Paid Oct. 18, 1907. Voucher No. 9,411."

Witness Bliss testified that his company received no notice from the railroad company "to pay their royalty in oil or money. I do not know as a matter of fact that the Associated Oil Company was settling with the Southern Pacific Railroad Company in some way, whether in oil or money; I understand they settled with them. I never received any notification from the Southern Pacific Company that they were not being settled with. With reference to these letters I wrote, sending run tickets to the Associated Oil Company down to the commencement of this action, I never received any letter from the Associated Oil Company, wherein they objected to the phraseology used in my letter, where I said we had sold them so many barrels of oil. Mr. Short: Did you ever write any letters to them objecting to their accounts rendered to you, showing you they had deducted and credited you with the net quantity? No, sir."

Defendant attaches much importance to these run tickets and monthly accounts as tending to show that the contract did not include the royalty oils. For two years accounts were made up in which the total amount of oil delivered was charged to defendant as sold, and in which plaintiff certified and guaranteed that it was the "legal owner of the above described oil." It is true that in settling with plaintiff the royalty oil was deducted, and it is true that accounts stated that "the S. P. R. R. Co. is entitled

to 1-6 royalty on amount sold to A. O. Co." But defendant got the full amount which plaintiff agreed to deliver, and it was immaterial to plaintiff in what way defendant was settling with the lessor, whether it paid the lessor the same price it had agreed to pay plaintiff or some other price, or adjusted the matter in some other way. For plaintiff had no knowledge of the terms on which defendant was dealing with the lessor, or that the lessor ever claimed the right to receive the oil in kind, instead of money; and had the lessor claimed from defendant such right it certainly was not binding on plaintiff in this controversy. In view of the plain provisions of the contract and the lease, it was defendant's duty to notify plaintiff that it did not regard the royalty oil as delivered on the contract. Furthermore, in whatever view these run tickets and accounts may be regarded, they cannot be taken on their face as giving a construction in derogation of the terms of the contract itself, which are free from ambiguity.

On January 22, 1908, S. Guiberson, Jr., who was connected with defendant and signed his letter as "Supt.," wrote defendant as follows: "In looking over the Coalinga Pacific contract I find that they have delivered up to January 1st 288,147.58 bbls. net oil. Since January 1st we have received about 10,000.00, which with another tank, will complete their contract. I understand the Southern Pacific is offering them 40c, on daily runs. I was talking with Mr. Shore and Mr. Parlin (Shore was vice president and Parlin a director of plaintiff company), and they are ready to enter into negotiations for another contract." The receipt of this letter was acknowledged by defendant on January 25th. About the same time Guiberson had a conversation by telephone with Mr. O. Scribner, secretary of defendant company, in which this same matter was discussed. He testified: "So when I called Mr. Scribner up, he said that, pending the S. P. Company receiving the oil or their making a new contract, after the completion of the old contract, they would receive the oil on daily runs at 40 cents." This information was communicated to defendant, and defendant acted upon it. The witness was asked when, if at any time, defendant first objected that the contract between plaintiff and defendant had not been completed, and answered: "I think the first letter I have on that was under date February 27th." It was stipulated that Scribner had authority to give whatever instructions he gave Guiberson. With this understanding, plaintiff continued to make deliveries until notified by the lessor of its election to take plaintiff's oil, which occurred about February 20, 1908, and deliveries to defendant ceased February 20, 1908. On February 5, 1908, plaintiff sent

in the run tickets for January, and in the statement was an item of certain oil at 40 cents per barrel for the excess over the amount of the original contract. On February 6, 1908, defendant's secretary, Mr. Sloan, replied: "The writer has no information which would indicate that payment should be made to you for any part of this quantity at any price other than 19c. per barrel" Mr. Guiberson's attention was called to this letter, and he replied: "Oh, that is Sloan. He does not know anything about it. That is all right. That will be all right"—as testified by witness Shore.

It is difficult to reconcile defendant's present contention with its conduct in authorizing deliveries of oil at 40 cents per barrel, after it had been informed that plaintiff's contract was completed in accordance with plaintiff's understanding of what the contract meant.

We have considered some but not all the facts and circumstances relied upon by the parties, respectively, as aids in the construction to be given the contract and lease. It was, perhaps, unnecessary to consider them at all, in view of the explicit terms of these instruments. We fail to find in the record any substantial ground for accepting defendant's contention in the case. From the view we have taken, it follows that there is no merit in the demands of defendant's cross-complaint.

[7] Some errors of law are assigned which will be noticed. Witness Shore testified to certain conversations with witness Guiberson, who represented the defendant. It is claimed that "the letter of Mr. Guiberson to Mr. Scribner was a material part of this transaction, and should have been admitted." The only letter we have found in the transcript from Mr. Guiberson to Mr. Scribner is the letter introduced by plaintiff already quoted. If defendant refers to this letter and means that it ought not to have been admitted, we cannot agree with defendant. It was in line with what the writer had communicated to plaintiff, and was notice to defendant of the important fact that plaintiff's contract was about completed.

[8] The letter of E. T. Dumble, who represented the Southern Pacific Railroad Company, to defendant, of date April 20, 1908, was an expression of Professor Dumble's opinion, and was given after plaintiff had ceased to have any relations with defendant under the contract. It was properly excluded. The dealings between defendant and the railroad company were not binding on plaintiff, and were properly excluded.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

MEMORANDUM DECISIONS

SAUL v. MOSCONE et al. (S. F. 5,795.)
(Supreme Court of California. Feb. 14, 1911.)
In Bank. Appeal from Superior Court, City
and County of San Francisco; J. C. B. Heb-
bard, Judge. Action by John R. Saul against
Giacomo Moscone and others. Judgment for
defendants, and plaintiff appeals. Transferred
to District Court of Appeals.

BEATTY, C. J. Good cause appearing there-
for, it is hereby ordered that the above-entitled
cause, now pending in this court, be transferred
to the District Court of Appeal of the First
Appellate District for hearing and determina-
tion.



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PEOPLE v. JONES. (Cr. 1,617.)

(Supreme Court of California. July 13, 1911.)

1. CRIMINAL LAW (§ 368*)—EVIDENCE—RES GESTÆ.

In the midst of an affray and just before the killing of K., he having, at the direction of another, been turned loose by the person who had grabbed and held him, as he was coming through the crowd, what the person said in giving the direction was admissible as *res gestæ*, even though not said in defendant's presence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806, 812, 815, 821; Dec. Dig. § 368.*]

2. CRIMINAL LAW (§ 672*)—SHOWING RELEVANCY OF QUESTION TO WITNESS.

Where the question asked on cross-examination is permissible and the answer might be material, though the court or the examiner cannot tell whether or what it will be, it should be allowed; and if the answer prove irrelevant or impertinent it can be stricken.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1611, 1612; Dec. Dig. § 672.*]

3. CRIMINAL LAW (§ 672*)—SHOWING RELEVANCY OF QUESTION TO WITNESS.

A witness, who has testified that when a person who had fallen arose he knew him, may, on cross-examination, without foundation for an impeaching question being laid, be asked if, at the preliminary examination, he did not testify that he did not know him till later; it being improper to exclude it as being necessarily an impeaching question, though, according to the answer given, it may be followed by a strictly impeaching question.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1611, 1612; Dec. Dig. § 672.*]

4. CRIMINAL LAW (§ 413*)—SELF-DEFENSE—EVIDENCE—SELF-SERVING DECLARATION.

The theory and evidence of defendant being that he acted in self-defense, and instead of fleeing from the scene of a crime committed by him, retreated from a mob carrying the baseball bat with which he committed the homicide, and when 50 or 60 feet from the place thereof stopped a few moments, with the bat in his hand, it was pertinent and proper for him to show just what he did and how he did it; and evidence of his attitude and the position in which he was holding the bat, as indicating that he was on the defensive, fearing further attack, was not objectionable as a self-serving declaration, the occurrence being immediately after the main event,

especially where the prosecution was relying on evidence of his flight as indicative of his guilty mind.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 928-935; Dec. Dig. § 413.*]

5. WITNESSES (§ 240*)—EXAMINATION—"LEADING QUESTION."

The question asked by the defense, if it was possible, during the time the flight was in progress, for any man to leave the crowd and go 40 feet and return with a bat without witness seeing him, which question was addressed to the evidence of the state that defendant had done just this thing, is not a "leading question"; a question not being leading because it can be answered "Yes" or "No," but being leading where it suggests the answer desired.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 838; Dec. Dig. § 240.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4040, 4041.]

6. WITNESSES (§ 240*)—EXAMINATION—LEADING QUESTIONS.

Leading questions are obnoxious only where there is manifestly an attempt to put answers on material matters in witness' mouth.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 838; Dec. Dig. § 240.*]

7. HOMICIDE (§ 309*)—MANSLAUGHTER—PROVOCATION—INSTRUCTIONS.

While it is proper to instruct that to reduce a homicide from the degree of murder to manslaughter, on the ground of sudden quarrel or the heat of passion, the provocation must be of such a character as would be naturally calculated to excite and arouse the passions, and, if the provocation was of slight and trifling character, of such a nature as would not be calculated to arouse the passion, the offense would not be reduced, it is error to instruct that any trivial provocation, though amounting to an assault, or even a blow, will not so reduce it; it being a question for the jury in each case whether the assault or blow be sufficient.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649-656; Dec. Dig. § 309.*]

8. CRIMINAL LAW (§ 778*)—FLIGHT AS EVIDENCE—INSTRUCTIONS.

An instruction that flight of a person, after the crime has been committed with which he is charged, is a circumstance to be weighed as tending to prove a consciousness of guilt, if given at all, should contain the qualification that he knows he is charged with the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1857; Dec. Dig. § 778.*]

9. CRIMINAL LAW (§§ 763, 764*)—FLIGHT AS EVIDENCE—INSTRUCTIONS.

Where defendant has given a full explanation of his flight, it is for the jury to say whether or not that explanation is true, untrammelled by any instructions that the evidence of flight is to be weighed by the jury as indicative of consciousness of guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1731; Dec. Dig. §§ 763, 764.*]

10. HOMICIDE (§ 146*)—MURDER—MALICE—BURDEN OF PROOF.

Under Pen. Code, § 1105, providing that on a trial for murder, the commission of the homicide by defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves on him, unless the proof on the part of the prosecution tends to show that the crime only amounts to manslaughter, or that defendant was justifiable or excusable, malice, which, under section 187, is an essential to murder, is established by proof of de-

fendant's commission of the homicide, putting on him the burden of overcoming it.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 265-271; Dec. Dig. § 146.*]

In Bank. Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

J. C. Jones was convicted of murder, and appeals. Reversed and remanded.

H. B. Neville, L. H. Hughes, and White, Miller & McLaughlin, for appellant. U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and M. C. Kerr, Dist. Atty., for the People.

HENSHAW, J. The defendant, informed against for the murder of George King, was convicted of murder in the second degree. From the judgment and from the order denying his motion for a new trial, he prosecutes this appeal.

Herein he urges certain rulings of the trial court in admitting and refusing to admit evidence and certain instructions given by the trial court as errors justifying his demand for a new trial. There was no question but that the homicide charged was committed by the defendant. His plea was self-defense. The evidence was in sharp conflict. The rulings of the court in admitting and rejecting evidence touching the homicide thus became very important. The circumstances attending the homicide, as shown by the witnesses for the people were substantially as follows: Upon August 15, 1909, at the town of Beckwith, in Plumas county, a baseball game was in progress between the rival teams of the town of Beckwith and of the neighboring town of Loyalton, in Sierra county. Defendant resided at Loyalton, and was an ardent partisan of his home team. He and others of his townspeople had accompanied the home nine to Beckwith. The game was in progress. The Beckwith nine was at the bat. The defendant had taken a position near the side line, between the home plate and first base, where he shouted encouragement to his home team and jeers and gibes at the opposition players. He was a vociferous "rooter" for the Loyalton nine. He seems to have made himself offensive to certain of the supporters of the Beckwith nine. One of these, Yerrington, accompanied by some of his friends, engaged Jones in a wordy altercation. Jones was holding an old axe handle in his hand. Yerrington asked him if he was carrying it for protection and challenged him to throw the axe handle away, which Jones admittedly did. Yerrington seemed disposed to provoke a fight with Jones, and Jones apparently was not unready or unwilling. Yerrington said to Jones, "You could not whip me if you had a gatling gun," and Jones replied that he was "willing to take a chance anyway." Others had gathered about. Middleton, the manager of the

Beckwith nine, came up to Yerrington, telling him there must be no fight; that it would break up the game, and Yerrington said, "All right, there will be no fight"; then Yerrington turned away. In the crowd of Beckwith sympathizers which had surrounded Jones was one Jeff Parrish. Immediately following the Yerrington incident, according to the testimony of Parrish, the deceased, King, and Jones engaged in conversation. King was talking quietly to Jones and to the others, endeavoring to pacify them and prevent a disturbance. Upon this scene, according to his own testimony, Parrish intruded himself and to Jones said: "Don't holler and make so much noise, you son of a bitch; you have been hollering your head off ever since you have been here." Jones to Parrish replied: "You are a damned liar." Parrish struck him in the face; Jones endeavored to draw a beer bottle from his hip pocket and to use it as a weapon, but it was knocked from his hands and shattered on the ground. Parrish struck Jones in the face four or five times. Jones retreated from the *mêlée*. King was acting as peacemaker, endeavoring to quell the disturbance and quiet the crowd. He was so engaged, with his side or back toward Jones, when Jones, who had walked deliberately some 20 or 40 feet to where a baseball bat was lying, picked it up, walked back, and struck the unseeing and unsuspecting King a savage overhand blow with the large end of it, crushing his skull, felling him to the ground, and inflicting injuries from which he speedily died. Jones then made another equally vicious blow at another of the bystanders, who dodged it and escaped. He then fled the scene, running in the direction of Loyalton, was pursued, was intercepted by an armed man on horseback, and surrendered himself into custody.

The version of the fatal affray, as given by Jones and the witnesses for the defense, was that Jones was set upon by a Beckwith mob; that King was in the mob, not as a peacemaker, but as the leader of it; that Jones was beaten about the head by blows, not alone from Parrish, but from others; that the axe handle which he had tossed aside to engage in a fair fist fight with his adversary was wielded in the mob against him; that his futile effort to use the beer bottle was in self-defense; that roughly handled, bleeding, and half dazed, he staggered backward from the blows of his adversaries and fell on one knee; that his hand touched a baseball bat, which instinctively he seized and swung in self-defense; that the first sweep of the bat struck King, who was the foremost of the mob in his pursuit; that he struck wildly again to clear himself of his assailants, and retreated with the bat in his hand some distance into the ball field, where he stood and faced about; that he heard cries of "We will hang you for this;" that, fearing further and greater violence at the hands of the mob, he ran toward his home

at Loyalton, and so running was intercepted by an armed man on horseback, who covered him with a rifle and called upon him to surrender, which he promptly did.

Accepting the first version of the affray given by the witnesses for the prosecution, the evidence fully supports a verdict of murder. Upon the other hand, if the evidence offered for the defense were accepted, defendant was acting in self-defense. The testimony for the prosecution is principally that of the participants in the affair—Beckwith partisans. For the defense, the witnesses are not only from Loyalton, but include certain disinterested spectators, residents of Beckwith and vicinity. Through the conflicting versions, certain facts stand forth without dispute. Jones was not the assailant, but the assailed. The crowd about him was composed almost wholly, if not entirely, of Beckwith people, friends and associates of King. Whether or not any blows were actually struck with the axe handle which Jones had cast aside, it was certainly brandished in the affray in hands hostile to Jones. Jones had been struck at least four or five times; blood was flowing from his face; the beer bottle which he sought to use as a weapon of defense had been struck from his hands; and, whatever willingness he may have possessed to do so, he had not delivered any effective blow, either in retaliation or in self-defense. In such sharp conflict is this evidence that the rulings and instructions of the court become of grave consequence.

[1] Clair Thomas, a witness for the people, testified that he saw the deceased, King, who was his friend, "coming through the crowd, a bunch of fellows standing there, like he had been shoved or hit," and "grabbed him and held him away from trouble." Then, "another young fellow said, 'You better turn King loose,' so I let him go. Just a minute or so, something like that, I heard a blow struck. I looked around in time to see King fall." On cross-examination, being asked why he did not hold King, he replied that King was a strong man and was giving him a tussle, and, besides, "another man told me to turn him loose." "Q. Who told you to turn him loose? A. McCloud. Q. Why did you turn him loose? A. He had this axe handle, and he said turn him loose. Q. How did he tell you; give me the language?" To this last question objection was interposed, upon the ground that it was "immaterial, incompetent, and not cross-examination," and the objection was sustained by the court upon the ground that: "It does not appear that it [the language used] was said in the defendant's presence. Further, even if it had, the court does not know what was said, and cannot tell whether it would be material or not, unless it be shown that it was said in the presence or hearing of the defendant." The matter called for was a part of the *res gestæ* and was admissible, either as to acts or language, whether done or uttered in the

presence of the defendant or not. It had to do with the action, conduct, and speech of a member or members of the crowd at the time and in the very midst of the fracas which ended in the death of the man who was being held.

[2] The trial judge very justly said that he could not know "what was said, and cannot tell whether it would be material or not," but this question was on cross-examination. Defendant's counsel, likewise, could not know and could not advise the court of the evidence which they expected to elicit. One of the most important objects of cross-examination, one of the most important purposes for which a liberal range of cross-examination is allowed, is to bring forth from adversary witnesses matters which they have glozed over or suppressed. The question was permissible; the answer might have had an important bearing upon the matter. The question, therefore, should have been allowed, and the answer, if it proved irrelevant or impertinent, could have been stricken out. But to rule out a pertinent question asked on cross-examination, because the court and cross-examiner cannot know what the answer will be, is to destroy every purpose of a cross-examination and render it a vain and empty thing. Where a question is by a party asked of his own witness, which does not seem to have any relevancy or pertinency to the issues, and objection is made upon that ground, it is always within the power of the party producing the witness to state what he expects to prove, and the court can then rule with certainty upon the permissibility of the question. But, upon cross-examination, because of the very fact that it is cross-examination, the interrogator cannot tell the court what evidence he expects to bring forth; and to exclude evidence because such a showing is not made is destructive of the whole theory of cross-examination. For example, supposing the witness had been allowed to answer the question, and had replied: "Turn him loose; he will help us kill Jones"—the evidence would have much bearing upon the conduct and attitude of the deceased, who, according to the prosecution, was a peacemaker, but, who, according to the defense, was the active leader of the assaulting mob.

[3] The same witness, upon cross-examination, having testified that he saw Jones strike at a young man, who dodged by falling to the ground, and that he did not know him when he fell, but knew him as soon as he arose, was asked: "Did you not testify that you did not know the man until later, at the preliminary examination?" An objection was interposed, to the effect that if the question was "meant for impeachment no foundation has been laid," and the court sustained the objection. A misconception seems to exist upon the subject of the permissibility of inquiries such as this. To such a question the objection here stated is usual-

ly interposed, and usually the objection is sustained upon the ground that the question is intended to impeach, and being intended to impeach the "proper foundation" of time, place, circumstances, and persons present are not called to the attention of the witness. It is true that when a question is asked for the purpose of impeachment its "foundation" must be laid, to the end that the witness' attention may be called to every circumstance which will tend to refresh his memory and prevent him from falling into error. But it by no means follows that every such question is or is meant to be an impeaching question. Frequently such questions may be properly asked upon collateral matters, where the answer would bind the questioner, without right to impeach. Frequently they are designed to test the recollection of the witness, and frequently, as in the instance before us, the question is proper, though ultimately, and according to the answer which may be made to it, it will or will not be followed by a strictly impeaching question. Thus it was proper to ask the witness if he had so testified. His answer might have been that he did not, when an impeaching question would properly follow. His answer might have been that he did so testify, with explanation of the variance between his answers, in which case no impeaching question would be necessary; and it is an unwarranted curtailment of legitimate cross-examination to exclude such questions, as was here done, upon the ground that they are necessarily impeaching questions, and the proper foundation for them has not been laid. *People v. Hart*, 153 Cal. 261, 94 Pac. 1042.

[4] Upon the evidence and theory of the prosecution, when Jones fled the scene of his crime, and when, according to the evidence and theory of the defense, he made his retreat from the mob, he was carrying the baseball bat, and stopped for a few moments on the ball field 50 or 60 feet away from the place of the homicide. A witness for the defense, testifying that the defendant stood with the baseball bat in his hand, was asked: "What was he doing with the bat?" and answered: "Just standing there with the bat in his hand. Q. Over his shoulder, on the ground, or where was it?" The objection to this question was improperly sustained. It is insisted by the defense that the answer would have shown that defendant's attitude and the position in which he was holding the bat would have indicated that he was on the defensive, fearing further attack from the mob. In support of the ruling, it is said that, even if this were so, it was after the homicide, and would have been in the nature of a self-serving declaration. In other words, that defendant's conduct and actions could have been assumed and feigned. But the occurrence was, in point of time, too closely and intimately related with the main event to justify the exclusion of the evidence on

this ground, and particularly so as the prosecution was relying upon the evidence of defendant's flight as indicative of his guilty mind. It was pertinent and proper, therefore, for the defense to show just what defendant did and how he did it, leaving it for the jury to say what motives and impulses were the actuating causes of his conduct.

[5, 6] A witness for the defense was asked if it was possible, "during the time the fight was in progress, for any man to leave that crowd and go a distance of 40 feet to first base and return with a bat, without your seeing him." The question was objected to as leading, and the objection was sustained. The question was addressed to the evidence offered on behalf of the people to the effect that the defendant had done just this thing. The question was not leading. A question is not a leading question, because it may be answered by "Yes" or "No," and even a leading question is frequently permissible. A leading question is one which suggests the answer desired; but leading questions are obnoxious only when there is manifestly an attempt to put answers upon material matters in the witness' mouth. That the question was important as negating the testimony of the prosecution is, of course, manifest.

[7] Upon the subject of manslaughter, the jury was instructed as follows: "You are instructed that under the information in this case the defendant may, if the evidence warrant, be convicted of manslaughter. This is defined by our statute to be the unlawful killing of a human being without malice, and is of two kinds: First, voluntary, upon a sudden quarrel or heat of passion; and, second, involuntary, in the commission of an unlawful act, which might produce death, in an unlawful manner, and without due cause and circumspection. To reduce a felonious homicide from the grade of murder to manslaughter, upon the ground of sudden quarrel or heat of passion, the provocation must be of such a character as would be naturally calculated to excite and arouse the passions, and it must appear that the party acted under the smart of this sudden passion and resentment. If, however, the provocation was of slight and trifling character, of such a nature as would not be calculated to arouse the passion, or if sufficient time had elapsed between the provocation and the fatal blow for passion to subside and reason to resume its empire, the offense will not be mitigated, but the slayer will be guilty of murder." This instruction was unobjectionable. *People v. Bruggy*, 93 Cal. 476, 29 Pac. 26. The court then proceeded to give another instruction in the following language: "You are instructed that any trivial provocation which, in point of law, amounts to an assault, or even a blow, will not reduce the crime of the party killing from murder to manslaughter. For when the punishment inflicted for a slight

transgression of any sort is outrageous in its nature, either in the manner of its continuance or beyond all proportion to the offense, it is rather to be considered as the effect of malice than of human frailty, and the crime will amount to murder, notwithstanding such provocation." This instruction is a garbled extract from a quotation from East's Pleas of the Crown, which quotation is employed argumentatively in *People v. Bruggy* to show the soundness of the instruction first above given, which instruction itself was given in the *Bruggy* Case. Besides, the fact to which this court is all too often compelled to call attention, that argumentative discussion by this court is not the proper subject-matter for instructions to juries (*Davis v. Hearst*, 116 Pac. 530, decided June 6, 1911), the instruction actually given in this case does violence even to the language quoted by this court. The language quoted was: "It must not, however, be understood that any trivial provocation which in point of law amounts to an assault, or even a blow, will, of course, reduce the crime of the party killing to manslaughter. This I know, has been supposed by some, but there is no authority for it in law." Here, it will be seen, that the discussion is addressed to the legal contention that an assault or a blow will, in point of law, *as matter of course*, reduce the crime to manslaughter, and the argument is advanced to show that, as matter of law, it will not do so, because it is not a matter of law, but a matter of fact for the jury in each case to determine, under the circumstances of the case whether the assault, or whether the blow, or whether the indignity, or whether the affront, or whatever the act may be, was such as is naturally calculated to arouse the passions, and so lessen the degree of the offense by relieving it from the element of malice. *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711. The instruction, as given, omits this all-important qualification, and instructs the jury, as a matter of law, that which has always been for them a matter of fact. It instructs them that an assault, or even a blow, will not reduce the crime of the party killing from murder to manslaughter. According to the circumstances, the assault or the blow may or may not be sufficient in the minds of the jury so to reduce the crime; but it is for the jury to determine this, and not for the court to declare such to be the law.

[8] As has been pointed out the defendant admittedly fled the scene of the homicide. By his testimony, he fled in ignorance that he had killed King, and to save himself from further attacks of the mob. The prosecution sought to have his flight associated with guilty knowledge that he had committed a crime, and the court instructed the jury as follows: "You are instructed that the flight of a person immediately after the commission of a crime, or after a crime

has been committed with which he is charged, is a circumstance to be weighed by the jury as tending in some degree to prove a consciousness of guilt, and is entitled to more or less weight, according to the circumstances of the particular case. Evidence of flight is received, not as part of the *res gestae* of the criminal act itself, but as indicative of a guilty mind; and, if you believe from the evidence in this case that the defendant did try to escape by flight, it is a circumstance to be weighed by you as tending in some degree to prove a consciousness of guilt. It is not sufficient of itself to establish the guilt of the defendant; but the weight to which that circumstance is entitled is a matter for you to determine in connection with all other facts and circumstances called out in this case." This court has for a long time discountenanced the giving of such instructions, and has refused to reverse cases where they have been given only when it could be seen that the instruction as given was not prejudicial. Thus, where a defendant flees "immediately after the crime has been committed with which he knows he is charged," and the reason for his flight remains unexplained, this court has, in effect, said that it would not reverse cases for an instruction, in substance, declaring to the jury that this evidence can be by them considered and given such weight as they thought fit as tending to indicate a guilty mind. *People v. Lem Deo*, 132 Cal. 199, 64 Pac. 265. But this court, as has been said, has frowned upon the giving of any such instructions, because it is a clear invasion of the jury's province in weighing evidence, and may work much injury and prejudice to a defendant's case. The instruction here given is typical. In the first place, it omits the essential qualification that, where flight can be indicative of a guilty consciousness, the defendant must *know* that he is charged with the crime.

[9] But more important even than this, we have before us a case where the flight of the defendant was explained, where it was in evidence that he feared mob violence and fled to avoid it, and where it was in evidence that, when away from the mob he was called upon to surrender, he promptly did so. Here, certainly, it was for the jury to determine what prompted the flight, and if it was prompted by fear of mob violence, as defendant says, then no element of guilty consciousness entered therein. And yet the jury is told that if the defendant "did try to escape by flight" (a fact which was admitted) that that was a circumstance to be weighed as tending in some degree to prove a consciousness of guilt. Where flight is unexplained, the giving of such an instruction may be excused, though not justified, because it is within the power of the defendant to explain it, and he has not done so; but where the defendant has given a full explanation of his flight, it is for the jury

to say whether that explanation is true or not, untrammelled by any instructions from the court to the effect that the evidence is to be weighed by them as indicative of guilt.

[10] The court instructed the jury as follows: "You are instructed that in determining the intention of the defendant at the time of the transaction complained of it is important to consider the means used to accomplish the killing. The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots, nor lunatics, nor affected with insanity. A person is presumed to intend to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable, and usual consequences of his own acts. Therefore, if you are satisfied to a moral certainty, and beyond a reasonable doubt, that the defendant did assail, on the date mentioned, one George King, violently with a dangerous weapon, likely to kill, and which did in fact destroy the life of said George King, the natural presumption is that such assailant intended death or great bodily harm, and in the absence of evidence to the contrary this presumption must prevail." It is contended that this instruction does violence to the law, in that the law is that whenever a specific intent is an element of an offense no presumption of law can arise, and that the specific intent is a fact to be shown like any other fact in the case. *People v. Landman*, 103 Cal. 580, 37 Pac. 518; *People v. Johnson*, 106 Cal. 295, 39 Pac. 622; *People v. Flannelly*, 128 Cal. 89, 60 Pac. 670. The rule of law is as appellant declares in all crimes saving that of murder. In the case of murder, the law has made provision peculiar to the crime. To the crime of murder, malice is an essential. (Pen. Code, §§ 187, 188); but by section 1105 of the Penal Code, when the homicide by the defendant has been proved, the murder is established, and, of course, to establish murder the malice must be established. We have thus, in our law, the peculiar situation touching murder that proof of the homicide alone establishes the crime, with its necessary ingredient of malice, and immediately the burden is transferred to the defendant of proving circumstances in mitigation to lessen the degree of the crime, or in justification or excuse show that no crime has been committed. Thus the effect of section 187 and of section 1105 of the Penal Code, construed together, is as though the law had expressly declared that, while murder is the unlawful killing of a human being with malice aforethought, every killing is murder, unless the defendant proves the contrary. To illustrate this peculiarity of our law, reference may be made to *People v. Knapp*, 71 Cal. 1, 11 Pac. 793, where the subject is discussed. It is pointed out that in the state of New

York there is no section corresponding to section 1105 of our Penal Code, and consequently no rule of evidence similar thereto. In New York, therefore, it is held that there is never a presumption of malice in the case of a homicide, and that an actual intent to kill must be shown affirmatively; whereas, by virtue of section 1105 of our Code, the existence of malice is presumptively proved by proof of the killing. So in *People v. Kernaghan*, 72 Cal. 613, 14 Pac. 568, this court distinguishes between murder of the second degree and manslaughter, quoting *People v. Doyell*, 48 Cal. 96, to the following effect: "In the former cases [second degree murder], the slayer is presumed to be actuated by an intent which may not exist; in the latter [manslaughter], out of forbearance for the weakness of human nature, the slayer is presumed not to be actuated by an intent to kill, although such intent may in fact exist." But, wherever the crime falls short of homicide, even if it be the crime of assault with an intent to commit murder, this shifting of proof does not arise, and it is necessary for the prosecution to show as a fact the specific intent which is essential to the particular crime charged. Thus, in *People v. Mize*, 80 Cal. 41, 22 Pac. 80, the charge was an assault with intent to commit murder. The jury was instructed, as here, that every person is presumed to have intended the natural and probable consequences of his act, and therefore, if the jury believed that the defendant did shoot "at said Henry Coffey as charged in the indictment, and that the natural and ordinary consequences of such shooting would be the death of said Henry Coffey, then the presumption of law is that the defendant so shooting did shoot at said Henry Coffey with intent to kill him." This court in condemning the instruction said: "In homicide cases, where the killing is proved, it rests on the defendant to show justification, excuse, or circumstances of mitigation, subject to the qualification that the benefit of the doubt is to be given to the prisoner; *but this is because the statute expressly shifts the burden of proving circumstances in mitigation upon the defendant in homicide cases.* The rule is confined to murder trials." *People v. Cheong Foon Ark*, 61 Cal. 527. See, also, *People v. Gordon*, 88 Cal. 422, 26 Pac. 502. As this was a case of homicide, it forms, as we have shown, an exception to the general rule that, where a specific intent is an essential element of a crime, the existence of that intent must be established as a fact. The instruction was therefore proper.

For the foregoing reasons, the judgment is reversed, and the cause remanded.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.

(160 Cal. 374)

PEOPLE by WEBB, Atty. Gen., v. CALIFORNIA SAFE DEPOSIT & TRUST CO. (HYLEN et al., Interveners). (S. F. 5,379.)

(Supreme Court of California. July 24, 1911.)

1. BANKS AND BANKING (§ 309*)—INSOLVENCY—PREFERENCES BETWEEN DEPOSITORS—CONTRACTS.

A corporation, doing both a savings bank and a commercial bank business, does not give its savings depositors a preferential lien over the commercial depositors by the provision in the books of the savings depositors, "The reserve fund, together with the guarantee capital and the assets of the corporation, shall form an absolute security to all depositors for their deposits and declared dividends. In consideration of the security thus afforded, each depositor * * * expressly waives all claim * * * on the individual stockholders * * * for any losses, and consents to look for * * * security solely to the guarantee capital, to the reserve funds and the assets of the corporation"; but its purpose is to work a waiver by the depositors of the stockholders' liability.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 309.*]

2. BANKS AND BANKING (§ 309*)—INSOLVENCY—PREFERENCES BETWEEN DEPOSITORS—CONTRACTS.

Savings depositors of a corporation, doing both a savings bank and a commercial bank business, not being given by law any preferential lien over commercial depositors, an agreement therefor between the corporation and savings depositors, not known of and consented to by the commercial depositors, could not have that effect.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 309.*]

3. BANKS AND BANKING (§ 309*)—INSOLVENCY—PREFERENCES BETWEEN DEPOSITORS.

The provision of Civ. Code, § 573, "The capital stock and the assets of a savings and loan corporation are a security to depositors and stockholders, depositors having the priority of security over stockholders, but the by-laws may provide that the same security shall extend to deposits made by stockholders," does not give a preferential lien to savings depositors over commercial depositors, in the case of a corporation doing both a savings bank and a commercial bank business.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 309.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Liquidation proceeding by the People, by U. S. Webb, Attorney General, against the California Safe Deposit & Trust Company. I. N. Hylen and another filed an intervening petition, which being denied, they appeal. Edward J. Le Breton, the receiver, being respondent. Affirmed.

H. W. Hutton, for appellants. J. V. de Laveaga and E. De Los Magee, for respondent.

HENSHAW, J. The California Safe Deposit & Trust Company, being insolvent, its assets in the hands of a receiver and its affairs in process of liquidation, I. N. Hylen petitioned the court upon his own behalf as a savings depositor, and on behalf of others

similarly situated, to have it declared that the savings depositors were entitled to have their claims paid in advance of the commercial depositors of the banking corporation. The court denied the petition, and this appeal is taken for the determination of this question.

It is conceded that the California Safe Deposit & Trust Company, under its articles of incorporation and by-laws, was entitled to do, and was in fact doing, both a savings bank and a commercial bank business, having depositors of both kinds. Appellants' contention is that the savings depositors acquired a preferential lien, first, by virtue of their contract with the bank, and, second, by virtue of the law. The asserted preferential lien of contract arises out of the seventh section of the contract printed in each savings depositor's bank book as follows: "Seventh. The reserve fund, together with the guarantee capital and the assets of the corporation, shall form an absolute security to all depositors for their deposits and declared dividends. In consideration of the security thus afforded, each depositor, by signing these conditions, expressly waives all claim—whether founded upon the statutes or upon the Constitution of this state—upon the individual stockholders of this corporation, or any of them; or his, her, or their heirs, executors or administrators for any losses, and consents to look for his or her security solely to the guarantee capital, to the reserve funds and assets of the corporation."

[1] Analyzing this section, it becomes apparent that all the preliminary part of it is mere words used to darken understanding. The purpose of the section is to work a waiver by the depositors of the stockholders' liability. The somewhat grandiose language to the effect that the reserve fund together with the guarantee capital and the assets of the corporation "shall form an absolute security to all depositors," really gave them nothing more than what the law accorded them. "Absolute security" is a high-sounding phrase, but "absolute," as here employed, has little meaning, and is apparently used merely as an impressive epithet. But whether "absolute" was designed to mean "sole," or "the entire," or "the total," or "all," or "adequate," or "only," it is not important to consider, though it may be said after scanning the last sentence where the declaration is that the depositor consents to look for his security *solely* to the guarantee capital, etc., that the idea really intended to be conveyed by the use of the word "absolute," would make it synonymous with "only" or "sole." But, viewing the section as a whole, it must be apparent that it does not, either in terms attempt to create, nor in law effect the creation of, any preferential lien in favor of savings depositors.

[2] Nor if the attempt were shown, could

it be given validity against commercial depositors in ignorance of, and not assenting thereto, for the effect would be as to such depositors to deprive them of their rights to a return of their own funds, or to their ratable share of the assets of the corporation, without knowledge of the secret lien attempted to be created by the bank in favor of another class.

[3] The contention that the law gives to savings depositors this preferential lien over the commercial depositors is by appellant declared to exist by virtue of section 573 of the Civil Code, to the following effect: "Sec. 573. * * * The capital stock and the assets of the corporation are a security to depositors and stockholders, depositors having the priority of security over the stockholders, but the by-laws may provide that the same security shall extend to deposits made by stockholders."

But while establishing liens and priority of liens, this section does not pretend to favor savings depositors over commercial depositors. It simply gives a preference to all depositors who are not stockholders over like depositors who are stockholders, with a provision that the same security may by the by-laws be extended to stockholding depositors. Such is the construction of the law unmistakably set forth in such cases as *Murphy v. Pacific Bank*, 119 Cal. 339, 51 Pac. 317; *s. c.*, 130 Cal. 542, 62 Pac. 1059; *Laidlaw v. Pacific Bank*, 137 Cal. 392, 70 Pac. 277.

For these reasons the order appealed from is affirmed.

We concur: MELVIN, J.; LORIGAN, J.

160 Cal. 372

BENDER v. HUTTON, Presiding Judge of Superior Court. (S. F. 5,940.)

(Supreme Court of California. July 17, 1911.)

1. MANDAMUS (§ 34*)—TO JUDGE—ORDER FOR SERVICE BY PUBLICATION.

Under Code Civ. Proc. § 412, providing that where the person to be served resides out of the state, and the fact appears by affidavit to the satisfaction of the court or judge, it or he may make an order for service of summons by publication, a judge may not, except where there has been a manifest abuse of discretion, be compelled by mandate to make such an order, where the affidavit, though formally sufficient, did not satisfy him as to the fact of residence.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 77; Dec. Dig. § 34.*]

2. PROCESS (§ 96*)—SERVICE BY PUBLICATION—APPLICATION—AFFIDAVIT.

A judge, who under Code Civ. Proc. § 412, may order service of summons by publication where the person to be served resides out of the state, and this fact appears by affidavit to his satisfaction, may refuse the order as not satisfied because the affidavit merely states that the last known address of defendant was and is a certain place in another state, and that defendant now resides there; and does not state the grounds on which affiant relies for his belief as to such residence.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. §§ 108-120; Dec. Dig. § 96.*]

In Bank. Petition of Robert B. Bender for writ of mandate to George H. Hutton, Presiding Judge of the Superior Court in and for the County of Los Angeles. Denied.

E. M. Barnes, for petitioner.

BEATTY, C. J. This is a petition for a writ of mandate requiring a judge of the superior court to make an order for the publication of the summons in an action for divorce. The application for the order was based upon the ground that the defendant resided out of the state (Code Civ. Proc. § 412) and it was supported by the affidavit of the plaintiff alone, who merely deposed "That the last known address of said defendant was and is Clovis, New Mexico, and this defendant now resides at Clovis, New Mexico."

The judge refused to make the order, and it is said that his only ground for such refusal was—as stated by him—that the affidavit was insufficient to satisfy him that the residence of defendant was at Clovis, New Mexico, and this because it failed to state the grounds upon which the affiant relied for his belief that her residence was at that place.

[1] The petitioner cites in support of his petition certain cases in which this court has refused to set aside default judgments based upon summons by publication, in which it was contended that the orders for publication were made upon too slight evidence of the essential facts. It is true that this court has been extremely liberal in sustaining such judgments, but the principle of those decisions—as of many others involving similar considerations—is that in matters confided to the discretion of the trial courts or judges—where in other words, they are to act upon evidence satisfactory to them—their orders will not be invalidated when found to be supported by substantial evidence as to the essential facts. Upon the same principle, and a fortiori, we cannot compel those courts or judges to make orders in such matters where the evidence of essential facts—though formally sufficient—is not satisfactory to them, except in cases where there has been a manifest abuse of their discretion. There is a wide distinction between the affirmance of an order based upon slight evidence which has satisfied a judge and a peremptory mandate compelling him to make the same order upon similar evidence which has not satisfied him, and in the latter case especially it cannot be deemed an abuse of discretion to demand other and corroborative evidence which the party claiming relief may easily produce.

[2] When the plaintiff in an action pending in Los Angeles makes an affidavit that the defendant is now a resident of Clovis, N. M., the judge who is asked to make an order for the publication of summons for

that reason may justly assume that the averment is based upon information derived from third parties, or upon the recollection of the affiant as to the former residence of the defendant at a time more or less recent, or upon the receipt of letters, or upon other circumstances from which the fact of present abode may be reasonably inferred. He is entirely justified, therefore, in requiring a statement of the grounds of the affiant's belief in order to determine whether they are sufficient to satisfy the mind and conscience of a reasonable man that the fact is as alleged. This involves no hardship to the plaintiff, for in making his showing he is not limited to his own affidavit, and if he or his witnesses have good grounds for their belief it will always be easy to state them, and if they have not he has no right to the order. The practice, therefore, of requiring reasonably strict proof of the place of residence of the defendant when publication of summons is sought upon the ground that he resides out of the state, so far from deserving reproof is much to be commended. It is certain that a more general observance of it would have spared the courts of this state much trouble and some painful doubts as to the validity of default judgments by which important rights have been foreclosed without a hearing of the parties interested.

The writ of mandate is denied.

We concur: ANGELLOTTI, J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

(160 Cal. 423)

BROOK v. CITY OF OAKLAND.

(S. F. 5,895.)

(Supreme Court of California. Aug. 1, 1911.
Rehearing Denied Aug. 31, 1911.)**1. CONSTITUTIONAL LAW (§ 290*)—MUNICIPAL CORPORATIONS (§ 407*)—DUE PROCESS OF LAW—HEARING ON EXTENT OF ASSESSMENT DISTRICT FOR SEWER.**

Act Feb. 13, 1911 (St. 1911, p. 40), conferring on a city council power to create a sewer district for special taxation for payment of a sewer to be constructed therein, without any provision for persons interested having a hearing on the question of limits of the district, and the exclusion of their property therefrom, if found not benefited, the only hearing vouchsafed them being one, under Pol. Code, §§ 3673-3682, before the city board of equalization, as to their property having been properly valued, contravenes the provision of the Constitution against taking property without due process.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 871-875; Dec. Dig. § 290;* Municipal Corporations, Dec. Dig. § 407.*]

2. MUNICIPAL CORPORATIONS (§ 950*)—BONDS—LOCAL IMPROVEMENTS.

The bonds provided for by Act Feb. 13, 1911 (St. 1911, p. 40), to be issued for payment of the cost of a sewer to be paid by taxes on the property in the sewer district, and which therefore are not obligations of the city, are not invalid because the statute provides that the city shall not be responsible for their payment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 902-910; Dec. Dig. § 950.*]

3. MUNICIPAL CORPORATIONS (§ 859*)—REPEAL—INCONSISTENT ACTS.

Act Feb. 13, 1911 (St. 1911, p. 40), as to sewer districts in cities, if conflicting with St. 1891, p. 84, as to the limit of indebtedness a city may incur for public improvements, to that extent repeals the earlier statute.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 859.*]

4. MUNICIPAL CORPORATIONS (§ 954*)—MUNICIPAL IMPROVEMENTS—INTEREST ON OBLIGATIONS.

The provision of the charter of Oakland, limiting the rate of interest on obligations of the city incurred for acquiring or constructing municipal works, applies only to works undertaken by the city itself as a municipal corporation, and not to local improvements made within a special assessment district to be paid for by taxation of the property in the district.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 954.*]

5. CONSTITUTIONAL LAW (§ 46*)—DETERMINATION OF CONSTITUTIONAL QUESTION—NECESSITY.

The question whether a statute authorizes the issue of bonds to run longer than 40 years, and, if so, whether it contravenes Const. art. 11, § 18, prohibiting the issuance of municipal bonds, is not presented, and need not be decided, it not appearing the bonds in question are to run longer, as the statute, if in contravention of such provision, would be void only in so far as authorizing the issuance of bonds maturing after more than 40 years, and remain in force with respect to an issue maturing within such period.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 43-45; Dec. Dig. § 46.*]

In Bank. Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by F. W. S. Brook against the City of Oakland. Judgment for defendant. Plaintiff appeals. Reversed.

Rehearing denied in bank; Beatty, C. J., dissenting.

Reed, Black & Reed, for appellant. Ben F. Woolner (Snook & Church, of counsel), for respondent.

SHAW, J. This is an action by the plaintiff, on behalf of himself and others as taxpayers within a certain part of the city of Oakland, described as Sewer District No. 1, to enjoin the issuance and sale of certain bonds of the city of Oakland to be paid by a special tax upon the property within the district. Defendant had judgment in the court below, and the plaintiff appeals.

The bonds have been authorized by proceedings taken under the act of February 13, 1911 (St. 1911, p. 40), providing for the creation of sewer districts in cities, the construction of sewers therein, the issuing of bonds to raise the funds necessary for the construction thereof, and the payment of such bonds. The plaintiff claims that this act is unconstitutional.

The act provides that the city council of any city may from time to time create, within such city, separate sewer districts, whenever it may be necessary or convenient in the judgment of the council for the proper sanitation of such district to construct a sewer therein, and may provide for the issuing of bonds to pay the cost of such sewer. The proposition to issue bonds must be submitted to a vote of the qualified electors of the district created, and they can only be issued when authorized by the votes of two-thirds of all the votes cast at such election. When issued, the bonds are to be paid by means of taxes levied and assessed upon the property within the district, the same to be levied, assessed, and collected in the same manner and at the same time as other taxes for municipal purposes are levied, assessed, and collected. The act contains no provision whatever for any notice or hearing upon the question of the limits of the sewer district. No property owner is given any opportunity to be heard upon the question whether the proposed sewer will benefit his property, or the question whether his property should be included in the district to be taxed for its construction. The only hearing vouchsafed to him is the hearing with respect to the regular annual valuation of his property by the city assessor before the city board of equalization under sections 3673 to 3682 of the Political Code, which the city charter makes applicable to assessments for city purposes. At such hearing he would be permitted to show that his property was not subject to taxation for gen-

eral city purposes, or that the valuation was too high, but there is no provision allowing him to show at that hearing that it was not benefited by the sewer, or that it should not have been included within the sewer district, or that it was not benefited in the same proportion as other property of like value.

[1] 1. If, under the constitutional provision that no person shall be deprived of his property except by due process of law, it is not within the power of the Legislature to confer upon a city council, or other local body, the authority to create local assessment districts for taxation to pay for local improvements, without some provision for notice to the persons interested and a hearing upon the question of the limits of the district and the exclusion of their property therefrom, if it is found not to be benefited thereby, then the act in question is unconstitutional and void. It clearly does not provide for such notice or hearing.

The Constitution of California provides that no person shall be deprived of his property without due process of law. Article I, § 13. This is also declared by the fourteenth amendment to the Constitution of the United States. The question whether or not this act operates to deprive persons of property without due process of law is therefore a federal question, upon which the decisions of the Supreme Court of the United States are the controlling authority.

It is thoroughly settled by the decisions of that court that the Legislature itself has the power to fix by statute the limits of a local taxing district, such as the sewer districts contemplated by this act, without a formal notice or hearing, and that, when it has done so, the courts will not inquire into the matter of a hearing before the Legislature, nor into the legislative decision as to the property benefited and properly included in the district, but will regard that determination as final and conclusive. These decisions were recently reviewed and followed upon this point by this court in *People v. Sacramento Drainage District*, 155 Cal. 386, 103 Pac. 214, wherein it is said: "Where the Legislature has itself spoken in the creation of a district such as this, and, where the legislative determination may be deemed to depend on a question of fact, it is conclusively presumed that the Legislature took evidence in its determination, and the decision which it has reached will not be subject to review by the courts." The opinion quotes the following from *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 174, 17 Sup. Ct. 56, 69, 41 L. Ed. 369: "The Legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of the benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing

upon the question of what is termed the apportionment of the tax; i. e., the amount of the tax which he is to pay." Accordingly it was held in the *Sacramento Drainage District Case* that the statute there involved was not rendered void by reason of the fact that it did not provide for a hearing with respect to the limits of the district to be taxed, but arbitrarily fixed it by the terms of the act itself.

Upon the converse question of the right to and the necessity for a hearing where the Legislature does not itself fix the bounds of the assessment district, but commits such determination to some local tribunal, the city council in this case, the decisions of that court are equally decisive to the effect that at some stage in the proceedings the landowner must be accorded a hearing upon the question whether or not his land is benefited by the proposed public improvement, in order to constitute due process of law. In the *Fallbrook Case* the court, after the passage above quoted, proceeded to discuss this phase of the question, saying: "But when, as in this case, the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition shall be benefited, and the decision of that question is submitted to some tribunal (the board of supervisors in this case), the parties whose lands are thus included in the petition are entitled to a hearing upon the question of benefits, and to have the lands excluded if the judgment of the board be against their being benefited. Unless the Legislature decide the question of benefits itself, the landowner has the right to be heard upon that question before his property can be taken." In *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763, the Legislature had declared in the act that certain lands were benefited and should be taxed for the improvement. The court held this determination conclusive upon the courts, but added that, if the determination is committed to commissioners, the landowners "may be entitled to notice and hearing upon the question whether their lands are benefited and how much." In *Parsons v. District of Columbia*, 170 U. S. 52, 18 Sup. Ct. 524, 42 L. Ed. 943, the court said: "Where the Legislature has submitted these questions for inquiry to a commission, or to official persons to be appointed under municipal ordinances or regulations, the inquiry becomes in its nature judicial in such a sense that the property owner is entitled to a hearing, or to a notice and an opportunity to be heard." In *Londoner v. Denver*, 210 U. S. 385, 28 Sup. Ct. 714, 52 L. Ed. 1103, the latest decision of the United States Supreme Court upon the subject, the court says: "Where the Legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount

and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing."

What is meant by these statements is illustrated by the two cases of *Voigt v. Detroit*, 184 U. S. 115, 22 Sup. Ct. 337, 46 L. Ed. 459, and *Goodrich v. Detroit*, 184 U. S. 432, 22 Sup. Ct. 397, 46 L. Ed. 627. The statute of Michigan authorized the common council of a city to assess the whole, or a part, of the cost of opening a new street upon the property of the district benefited thereby, the limits of which were to be fixed by the council. No hearing was provided at or before the passage of the resolution fixing the limits of the district and declaring the amount to be raised by assessment upon the property situated within it. But after thus fixing the bounds of the district and the amount to be raised the council was required to apportion said amount upon each parcel of property in the district in proportion to the benefits accruing thereto from the opening of the street, and another provision of the statute provided that there must be a hearing, or a notice and opportunity for a hearing, upon this assessment, before it could be confirmed or enforced. The Supreme Court of Michigan had held that no separate notice or separate hearing upon the questions of the bounds of the district and the amount to be charged thereon was necessary. It seems that it was also of the opinion that the hearing upon the assessment did not authorize an inquiry into the question of whether the lands within the district were or were not benefited, for it said: "It is very clear that the Legislature itself might have established the special assessment district. Had it seen fit to do so, would it be claimed that its right to do so could be questioned as unconstitutional, because no notice was given to the property holders affected thereby that it was intended to establish such a district? If the answer to this question should be in the negative, why, when the Legislature has delegated to the common council of the city the right to establish the special district, should it be said that the law delegating this power is unconstitutional because notice is not required? The establishment of the special assessment district, in the one instance by the Legislature, and in the other instance by the common council, is the exercise of a legislative power, with which the courts will not ordinarily interfere." *Voigt v. Detroit*, 123 Mich. 552, 82 N. W. 255. Upon this last question, the Supreme Court of the United States did not agree with the Michigan court. It held that the hearing upon the assessment was in effect a hearing upon the whole question, and that at that hearing inquiry must

be allowed not only as to the proper proportion charged upon the respective tracts of land, but also upon the question whether any particular tract was benefited at all and should not be excluded from the district, notwithstanding the resolution of the council including it. Upon this construction only did it hold the assessment valid. In the *Voigt Case*, upon this point, that court said: "He is given a thoroughly efficient opportunity to be heard to test the legality of the charge upon him. And it is only with the charge upon him that he is concerned, and of that alone he can complain. *In the legality of that charge is necessarily involved the legality of all which precedes it and of which it is the consequence.* The Supreme Court of the state decided, as we have seen, 'that the amount of the taxes which may be assessed upon the district or upon any given parcel of land cannot exceed the benefits.' On the hearing given, therefore, the property owner can show a violation of the rule, if a violation there be, and the showing will take his land out of the district and relieve it from the tax." 184 U. S. 122, 22 Sup. Ct. 340 (46 L. Ed. 459). (The italics are ours.) In the *Goodrich Case*, 184 U. S. page 440, 22 Sup. Ct. 400, 46 L. Ed. 627, speaking to the same point, the court said: "Upon such hearing the property owner may insist that his property was not benefited to the amount assessed, or that it was not benefited at all, and thus obtain every advantage which he might obtain were he informed of every step of the proceedings. The terms of the resolution that each lot be assessed 'in accordance with the amount of benefits derived from such improvements,' open the whole question of the amount of benefit derived by the lot, even to showing that no benefit whatever was occasioned by the improvement. It does not follow, however, that he had a right to be heard upon the extent of the territory to be embraced within the assessment district." The last sentence of this quotation is apparently addressed to the claim that the owner was entitled to a separate hearing upon the extent of the district.

The opinions in the *Detroit cases* say nothing upon the point that the exercise of a legislative power should be held as effective and conclusive when it is exercised by a local body to which it is delegated, as when it is exercised by the Legislature itself. But there is no uncertainty in their effect. They determine positively that when a local improvement is to be paid for by a tax assessed upon a local assessment district, embracing only territory benefited by the improvement, and the determination of the bounds of the district and, consequently, of the property to be assessed, is delegated by the statute to a subordinate body, such as a city council, the constitutional requirement of due process of law is not fulfilled, unless there is provided a notice and an opportunity to be heard to the property owner, upon the

question whether or not his property is in fact benefited by the improvement, and whether or not it shall be, in effect, excluded from the district, although within its territorial limits.

No inquiry of this character is provided or contemplated by the provisions of the Political Code for the equalization of taxes. The Constitution and Statutes of this state have conclusively determined what property is subject to general taxation and where it is to be taxed. The provisions of the Political Code referred to concern general taxation only. The inquiry of the board of equalization is confined to the question of the proportionate valuation of the respective parcels of property taxable by law within the territory concerned. It may, of course, determine whether or not a particular parcel or article of property is situated within the city, but, if the decision is that it is so situated, it can enter into no inquiry upon the question whether or not it is benefited by the uses to which the money raised by the taxation is to be applied. The act of February 13, 1911, does not purport to confer any special authority upon the board of equalization with respect to the sewer district tax or the property benefited thereby. That board has nothing to do with the question of benefits.

It may be, as was said in *Paulsen v. Portland*, 149 U. S. 30, 13 Sup. Ct. 750, 37 L. Ed. 637, that the constitutional provision requiring due process of law is, in effect, automatically incorporated into every statute, so far as may be necessary to give it validity, and that, in view of this consideration, the city council, under the statute and the Constitution taken together, might have passed a valid resolution creating such sewer district, by itself providing for and giving a reasonable notice fixing a time and allowing an opportunity to each property owner to be heard on the question of benefits to his property, before the resolution creating the district was passed. It is not necessary to pass upon this question, for no such notice or hearing was given or had before the council, or at all. In view of later decisions, it is doubtful if the *Paulsen* Case would now be followed by the Supreme Court of the United States. For the reason that we have given, and upon the authority of the decisions of the Supreme Court of the United States above cited, we can come to no other conclusion than that the resolution creating the district in question is invalid and that the bonds proposed to be issued will be void, for the reason that the property owners will be deprived of their property to the extent of the taxes they may be compelled to pay if the proceedings are carried out, without due process of law, in that they will be afforded no opportunity to be heard with respect to the question whether or not their property is benefited by the sewer and was therefore properly included in the district to be taxed.

We have thought it proper to raise and consider this objection, although it is not discussed or presented in the briefs of counsel. We understand that this case is brought here with a view of obtaining a decision of this court as to the validity of the bonds, preparatory to and as a foundation for a sale of the bonds. Bond buyers who were properly advised would probably refuse to purchase these bonds, although we should hold that the other objections were unfounded and affirm the judgment without mentioning this objection. It is not desirable that unwary buyers should be induced to purchase them on the faith of a decision which failed to consider a fatal objection to their validity.

[2] 2. It is claimed that the bonds are invalid because the statute provides that the city of Oakland shall not be responsible for the payment of the bonds. This position appears to be founded on the theory that the bonds should be obligations of the city of Oakland. The theory of the statute is that of a local improvement to be paid for by an assessment raised upon the property of the district benefited thereby. Such bonds do not become obligations of the city in which the district may be situated. *Meyer v. S. F.*, 150 Cal. 131, 88 Pac. 722, 10 L. R. A. (N. S.) 110; *Union T. Co. v. State*, 154 Cal. 716, 99 Pac. 183, 24 L. R. A. (N. S.) 1111. We know of no constitutional provision requiring that the city should become liable thereon and none is cited to us.

[3] 3. Another objection is that the act of 1911 conflicts with the provision of the act of 1891 (St. 1891, p. 84) to the effect that no city shall incur an indebtedness for public improvements exceeding 15 per cent. of the assessed value of the taxable property therein. It is a sufficient answer to this contention to say that the bonds herein involved are authorized by the act of 1911, and that, if that act is in conflict with the provision of the act of 1891, the first statute is, to that extent, repealed by the later one.

[4] 4. The objection that the rate of interest upon the bonds allowed by the statute is not in conformity with the provision of the charter of the city of Oakland concerning interest is answered by what we have heretofore said to the effect that these bonds are not the obligations of the city of Oakland, but are obligations imposed upon a certain district to be assessed for the payment thereof. Section 149 of the charter of the city of Oakland, to which this point refers, limiting the rate of interest upon obligations of the city incurred for the purpose of acquiring or constructing municipal works to five per cent. per annum, applies only to obligations of the city for works undertaken by the city itself as a municipal corporation. It has no application whatever to local improvements made within a special assessment district and payable out of funds raised by taxation thereon.

[5] 5. Another objection is that the act does not provide that the bonds issued under

it shall mature within 40 years from their date, and that this is a violation of section 18 of article 11 of the Constitution. The provision of the act on this subject is that the bonds "shall be payable in the following manner: a part to be determined by the legislative body of the municipality, which part shall not be less than one-fortieth part of the whole amount of such indebtedness, shall be payable each and every year on a day and date, and at a place within the United States, to be fixed by the legislative body of the city, town or municipal corporation issuing the said bonds, and designated in such bonds." Section 4. Conceding, for the purposes of the case, that the constitutional provision applies to bonds of a local assessment district, its effect upon the act would be to make it void so far as it purported to authorize the issuance of bonds maturing more than 40 years from the time of contracting the same, leaving it in full force with respect to an issue of bonds maturing within such period, if it was otherwise valid. It does not appear from the record that the proposed bonds are to run longer than 40 years, and hence this question is not presented. We do not deem it necessary even to determine whether or not the language of the act, as above quoted, would authorize an issue of bonds payable more than 40 years after they were contracted. Its terms are not positive and express and, as we have declared the act invalid for the reasons first discussed, it is unnecessary to go further. If future legislation is attempted on the subject, different expressions may be substituted. We remark, however, that further legislation seems unnecessary. The provisions of the Vrooman act, authorizing the construction of sewers in cities, to be paid for by special assessments upon the property within a district fixed by the city council, would enable the persons interested to construct the desired sewer, substantially in the manner attempted to be provided for in the act of 1911, and the Vrooman act makes proper provision for a hearing before the council as to the extent of the assessment district, before it is formed.

Upon the point first discussed we think the court erred in holding the bonds valid.

The judgment is reversed.

We concur: HENSHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; SLOSS, J.

160 Cal. 388

Ex parte HUGHES. (Cr. 1,649.)

(Supreme Court of California. July 31, 1911.)

CRIMINAL LAW (§ 177*)—DEMURRER TO INDICTMENT—DISCHARGE OF PRISONER.

Under Pen. Code, § 1008, providing that the allowance of demurrer to an information is a bar to further prosecution, unless the court directs a new information to be filed, an order allowing a demurrer and reciting that the court was of the "opinion that a new information

should be filed," being an exercise of judicial authority, was good, and did not entitle the defendant to a discharge, even though the minutes only gave leave to file another information.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 313-319; Dec. Dig. § 177.*]

In Bank. Application by John Hughes for a writ of habeas corpus to be directed against W. F. Sibley, sheriff of San Joaquin county. Writ refused.

A. H. Carpenter, for petitioner. Max Grim, Deputy Dist. Atty., for respondent.

HENSHAW, J. The petitioner shows: That the minute order of the superior court sustaining his demurrer to the information was in the following language: "The demurrer of the defendant to the information on file herein having been heretofore argued and submitted to the court for its decision, it is by the court ordered that the demurrer to the information be, and the same is, hereby sustained, and leave is granted to the district attorney to file another information." That upon the presentation of a second information his motion to quash, annul, and set it aside, was denied. Wherefore he has sued out this writ, contending that the second information was filed against him, and is being prosecuted against him without authority of law. Ex parte Williams, 116 Cal. 512, 48 Pac. 499; People v. Nogiri, 142 Cal. 596, 76 Pac. 490.

The return to this writ, however, shows that the minute order here assailed did not correctly set forth the order which the court actually made in the premises, and that the order actually made was in substantial conformity to the provisions of section 1008 of the Penal Code. The minute order, as entered, omitted a very essential feature of the order which the court actually made, to the effect that it (the court) was of the "opinion that a new information *should* be filed, which would do away with the objection and be sufficient in all respects." Here was the exercise of the judicial power, which, as has been said, the law contemplates the court—and not the district attorney—should make. This judicial power having in fact been exercised by the court, a substantial compliance with the statute is shown.

The writ is therefore discharged, and the prisoner remanded.

We concur: LORIGAN, J.; MELVIN, J.

SHAW, J. I concur. But I wish to suggest to the court below that it should correct its minutes, so that they may show the order directing the filing of a new information.

SLOSS, J. I concur in the judgment. The ruling of the court seems to be based upon a supposed distinction between this case and Ex parte Williams, 116 Cal. 512, 48 Pac. 499. I do not, however, see that there is any sub-

stantial difference between the orders in the two cases. I think that too strict a rule of construction was applied in the Williams Case, and I should prefer to have the court expressly overrule that case, rather than attempt to distinguish it upon insufficient grounds.

I concur: ANGELLOTTI, J.

160 Cal. 390

MORRISSEY et al. v. GRAY et al. (Sac. 1,825.)

(Supreme Court of California. July 31, 1911.
Rehearing Denied Aug. 30, 1911.)

1. MORTGAGES (§ 587*)—FORECLOSURE—PERSONS CONCLUDED—MINORS' INTEREST—SERVICE OF PROCESS.

Where a mortgaged homestead was set apart to the widow and eight minor children, the interest of each child could not be affected by foreclosure without service on them.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1685-1688; Dec. Dig. § 587.*]

2. MORTGAGES (§ 587*)—FORECLOSURE—MINORS' INTEREST—CONVEYANCE.

Where a mortgaged homestead was set apart to a widow and minor children, and the mortgage was sought to be foreclosed by a service on the widow as administratrix only, and not on the children, their interest was not affected either by a sheriff's deed to the purchaser or by deeds executed by the purchaser to others.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 587.*]

3. JUDGES (§ 47*)—DISQUALIFICATION—PRIOR ACTS OF ATTORNEY.

Code Civ. Proc. § 170, subd. 3, disqualifies a judge to act in any action or proceeding, where in any previous action or proceeding involving any of the same issues he has been attorney or counsel for either party. *Held*, that where defendant G., prior to his elevation to the bench, had prepared a widow's petition for letters of administration on her husband's estate, he was not thereby disqualified from sitting as judge in a proceeding to foreclose a mortgage on property belonging to the estate.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 214-223; Dec. Dig. § 47.*]

4. EXECUTORS AND ADMINISTRATORS (§ 441*)—ACTIONS—SERVICE—RETURN.

A return of service personally by delivery to M. of a copy of the summons attached to a copy of the complaint did not show service on M. as administratrix of her deceased husband's estate, but only as an individual.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1792-1797; Dec. Dig. § 441.*]

5. PROCESS (§ 164*)—SERVICE—JURISDICTION—RIGHT TO AMEND.

Jurisdiction is obtained from the existence of the fact of proper service of process, and not from the proof of the fact by the return of service or otherwise.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 239-248; Dec. Dig. § 164.*]

6. PROCESS (§ 164*)—SERVICE—RETURN—AMENDMENT.

Since amendments of a return necessary to show proper service affect the record, they may not be made as of course, but only on leave of court.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 239-248; Dec. Dig. § 164.*]

7. PROCESS (§ 164*)—AMENDMENT—PERMISSION TO AMEND.

Amendment of a return of service of process will not be allowed when its effect is to avoid a judgment to render it erroneous or subject to reversal; such amendments being permitted only in support of a judgment actually given.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 239-248; Dec. Dig. § 164.*]

8. PROCESS (§ 164*)—AMENDMENT—OBJECTION—LAPSE OF TIME—EXPIRATION OF OFFICE.

Mere lapse of time or the fact that the officer making a return of service is, at the time of a proposed amendment, out of office does not affect the court's right to order the amendment of the return so as to make it speak the truth.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 239-248; Dec. Dig. § 164.*]

9. JUDGES (§ 42*)—DISQUALIFICATION—INTEREST.

A judge who had purchased certain real estate under mortgage foreclosure proceedings, which were defective in that the return of service was improper, was disqualified to grant leave to the officer to amend the return.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 190-200; Dec. Dig. § 42.*]

10. PROCESS (§ 141*)—RETURN—CONCLUSIVE-NESS—CORRECTION.

A mortgage on property having been foreclosed pursuant to a defective return of service, the property was conveyed by the purchaser to a judge of the superior court, and, on its being subsequently discovered that the return of service was defective, the judge directed the officer to amend his return to conform to the truth. *Held* that, though such order was invalid because of disqualification of the judge to make it, such fact did not prevent the court, presided over by another judge, in a subsequent action to quiet title, from taking testimony to establish the fact that service was actually made and granting leave to file an amended return of service or, without the filing of such amended return, sustaining the judgment of foreclosure on proof of due service.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 189-192; Dec. Dig. § 141.*]

11. QUIETING TITLE (§ 44*)—FRAUD—EVIDENCE.

Where, after foreclosure of a mortgage on property a part of which was the homestead of a widow and minor children, it was conveyed by the purchaser at the sale to a judge of the superior court, the fact that he thereupon took a deed from the widow and minor children of all their interest in the property, and as a part of the same transaction immediately conveyed to the widow all the land affected by the homestead, was not indicative of fraud on his part; it appearing that neither he nor his subsequent grantees claimed any rights to the property under such deeds.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 44.*]

12. QUIETING TITLE (§ 52*)—JUDGMENT.

Where an action was instituted to quiet plaintiffs' title to a 300-acre tract of land, certain of which had been sold in parcels, the court properly gave separate judgments touching the rights of the separate defendants.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 52.*]

In Bank. Appeal from Superior Court, Butte County; E. P. McDaniel, Judge.

Action by T. E. Morrissey and others against John C. Gray and others. Judgment

for defendants, and plaintiffs appeal. Affirmed.

W. H. Morrissey, for appellants. Mr. Carlin, Charles Gray, and A. E. Boynton, for respondents.

HENSHAW, J. The action is to quiet title. The appeal is from the judgment and the order denying plaintiffs' motion for a new trial. In July, 1887, Timothy Morrissey died intestate. He left surviving him Johanna Morrissey, his widow, and eight minor children. His estate consisted of a ranch of 300 acres, which was community property, incumbered by a mortgage to one Moses Wick. The widow was appointed administratrix of the estate, her petition for appointment being signed by Gray & Sexton, attorneys at law, the firm consisting of Warren Sexton and John C. Gray, defendant and respondent herein. In March, 1888, upon petition, a parcel of the ranch, consisting of about 50 acres, was by the court set apart to the widow and minor children as a homestead. In January, 1891, defendant John C. Gray became judge of the superior court of Butte county, and, saving for an interval of a few months, which interval has no bearing upon the matters here involved, has continued in that judgeship ever since. Warren Sexton acted as attorney for the administratrix. Efforts were made from time to time, but without result, to sell the incumbered ranch, and finally, in April, 1892, when the mortgage promissory note was about to expire by limitation, action of foreclosure was brought against the widow, all the children, and the administratrix of Timothy Morrissey's estate. Admittedly none of the children was served in this action. Johanna Morrissey, the widow, was served; whether in her individual or representative capacity is a question for future consideration. Suffice it here to say that she made default, that her default as administratrix was entered, and in due course a decree of foreclosure was made and given. The decree recited the service upon "Johanna Morrissey, administratrix of the estate of Timothy Morrissey, deceased," the entering of her default for nonappearance, and the decree found the amount due under the terms of the note and mortgage, and that the estate of Timothy Morrissey was liable for the whole thereof. It then proceeded in regular form to foreclose against Johanna Morrissey, administratrix, and the estate of Timothy Morrissey, deceased. Defendant John C. Gray was judge in the foreclosure proceeding and signed the decree. The land was sold under order of sale, and the plaintiff in the foreclosure action, Charles F. Wick, became the purchaser and received his certificate of sale in 1893. No redemption was attempted. The sheriff in February, 1894, executed his deed to the purchaser. On the day when Wick so received the sheriff's deed, he, in turn, executed his deed, transferring

all the land to the defendant John C. Gray, and here, for the first time, defendant John C. Gray appears as having any interest in the land. Judge Gray immediately made his conveyance to Johanna Morrissey of the 50 acres of the ranch covered by the homestead, and remained in possession of the other lands until subsequently when he sold 80 acres thereof, which 80 acres, by mesne conveyance, have passed to the ownership of defendant W. P. Hammon. After defendant Gray conveyed the homestead premises to Johanna Morrissey, she sold a portion thereof to the defendants Blackwood and Higgins. Their rights thereto were tried in this action, together with the rights of defendant Gray. The rights of defendant Hammon were separately tried, and are the subject of a separate appeal.

[1] The probate homestead having been set apart to the widow and eight minor children, each child's interest was an undivided one-sixteenth thereof. Those interests, of course, could not be foreclosed without service upon the minors, and admittedly no such service was had. The rights of the elder children seem to have been forfeited by their laches after attaining majority. The plaintiffs are the three youngest minors who, having attained majority, prosecute this action to quiet their title to all of the ranch, including the homestead 50 acres. [2] The homestead rights of the minors not having been concluded by the foreclosure and sale, the sheriff's deed to Wick did not affect or impair those rights, and Wick's deed, in turn, to Gray did not and could not include those rights. Gray's deed to Johanna Morrissey, for the same reason, was abortive as to those rights, and so also was Johanna Morrissey's deed to defendants Blackwood and Higgins. In recognition of this, as to the defendants Blackwood and Higgins, the court decreed to plaintiffs each a one-sixteenth interest in the land claimed by them. The soundness of this decree was recognized, defendants Blackwood and Higgins compounded and settled their differences with the plaintiffs, and do not appear on this appeal. This appeal is directed against the court's decree confirming title to the lands claimed by defendant Gray, which lands, it is to be borne in mind, do not include, and form no part of, the homestead.

[3] It is contended that the decree in foreclosure, through which the defendant Gray deraigns title, is void because the Wick mortgage was drawn by defendant Gray, and because defendant Gray, as attorney, signed the widow's petition for letters of administration and afterward sat as trial judge in the foreclosure action. The fact that the defendant Gray as an attorney at law and before his elevation to the bench drew the mortgage contract which was subsequently brought to suit before him is without significance. His only connection with the estate of Timothy Morrissey as an attorney at law was in pro-

curing for the widow letters of administration. In no other matter does he appear to have acted. Code Civ. Proc. § 170, subd. 3, prescribes the disqualification of a judicial officer to act "in the action or proceeding, or in any previous action or proceeding involving any of the same issues, when he has been attorney or counsel for either party." The only action or proceeding in which defendant Gray participated in the matter of the estate was the proceeding to secure letters of administration for the widow. It cannot be successfully argued that there is any legal or ethical relationship between this proceeding and the proceeding to foreclose a mortgage subsequently brought against the estate. Not only was there no kinship between the proceedings, but the issues in the two matters were equally separate and distinct.

[4] Appellants make a further contention that the foreclosure judgment is void, which contention grows out of the following facts:

The original return of service of summons in the foreclosure action was as follows: "Sheriff's Office, Oroville, County of Butte—ss.: I hereby certify that I received the within summons on the 17th day of April, A. D. 1893, and personally served the same on the 19th day of April, A. D. 1893, by delivery to Johanna Morrissey a copy of said summons, attached to a copy of the complaint, personally in the county of Butte; and that upon orders from plaintiff's attorney, none of the other defendants were served. Dated, this 19th day of April, 1893. R. A. Anderson, Sheriff, by T. A. Atchison, Deputy. Filed, April 19th, 1893. C. L. Stilson, Clerk."

This return, of course, afforded no evidence of a service upon Johanna Morrissey as administratrix of the estate. But it is to be remembered, as above stated, that the complaint appropriately charged the estate and her as administratrix thereof, the summons was directed to her as administratrix of the estate, and the decree in terms foreclosed through her as administratrix of the estate the interest of the estate of Timothy Morrissey in the land. This condition of the record having been discovered apparently in June, 1895, the following proceedings were had: T. A. Atchison, the deputy sheriff who made service, testified that his return was defective, and did not state the facts of service. Thereupon the judge ordered that the return of service of summons be corrected to show the truth, and that the return be filed nunc pro tunc as of April 19, 1893. This order was made by defendant Gray as judge of the superior court. Thereupon the sheriff filed the following: "Return of Service of Summons. Sheriff's Office, Oroville, County of Butte—ss.: Under and by virtue of an order of the superior court aforesaid, duly made on motion of Warren Sexton, attorney for plaintiff, made and entered the 22nd day of June, 1895, I hereby make the following corrected return of service of summons in

said action, to wit: I hereby certify that I received the within annexed summons on the 17th day of April, 1893, and personally served the same upon Johanna Morrissey, as administratrix of the estate of Timothy Morrissey, deceased, one of the within named defendants, by delivering to and leaving with the said defendant, personally, in Butte county, state of California, the 19th day of April, 1893, a copy of said summons attached to a copy of the complaint in said action, and that order of the plaintiffs' attorney, none of the other within named defendants were served with summons or complaint. Dated at Oroville, Cal., June 22, 1895. [Signed] R. A. Anderson, Sheriff, by T. A. Atchison, Deputy." This order was made and this amended return filed when defendant Gray claimed ownership of the lands under the foreclosure decree. Upon the trial of this cause the court ruled that Judge Gray was disqualified from making the order in question by reason of his interest, and that the order permitting the filing of the amended return was therefore void. But the court itself took the testimony of the deputy sheriff, Atchison, and upon that testimony permitted the filing of the amended return, and decreed its sufficiency to show jurisdiction obtained over the administratrix. Appellants' contention is that this ruling and this determination were erroneous, that the return was complete in itself and not susceptible of amendment, either before Judge Gray or before the trial court in this action. The argument herein is that a court will not, after a judgment has become final, allow an amendment to a return which will vary, impair, or destroy the judgment actually given; that by the return it is shown that jurisdiction was acquired over Johanna Morrissey only as an individual, and not in her representative capacity as administratrix; and that the only judgment which the court could and did render was a judgment foreclosing such rights in the property as Johanna Morrissey possessed in her personal and not in her representative capacity.

[5] It is the fact of proper service, and not the proof of the fact, which gives to a court jurisdiction. *In re Newman*, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146. Therefore, when the facts conferring jurisdiction exist, but the record of them by way of return is defective, great liberality is allowed by the courts in permitting amended returns to be filed.

[6] But, as these amendments affect the record, they may not be made as matter of course, but under permission of the court in the exercise of its sound discretion. *Scruggs v. Scruggs*, 46 Mo. 271.

[7] Such amendments, however, are not permitted when their effect would be to avoid a judgment, to render it erroneous, or subject it to reversal. *Chicago Planing Mill Co. v. Merchants' Nat. Bank*, 97 Ill. 294; *White River Bank v. Downer*, 29 Vt. 332.

The amendments are permitted in support of the judgment actually given. The amendment is not designed or permitted to change or impair a decision or judgment, but is permitted only to support such decision and judgment by the new evidence. *Petition of Lake, Deputy Sheriff, 15 R. I. 628, 10 Atl. 653.*

[8] Mere lapse of time or the fact that the officer making the return is at the time of the proposed amendment out of office does not affect the right of the court to order the return to speak the truth. *Petition of Lake, supra; Scruggs v. Scruggs, supra; Shenandoah Valley R. R. Co. v. Ashby's Trustees, 86 Va. 232, 9 S. E. 1003, 19 Am. St. Rep. 898; Briggs v. Hodgdon, 78 Me. 514, 7 Atl. 387; Wilkins v. Tourtellott, 28 Kan. 825; Luttrell v. Martin, 112 N. C. 593, 17 S. E. 573; Herman v. Santee, 103 Cal. 519, 37 Pac. 509, 42 Am. St. Rep. 145; Woodward v. Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108. In Jones v. Gunn, 149 Cal. 687, 87 Pac. 577, defendants claimed title under a purchase at foreclosure sale. In an action to quiet title subsequently brought—a proceeding very similar to the one here at bar—when reliance was sought to be placed on the judgment roll in the foreclosure proceedings, it was discovered that the return of service was unsigned. The sheriff during whose term of office service had been made was no longer in office. Yet the deputy sheriff who actually made the service was permitted to testify to the fact of service, the trial court allowed the amendment to be made in accordance with the fact, twelve years after, and ordered it filed nunc pro tunc as of the date when actual service had been made. The action of the trial court was upheld, and it was by this court declared that it was immaterial whether an amended return of service was filed or not because "the court had the unquestioned right to take evidence upon the fact of the service, since upon this fact, and not upon the return, the jurisdiction of the court in foreclosure depended, and if it found the fact of service to exist, as here it did, then to admit the judgment roll in evidence regardless of the defective return of service."*

We do not understand that appellant seriously questions any of the foregoing principles. Indeed, so well settled are they that argument against them would be futile. Appellant, however, contends that the court has no power to modify or vary the judgment actually given, and, as we understand his argument, to allow an amended return to be filed is, in effect, a modification of the judgment. Herein reliance is placed upon such cases as *Scamman v. Bonslett, 118 Cal. 93, 50 Pac. 272, 62 Am. St. Rep. 226, and Herd v. Tuohy, 133 Cal. 55, 65 Pac. 139.* In both of those cases, however, the amendment was a direct amendment of the judgment itself. In the first instance the amendment made provision for a deficiency judgment—a provision which the original judgment did

not contain. In the second, the decree was amended to award a personal judgment—a provision which the original judgment did not contain. And this court held, under the facts of each case, that the power so to amend the judgment did not exist. But in the case at bar there is no attempt, direct or indirect, to amend the judgment actually given, and that judgment, as has been pointed out, is a judgment against the administratrix of Timothy Morrissey's estate, foreclosing the interest of the estate in the property. Not only is this the judgment, but it is the judgment prayed for under appropriate pleadings. Appellants' real contention is that, because the original return showing service upon Johanna Morrissey does not show service upon her as administratrix, the court, no matter what the facts may be, has no power either to permit the return to be amended, or, as in the case of *Jones v. Gunn, supra*, to take evidence of the fact that service was actually had and made upon Johanna Morrissey as administratrix. But it will at once be seen from the foregoing that the contention of appellant in this regard is at variance with all reason and all authority. 23 Cyc. 872; *Alderson Jud. Rights & Process, par. 192.*

[9] It necessarily follows, therefore, that the trial court was correct in its rulings upon the matter. The formal order made by Judge Gray permitting the amended return to be filed in conformity with the fact being void for the reasons above stated, the return based upon that order necessarily fell, since an amendment to a judgment roll cannot be made excepting under the supervision and permission of the court.

[10] This circumstance, however, did not forbid the trial court in this case from doing as was done in the *Jones Case*—taking testimony to establish the fact that service was actually had, permitting an amended return of service in accordance with the fact, or, without the filing of such an amended return, sustaining the judgment in the foreclosure suit, upon proof of the fact of due service.

[11] It appears that Judge Gray, after judgment in foreclosure, took a deed from the widow and minor children of all their interest in the property. When that deed was actually executed is unimportant, since the defendant Gray neither deraigned nor attempted to deraign title through it. Evidently, as part of the same transaction, whatever it was, Judge Gray immediately deeded to Mrs. Morrissey all of the land affected by the homestead. Appellant in his brief seeks to establish some sort of fraud upon the part of Judge Gray in this transaction, and argues that this asserted fraud is in some way cumulative upon the question of the judge's disqualification. The matter could be disposed of by the unanswerable declaration that, as no reliance is placed by any of these defendants upon the deed, it was properly excluded from and has no bearing on

this case. But in justice to Judge Gray, who is thus attacked, it is proper to add that it is not conceivable that he could have attempted to gain any advantage by the transaction. The rights of none of the parties were affected by it. No reliance is placed upon it. Everything which the widow and children could claim was immediately by him conveyed back to the widow. The rights of none of the minors were in any way affected or impaired, and the transaction seems to have been conceived in a spirit of friendship to the widow rather than in the spirit of hostility, by conveying back to her the homestead, relieved from any possible cloud which the foreclosure proceedings might be thought to have cast over it. And, finally, it may be added that these parties are accorded by the judgment of the trial court their interest in the homestead without the payment of any part or portion of the mortgage debt to which the homestead was subject, and from the burden of which it escaped solely by defective service of summons upon the original parties to the foreclosure action.

[12] Appellants contend that, as the action was by plaintiffs to quiet their title to the 300-acre tract, it was error upon the part of the court to try the case piecemeal and give separate judgments touching the rights of separate defendants, but, under the nature of the action, this was not only the proper, but the only, course for the court to pursue. Certain of the lands had been sold in parcels. The rights of the holders of those parcels might be, and, as the trial proved in fact were, very different. Certain rulings of the court in admitting and rejecting testimony are objected to. They go to evidentiary matters already discussed, and what has thus been said relieves from the necessity of detailed consideration of them.

The judgment and order appealed from are therefore affirmed.

We concur: SHAW, J.; SLOSS, J.; ANGELLOTTI, J.; LORIGAN, J.; MELVIN, J.

160 Cal. 808

MORRISSEY et al. v. GRAY et al.
(Sac. 1,868.)

(Supreme Court of California. July 31, 1911.
Rehearing Denied Aug. 30, 1911.)

Department 2. Appeal from Superior Court, Butte County; K. S. Mahon, Judge.

Action by T. E. Morrissey and others against John C. Gray and others. From the judgment and from an order, plaintiffs appeal. Affirmed.

W. H. Morrissey, for appellants. W. H. Carlin, Charles Gray, and A. E. Boynton, for respondents.

PER CURIAM. The appellants upon this appeal are the same as those in T. E. Morrissey et al. v. John C. Gray et al., Sac. No. 1,825, 117 Pac. 438. The respondent upon this appeal, W. P. Hammon, holds title from defendant John C. Gray, through mesne conveyance, to a portion of the Morrissey ranch not affected by

the homestead. The questions involved upon this appeal are identical with those considered and decided in Sac. No. 1,825, 117 Pac. 438.

For the reasons therein given, the judgment and order appealed from are affirmed.

160 Cal. 399

In re SHAY. (Cr. 1,684.)

(Supreme Court of California. June 2, 1911.
On Hearing on Merits, July 31, 1911.)

1. CONTEMPT (§ 5*)—MISCONDUCT BY ATTORNEY—STATUTORY PROVISIONS.

The amendment in 1891 of Code Civ. Proc. § 1209, subd. 13, to provide that no statement concerning a court shall be treated as contempt unless made in the immediate presence of such court, does not qualify subdivision 3, making violation of an attorney's duty to a court contempt.

[Ed. Note.—For other cases, see Contempt, Dec. Dig. § 5.*]

2. CONTEMPT (§ 8*)—UNTRUTHFUL AND SCANDALOUS MATTER CONCERNING COURT.

Under Code Civ. Proc. § 282, requiring attorneys to maintain respect due to courts and judicial officers, and under section 1209, subd. 3, making violation of an attorney's duty contempt, an attorney is punishable for writing an untruthful and scandalous letter, stating that one in whose name he wrote had had a conversation with the justices of the Supreme Court in which they expressed opinions concerning a pending suit.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 14; Dec. Dig. § 8.*]

Beatty, C. J., and Angellotti, J., dissenting.

In Bank. Frank Shay was cited for, and adjudged guilty of, contempt.

Guy V. Shoup and C. W. Durbrow, for petitioner.

PER CURIAM. It having come to the knowledge of the court through publication in the newspapers that a letter dated March 28, 1910, purporting to be addressed to J. W. McKinley, and signed, "W. F. Herrin, by M.," a copy of which is hereinafter included, was recently introduced in evidence in a proceeding then pending in the superior court of Los Angeles county, and Mr. Frank Shay, an attorney of this court, having admitted that he dictated said letter in the absence of Mr. Herrin from the state of California, and caused it to be signed in his name, and the statements contained in said letter being within the knowledge of the court untrue, as they are scandalous, it is ordered that said Frank Shay show cause before the Supreme Court in bank at the city of San Francisco, on Monday, the 5th day of June, at 10 o'clock a. m., why he should not be adjudged guilty of contempt of court and punished therefor.

The following is a copy of the letter referred to: "Dear Sir: I have just wired you copy of order this day entered by the Supreme Court in the case of Duncan versus the Superior Court, Imperial County, et al. I enclose copy of the order. I also enclose the Court's copy of petitioners' points and authorities on application for writ of prohi-

bition. Please make copies for your use and return to me as soon as possible. As stated in my second telegram of this date, the reason why the order to show cause was issued was because of the weakness of paragraph 5 of the complaint in the foreclosure suit. The Supreme Justices, in conversation with me to-day all seemed to be of the opinion that this paragraph should be amended so as to state the facts, as required under the decision in the case of the Bank of Woodland versus Stevens, 144 Cal. page 660,¹ and to have an order made reappointing the receiver. It was suggested that if this could be done between now and Monday it would be an answer to the application. The Justices, without exception, were of the opinion that the appointment of the receiver would be reversed by direct appeal, although it might not be subject to collateral attack. As stated in my second message above referred to, it seemed to be the consensus of opinion among the Justices that inasmuch as the court has jurisdiction to appoint a receiver in action of foreclosure, the certificates heretofore issued would be a first lien upon the property, even though the order making the appointment should be reversed on direct appeal. W. F. Herrin, by M."

Ordered further that a copy of this order be served upon said Frank Shay forthwith.

On Hearing on Merits.

SHAW, J. This proceeding was instituted in consequence of the fact coming to the knowledge of the court that the following letter, dated March 25, 1910, had been written at San Francisco and sent to J. W. McKinley at Los Angeles, to wit: "Dear Sir: I have just wired you copy of order this day entered by the Supreme Court in the case of Duncan versus the Superior Court, Imperial County, et al. I enclose copy of the order. I also enclose the Court's copy of petitioners' points and authorities on application for writ of prohibition. Please make copies for your use and return to me as soon as possible. As stated in my second telegram of this date, the reason why the order to show cause was issued was because of the weakness of paragraph 5 of the complaint in the foreclosure suit. The Supreme Justices, in conversation with me to-day all seemed to be of the opinion that this paragraph should be amended so as to state the facts, as required under the decision in the case of the Bank of Woodland versus Stevens, 144 Cal., page 660,¹ and to have an order made reappointing the receiver. It was suggested that if this could be done between now and Monday it would be an answer to the application. The Justices, without exception, were of the opinion that the appointment of the receiver would be reversed by direct appeal, although it might not be subject to collateral attack. As stated in my second message above referred to, it seemed to be the consensus of opinion among the Justices that

inasmuch as the court has jurisdiction to appoint a receiver in an action of foreclosure, the certificates heretofore issued would be a first lien upon the property, even though the order making the appointment should be reversed on direct appeal. W. F. Herrin, by M."

Each of the justices of this court well knew that no such conversation as that referred to in the letter had ever occurred, either with W. F. Herrin or any other person. The truth is that W. F. Herrin did not see or talk with the justices of this court, or either of them, upon any matter mentioned in said letter, that they did not, nor did any of them, state to any person that the complaint referred to in the letter or any part or paragraph thereof "should be amended so as to state the facts," or that such amendment "would be an answer to the application" for prohibition, or that an order should then "be made reappointing the receiver," or that the order appointing the receiver "would be reversed upon direct appeal, although it might not be subject to collateral attack," or that "the certificates heretofore issued would be a first lien upon the property, even though the order making the appointment should be reversed on direct appeal," or anything of like effect as to any of these matters. Knowing these facts, and being wholly unable to account for the writing of such a letter by any person, and upon learning further that the letter was written by Frank Shay, an attorney of the law department of the Southern Pacific Company, the court deemed it advisable to set on foot some proceeding which would bring about an investigation concerning it. To that end, Frank Shay was cited to show cause why he should not be punished for the writing of said letter, as for a contempt. He appeared and answered, avowing the authorship of the letter, and admitting that the statements therein were false as above stated.

The investigation showed that the facts giving rise to the letter were as follows: In December, 1909, an action was begun in the superior court of Imperial county by the Title Insurance & Trust Company against California Development Company, Southern Pacific Company, and others to foreclose a trust deed executed by the California Development Company to secure its bonds to the amount of \$500,000. The property conveyed as security included lands, water rights, canals, and personal property comprising the irrigating system of the Development Company, by means whereof it takes water from the Colorado river and supplies the same to the farmers of the large irrigated region constituting practically all of the cultivated lands in Imperial county. In that action a receiver was appointed by an order made at the time of the filing of the complaint ex parte and without notice to the defendants. In January, 1910, one Boaz Duncan, a holder of said bonds to the amount of \$165,120,

¹ 79 Pac. 379.

obtained leave to intervene in the action, and filed a complaint in intervention therein. In March, 1910, the receiver filed a petition therein for authority to issue receiver's certificates in the action to the amount of \$344,752.12, the same to become a first lien upon the property. J. W. McKinley appeared as attorney for the receiver in that behalf. That court was proceeding to the hearing of said petition, whereupon, on March 24, 1910, Boaz Duncan filed in the Supreme Court an application for a writ of prohibition against said superior court and said receiver to prevent said court from proceeding further in the matter of said receiver's petition. This application was based on the claim that the order appointing the receiver was void because the complaint in said action, and the affidavit in support thereof, did not state facts sufficient to give that court jurisdiction to appoint a receiver. Upon the filing of this application, this court, deeming the jurisdiction of the superior court doubtful, and the question sufficiently important, forthwith issued an alternative writ of prohibition, directing the superior court and the receiver to show cause on April 11, 1910, at Los Angeles, why the writ should not be made permanent. This was done without notice, in accordance with the regular and usual practice, and on the day the application was filed. The alternative writ was served on the receiver on March 25, 1910, at Los Angeles. Thereupon J. W. McKinley, at Los Angeles, on behalf of the receiver, sent a telegram addressed to W. F. Herrin, at San Francisco, as follows: "Los Angeles, March 25-10. W. F. Herrin, S. F. Duncan has obtained order prohibiting superior court from proceeding on issue of receiver's certificates and other matters. Please see papers. Return day April 11th. If possible obtain order shortening time so that motion to dismiss on moving papers or whole matter upon affidavits can be heard earlier. J. W. McKinley."

Mr. Herrin, at that time and for some time before and after that date, was absent from the state of California. Mr. Shay states in his answer herein that Mr. Herrin had no knowledge concerning said prohibition proceedings. The telegram was delivered at the office of Mr. Herrin, and Mr. Shay, as his assistant, took charge of it. What then occurred, and how the letter came to be written, may best be stated in the words of Mr. Shay contained in his answer admitting the charge. We quote as follows: "In the absence of Mr. Herrin, I went to the Supreme Court chambers in the city of San Francisco to submit the request of Mr. McKinley for an order shortening the time for the hearing of the return to the order to show cause issued on ex parte application of said Boaz Duncan. The Honorable W. H. Beatty, chief justice of said court, was absent, and I was directed to the chambers of Hon. F. W. Henshaw, acting chief justice of said court. I had given no personal attention theretofore

to the Boaz Duncan matter, or to California Development Company affairs, but knew generally the condition of affairs in Imperial county, and the situation with reference to the matters and things involved in the appointment of said receiver. Mr. Justice Henshaw called in consultation Mr. Justice Shaw and Mr. Justice Lorigan, and submitted to them the request for the order shortening time, in accordance with Mr. McKinley's telegram. I informed the said justices that the request was based upon the ground that any order of court prohibiting the issuance of receiver's certificates, or preventing the receiver from securing funds or from taking such other action as would be necessary to protect the lands in the Imperial Valley from flood water, or that would prevent the doing of work necessary to maintain the irrigating canals and ditches in the Imperial Valley, would cause great and perhaps irreparable damage to the settlers in said valley, and that, as I understood it, the issuance of receiver's certificates was the only way in which said receiver could secure the funds necessary at that time to carry on the work that was absolutely essential to the protection of the property owners in the Imperial Valley, and that, as I understood it, there was grave and imminent danger from flood waters which threatened the entire valley, and that it was therefore essential that the question as to whether the restraining order that had been issued by this court on the application of said Boaz Duncan should be made permanent or set aside should be heard and determined at the earliest possible date. Because of these representations on my part to said justices of the said court, an order was made and entered by Justices Henshaw, Lorigan, Shaw, and Sloss, as follows: 'By the Court. Good cause appearing therefor, it is hereby ordered that the former order heretofore entered in the matter of the above-entitled proceeding, setting the same for hearing in Los Angeles, California, on Monday, the 11th day of April, 1910, at the hour of 2 o'clock p. m. of said day, be and the same is hereby vacated, and the said matter is set for hearing before the Supreme Court sitting in bank, at San Francisco, upon Monday, the 4th day of April, 1910, at 10 o'clock a. m. Due notice of this order to be given forthwith.' Inasmuch as there was but little time intervening between March 28th and April 4th, I asked and obtained permission to take the points and authorities that had been filed in support of said Boaz Duncan's petition, and send them to Mr. McKinley for his information, upon my promise that such points and authorities would be returned to the clerk on the day set for the hearing. As is customary in cases where the court makes an order on ex parte application, the reasons why such order was made were stated to me by one of the justices. I cannot now recall who it was, but the statement, as I re-

call it, was to the effect that the application had been issued for the reason that there was a question in the minds of the court as to whether the complaint in the said action in said foreclosure suit was sufficient to justify or support the appointment of a receiver. Upon an examination of the points and authorities that had been submitted by the said Boaz Duncan in support of his petition, I saw that there was some ground for the averment in the petition as to the insufficiency of the allegations contained in paragraph 5 of the complaint in the foreclosure action hereinbefore mentioned. I made the remark at the time that this paragraph could be amended, and that, if such amendment were made, it would be an answer to the Boaz Duncan petition, but none of the justices at any time during my interview with them expressed any opinion concerning the legal questions involved, nor gave any intimation as to what rulings would or would not be made by the court. Upon my return to my office I dictated to a stenographer the letter to Mr. McKinley set forth in the order to show cause herein. When typed it was laid upon the desk of Mr. Murphy, the chief clerk of the law department of the Southern Pacific Company, who signed Mr. Herrin's name thereto, as is the general custom in Mr. Herrin's absence. Mr. Herrin never saw the letter, and his first knowledge of it, so far as I am aware, will be gained upon his return from Europe, where he now is. The said letter was hurriedly dictated, and contains statements which should not have been made. In it my own views and suggestions are given as if coming from the justices."

Mr. Shay is, and was when he wrote this letter, an attorney and counselor at law of this court. The letter was written in the course of his professional business.

[1] The Code declares it to be the duty of an attorney "to maintain the respect due to the courts of justice and judicial officers." Code Civ. Proc. § 282. In section 1209, subd. 3, it is provided that a violation of such duty by an attorney is a contempt of the authority of the court. This provision has been in the section ever since its first enactment in 1872. The section consists of thirteen subdivisions. In 1891 it was amended by adding at the end of subdivision 13, the following clause: "But, no speech or publication, reflecting upon, or concerning any court, or any officer thereof, shall be treated or punished as a contempt of such court, unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings." It is suggested that this clause so qualifies subdivision 3 that a violation of duty by an attorney, if done out of the immediate presence of the court, is not a punishable contempt. Mr. Shay disclaims the benefit of this clause. Nevertheless we deem it our duty to consider its effect.

Under the admitted rules of statutory construction we think that the amendment was not intended to modify subdivision 3. That subdivision enumerates the following acts as contempts: "Misbehavior in office, or other willful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner, or other person, appointed or elected to perform a judicial or ministerial service." The persons here named are all persons engaged in the service of the court, assisting it in the exercise of its jurisdiction, and in the performance of its functions. They are actually or potentially officers of the court. They stand in confidential relations toward the court, and in consequence thereof they owe to the court the duty of greater fidelity and respect than are due from other persons. It is apparent that such special duties may be violated by acts not done in the immediate presence of the court, and which would not influence the judges nor affect the proceedings, but which would tend to degrade the court in the minds of the people. If the persons thus immediately connected with the court do not observe proper respect toward it, or make statements derogatory to its character, the public regard and confidence would be much more affected than by similar behavior on the part of ordinary citizens not connected with the court or familiar with its proceedings. The court should have greater control of these persons than would be necessary with respect to ordinary citizens. It was for the purpose of giving to the court a means of protection against such attacks upon its character—attacks, as it were, from within—that this subdivision was enacted.

The amendment of 1891 was passed with different acts and persons in view, and to accomplish a different purpose. It was not intended to affect the power of the court to deal with its own officers for acts of disrespect in connection with their official positions. Its purpose obviously was to prevent the punishment of ordinary citizens, not connected with the court nor owing to it any special duty of fidelity and respect, for any "speech or publication," in censure or abuse of the court or the justices thereof, made to other persons, or to the general public, or even to the justices themselves, in the exercise of the common privilege of free speech. The phrase, "speech or publication reflecting upon, or concerning any court," is indicative of this intent and purpose. The amendment is general in its terms, and does not refer to any particular class of persons. Subdivision 3, on the contrary, is special, and is confined to the officers therein named. It is only by implication, and because of the seeming inconsistency, that the amendment can be said to affect subdivision 3. "Repeal by implication is not favored, and the conflict must be irreconcilable, or the intent to repeal very manifest, or both statutes will stand." *Malone v. Bosch*, 104 Cal. 683, 38 Pac. 517. "It is also the rule that where two statutes

treat of the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although latest in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject-matter as far as coming within its particular provisions." *People v. Pacific I. Co.*, 130 Cal. 446, 62 Pac. 740. In the light of these rules of construction it is clear that the amendment of 1891 should not be held to work an implied repeal of the special provisions of subdivision 3 regarding the power of the court over its own officers.

[2] That the writing and publication of the letter, if the false statements therein made were believed, would cast discredit upon this court and the justices thereof, cannot be denied. It falsely imputes to the justices of this court improper conduct of which they are entirely innocent. Whether made wittingly, or through sheer inadvertence or carelessness, it was a grave breach of his duty as an attorney on the part of Mr. Shay. Apparently it was not intended to be made public. Its recent publication does not appear to have been made at the instance of Mr. Shay, or Mr. McKinley, but rather against their wish and will. This fact somewhat palliates the offense. But the writing of such a letter made the publication possible. Its untruthful statements are well calculated to create the false impression that the members of this court are on terms of undue intimacy with powerful litigants. Such a false impression is most mischievous, and must tend greatly to impair the confidence of the people in the integrity of the court. To attempt to create such an impression, even to a few individuals, is a serious violation of duty by one upon whom the law enjoins the utmost fidelity and vigilance to preserve the court and its justices from even the appearance of evil.

It is considered by the court that the said Frank Shay is guilty of contempt as charged, and that, as a punishment therefor, he pay a fine of \$500, and that in default of payment thereof he stand committed until such fine is paid, at the rate of one day of imprisonment for every \$2 of the fine.

We concur: SLOSS, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

ANGELLOTTI, J. I am unable to concur in the judgment. I wholly concur in what is said in the opinion to the effect that the respondent was guilty of a grave breach of duty as an attorney, and have no doubt that he could be proceeded against therefor under section 287 et seq., Code of Civil Procedure, wherein it is provided that an attorney and counselor may be removed or suspended for various causes, including a violation of his duties as attorney and counselor. But in view of the amendment of 1891 to section 1209, Code of Civil Procedure,

discussed in the opinion, I am of the opinion that his acts cannot "be treated or punished as a contempt" of court.

The amendment, reading as follows, viz.: "But no speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings," while made a part of subdivision 13 of section 1209, cannot be restricted in its effect to such subdivision, for, in view of the subject-matter thereof, viz., practicing law or holding one's self out as entitled to practice law, without a license, it would be meaningless and entirely without force if so restricted. It was clearly intended as a general rule, applicable to every possible charge of contempt, prohibiting courts from treating or punishing as contempts any mere speech or publication reflecting upon or concerning any court or officer thereof, unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings, and in effect providing that anything to the contrary theretofore appearing in the section notwithstanding, no such speech or publication should be treated or punished as a contempt of court. I cannot perceive in the language used any warrant for a different construction, and if the only "violation of duty by an attorney" (subdivision 3, § 1209, Code Civ. Proc.) is the making of a speech or publication reflecting upon a court and its members, not in the presence of the court while in session and not in such a manner as to actually interfere with its proceedings, the case, to my mind, falls within the purview of the amendment.

It may freely be admitted that this court and the other courts which are established by the Constitution have the inherent authority, under the Constitution and independent of statute, to prevent interference with the exercise of the powers confided to them, and the enforcement of their orders, judgments, and decrees, and that such authority cannot be taken away or unreasonably restricted by the Legislature. It may also be conceded that a speech or publication may be made under such circumstances, although not made in the presence of the court while in session, that it would actually interfere with the proper exercise of its powers by the court in a proceeding pending before it. As to such a case, the power of the Legislature to unreasonably limit the court by prohibiting any punishment of the guilty person may well be doubted. But the case at bar is admittedly not such a case. The letter written by respondent was not designed to affect the action of the court in any matter pending before it, and could not possibly have such effect, or interfere in any degree with the action of the court or the enforcement of any order it might make in

any proceeding. It was a mere private communication to another party, and the sum and substance of its offending was that it contained false statements reflecting discreditably upon the members of this court. A court has no inherent power to punish such acts as contempts, for they do not actually interfere with the exercise of the powers confided to it by the Constitution. In the absence of statute authorizing other method, the remedy of a judicial officer who is merely assailed by slanderous or libelous statement is the same as that of any other citizen. It is, however, within the province of the Legislature to provide that acts, speeches, or publications not actually interfering with the exercise of its powers by a court shall constitute a contempt and be punishable as such, but with respect to such acts the Legislature likewise has the power to modify any provision so made in such manner as it sees fit. When such an act is made a contempt by statute, it is a contempt solely because the statute so provides, and any change in the statute removing such an act from the category of contempts divests it of that character. To my mind the amendment of section 1209, Code of Civil Procedure, in 1891, divested such acts as that of which respondent was guilty, of the character of a "contempt of court," and makes it impossible for us to treat or punish it as such a contempt.

I concur: BEATTY, C. J.

(160 Cal. 378)

Ex parte KARLSON. (Cr. 1,630.)

(Supreme Court of California. July 31, 1911.)

1. FINES (§ 11*) IMPRISONMENT FOR NONPAYMENT—COMMON LAW—APPLICABILITY.

The rule of the common law which is in force by Pol. Code, § 4468, so far as not repugnant to the Constitution and statutes, authorized the enforcement of payment of a fine by imprisonment until payment.

[Ed. Note.—For other cases, see Fines, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.*]

2. CONTEMPT (§ 77*)—PUNISHMENT—COMMON LAW—APPLICABILITY.

The provision in Code Civ. Proc. § 1218, that the court may impose a fine on one adjudged guilty of contempt of court, is consistent with the rule of the common law that the payment of a fine may be enforced by imprisonment until paid, and, in the absence of other statutory provisions, the court may sentence accused to jail on his failure to pay the fine until the fine is paid at the rate of one day's imprisonment for each \$2 of fine.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 268; Dec. Dig. § 77.*]

3. CONTEMPT (§ 77*)—CIVIL CONTEMPT—FINE—COLLECTION.

The payment of a fine imposed under Code Civ. Proc. § 1218, for a civil contempt may be enforced by imprisonment, notwithstanding section 1007, authorizing enforcement by execution against property, that being merely a cumulative remedy.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 268; Dec. Dig. § 77.*]

4. CONTEMPT (§ 77*)—CIVIL CONTEMPT—STATUTES—APPLICABILITY.

Pen. Code, §§ 6, 11, which declare that no act shall be punishable as a crime except where made a crime by statute, and that the Code does not affect any power of any tribunal to inflict punishment for contempt, has no application to a civil contempt, and section 1205 thereof, providing that imprisonment as a means of enforcing the payment of a fine shall not be extended beyond the term for which accused might be sentenced for the offense of which he has been convicted, does not limit the power of the court to commit one convicted of a civil contempt for failure to pay the fine authorized by Code Civ. Proc. § 1208.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 268; Dec. Dig. § 77.*]

5. CONTEMPT (§ 72*)—CIVIL CONTEMPT—PUNISHMENT—STATUTES.

Whether a particular act is punishable as a criminal contempt under Pen. Code, § 166, is immaterial on any inquiry arising in a contempt proceeding under Code Civ. Proc. § 1209, but where a person has been punished for a civil contempt, and is convicted of the same act as a crime under section 166, the former punishment may, as authorized by section 658, mitigate the severity of the sentence on a subsequent conviction.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 249-256; Dec. Dig. § 72.*]

6. CONTEMPT (§ 77*)—CIVIL CONTEMPT—EXCESSIVE PUNISHMENT—CONSTITUTIONAL GUARANTY.

Const. art. 1, § 6, providing that excessive fines shall not be imposed nor unusual punishments inflicted, is a guaranty against imprisonment for an unlimited period for nonpayment of a fine for civil contempt.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 268; Dec. Dig. § 77.*]

Angellotti and Henshaw, JJ., dissenting.

In Bank. Application for a writ of habeas corpus by Louis Karlson against W. A. Hammel, sheriff, for the discharge of petitioner from custody. Writ discharged, and petitioner remanded.

James G. Maguire, Daniel O'Connell, and Fred J. Spring, for petitioner. Gray, Barker, Allen, Van Dyke & Jutten, Earl Rogers, and W. H. Dehm, for respondent.

MELVIN, J. Petitioner has been held in custody by the sheriff of the county of Los Angeles on a commitment for contempt of court consisting of a violation of an injunction issued by the superior court in the case of the Pacific Ornamental Iron Works (a corporation) v. Metal Trades Council, Los Angeles, California (an association) Louis Karlson et al. It is unnecessary to review in detail the acts of Karlson found by the court to constitute the contempt for which he has been fined. It is sufficient to say that they were in violation of the injunction.

Petitioner's principal and only serious objection urged upon the hearing of this matter was directed to the method whereby the fine imposed was to be satisfied. Therefore we need only consider the punishment sought to be inflicted. Under the terms of the commitment a fine of \$200 was imposed upon this

petitioner, and it was further provided that "upon his failure to pay such fine he be committed to the county jail until such fine is paid at the rate of one day's imprisonment for each two dollars of said fine." When the petition for a writ of habeas corpus was filed, Karlson had been in custody for nonpayment of his fine under this commitment for a period of more than five days, but not long enough entirely to satisfy the fine by imprisonment. The question for us to determine, therefore, is this: May a court enforce payment of a fine imposed upon one found guilty of contempt by commitment to prison for more than five days?

Petitioner concedes that the court had jurisdiction to impose a fine of \$200 (Code Civ. Proc. § 1218), and that such fine may be enforced by an execution as is a judgment in a civil action, but he insists that sections 1218, Code of Civil Procedure, and 1205 of the Penal Code, are binding upon the court and determinative of the whole matter. The former section provides that a court has jurisdiction to punish for contempt by fine not exceeding \$500, or by imprisonment for not more than five days, or by both such fine and imprisonment, but section 1205 of the Penal Code ordains that imprisonment as a means of enforcing the payment of a fine shall not "extend in any case beyond the term for which the defendant might be sentenced for the offense of which he has been convicted." Petitioner's position would be impregnable if we were bound by the provisions of section 1205 of the Penal Code.

Before the amendment to that section limiting the term of imprisonment for satisfaction of a fine to a period equal to the maximum term for which the court might commit to prison without alternative, this court, speaking of the action of the lower court in a case very similar to the one at bar, said (In re Tyler, 64 Cal. 438, 1 Pac. 887): "In the punishment inflicted, the court did not exceed its jurisdiction. It had jurisdiction to punish by fine not exceeding five hundred dollars, or imprisonment not exceeding five days, or by both. Section 1218, Code Civ. Proc. In the exercise of its jurisdiction, it imposed a fine of \$500, and that exhausted its statutory power of punishment; but the committal was not an additional punishment. It was simply the written mandate or process by which the court undertook to enforce its judgment. A judgment of fine is enforceable by an execution, as on a judgment, in a civil action (section 1214, Pen. Code; section 1006, Code Civ. Proc.), or by commitment under the criminal law (section 1205, Pen. Code). A person against whom such a judgment has been pronounced has, therefore, the privilege, under the law, of paying it either by money or by imprisonment. If he pays in money there can be no commitment. If he refuses to pay in that way, the commitment follows, as an incident to the judg-

ment, until the judgment has been complied with according to law." If the measure of imprisonment for the collection of a fine in such a case was section 1205 of the Penal Code before its amendment, then, petitioner insists, the same section as amended, with the limitation which has been added, should now prescribe the maximum imprisonment for the collection of a part of this fine. But in *Ex parte Amos Abbott*, 94 Cal. 333, 29 Pac. 622, the Chief Justice held that section 1205 of the Penal Code had no application to cases of contempt because section 11 of the same Code expressly declares that "this Code does not affect any power conferred by law upon any * * * tribunal, or officer, to impose or inflict punishment for a contempt." Speaking of the measure of punishment for contempt of court, he said in that case: "The power to punish for contempt of court, and its limitations, must therefore be sought elsewhere than in the Penal Code, and they are found in the Code of Civil Procedure, § 1209 et seq. The limit of punishment there prescribed is a fine not exceeding \$500, or imprisonment not exceeding 5 days, or both. Code Civ. Proc. § 1218. The power conferred by this section is not affected by any of the provisions of the Penal Code. In *Ex parte Crittenden*, 62 Cal. 535, it was held that the court imposing a fine for contempt has the power to make and enforce a judgment such as that in question here, and that, as I understand the decision, without reference to or aid from section 1205, or any other provision of the Penal Code. That decision has never been overruled or questioned to my knowledge, and remains the law by which I must be bound in deciding this application."

It will be noted that in the opinion *In re Tyler*, supra, the court made no reference to section 11 of the Penal Code, and doubtless that section was not called to the attention of Mr. Justice McKee, who wrote the opinion from which some of the language quoted above is called to our attention by petitioner's counsel. In that opinion, however, and in the concurring opinions signed by four other justices, *Ex parte Crittenden*, 62 Cal. 535, is expressly affirmed, and no case has been called to our attention changing the rule there announced. In that case the court said: "But it is claimed that it was not competent for the court to imprison the petitioner under an order or judgment simply imposing a fine. In the case of *New Orleans v. Steamship Co.*, 20 Wall. 392 [22 L. Ed. 354], the Supreme Court of the United States says: 'Contempt of court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing. * * * In *Crosby's Case*, 3 Wils. 188, Mr. Justice Blackstone said: "The sole adjudication for con-

tempt, and the punishment thereof, belongs exclusively and without interfering to each respective court." The question of contempt of court and the punishment thereof has recently undergone a thorough examination in the case of *Fischer v. Hayes* (C. C.) 6 Fed. 71. In that case Blatchford, J., says: "It is suggested that section 725 [Rev. St. (U. S. Comp. St. 1901, p. 583)] provides for the punishment of a contempt by a fine or imprisonment, and that, therefore, a commitment for nonpayment of the fine is unlawful, because such commitment is "imprisonment." There is, however, no commitment or imprisonment if the fine be paid. There is no commitment and fine. The punishment by a fine is fully inflicted, under the terms of the order, if the fine be paid as the order directs, and in such case there can be no commitment. So, if there be a commitment for nonpayment of the fine, there must be a discharge as soon as the fine is paid. The payment of the fine is the punishment. The awarding or infliction of the fine is no punishment. The commitment is an incident of the fine. It is not in any manner the "imprisonment" allowed by the statute. The payment of the fine and a commitment for not paying it cannot coexist. The commitment is not a separate punishment or imprisonment added to the payment of a fine. It is in this view that it has always been held that where a statute authorizes or prescribes the infliction of a fine as a punishment, either for a contempt of court or for a defined offense, it is lawful for the court inflicting the fine to direct that the party stand committed until the fine be paid, although there be no specific affirmative grant of power in the statute to make such direction." The language quoted from *Fischer v. Hayes*, by the way, is not found in the report of that case in (C. C.) 7 Fed. 96, but in (C. C.) 6 Fed. 71.

[1] The common law of England is the law of this state, so far as it is not repugnant to our own statutes and Constitutions. Pol. Code, § 4468. The rule of the common law that the payment of a fine might be enforced by imprisonment until the fine is paid was the uniform practice of the common law courts in England, time out of mind, as may be seen by a perusal of the decisions of the Court of Kings Bench. "Directing that the prisoner shall stand committed till the fine, or till the fine and costs are paid, is not adding to the legal punishment, but simply a mode of enforcing obedience to the sentence of the law. The usual form of the common-law judgment is that the prisoner stand committed till the fine is paid." *Dodge v. State*, 24 N. J. Law, 466. There is abundant authority to this effect in addition to the cases already cited. See 8 Ency. of Pl. & Pr. 961; *Rex v. Waddington*, 1 East, 166; *Rex v. Wilkes*, 4 Burr. 2574; *Harris v. Commonwealth*, 23 Pick. (Mass.) 280; *Brock v. State*, 22 Ga. 100; *McMeekin v.*

State, 48 Ga. 335; *Hathcock v. State*, 88 Ga. 91, 13 S. E. 959; *In re Newton*, 39 Neb. 760, 58 N. W. 436; *State v. Manning*, 14 Tex. 402; *Bish. Crim. Proc.* § 1310.

[2] The provision of the Code of Civil Procedure that courts may punish a contempt by imposing a fine is consistent with this rule of the common law as to the method of enforcing its payment.

[3] The provision of section 1007, Code of Civil Procedure, that an order for the payment of money may be enforced by execution against property, is merely a cumulative remedy. In many cases an execution would be an ineffective means for the collection of a fine. The property of persons of wealth is often beyond reach of execution. At common law payment of a fine could be enforced both by a *capias ad satisfaciendum*—that is, imprisonment—and by a *levari facias*—that is, an execution against property. 2 *Tidd's Prac.* 1042; 1 *Bish. Crim. Proc.* § 1303. The two methods are not inconsistent. Section 1007 is general in its terms, and applies to all orders. It may apply to a judgment imposing a fine, but there is nothing indicating an intent to make it exclusive or to take away the common-law power to enforce a fine by imprisonment.

[4] The Penal Code declares, in effect, that the provision that no act shall be punishable as a crime except such as may be made a crime by statute, and then only in the manner prescribed or authorized by statute (section 6), shall not apply to contempts punishable under section 1209 of the Code of Civil Procedure (section 11). It necessarily follows that the Penal Code has no application to a civil contempt, and that the question whether the particular act is punishable as a criminal contempt or not, under section 166 of the Penal Code, is immaterial to any inquiry arising in a contempt proceeding under section 1209.

[5] If, after such punishment in such civil proceeding, a person is convicted of the same act as a crime under said section 166, the former punishment may mitigate the severity of the sentence upon the subsequent conviction. Pen. Code, § 658.

[6] The danger that persons may be imprisoned for an unlimited period for nonpayment of a fine for contempt is, as we think, completely removed by the constitutional guaranty that "excessive bail shall not be required, nor excessive fines imposed; nor shall cruel or unusual punishments be inflicted." Section 6, art. 1. There would be also perhaps recourse to the pardoning power in extreme cases.

It follows herefrom that there is no merit in petitioner's contention. Therefore the writ is discharged, and the petitioner is remanded.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.

ANGELLOTTI, J. I dissent. It is practically held by the opinion that, section 1205

of the Penal Code having no application to proceedings for contempt under section 1209 et seq. of the Code of Civil Procedure, any court imposing a fine upon a person as a punishment for contempt may direct that he be imprisoned until such fine is paid. The limitation of section 1205, Penal Code, not being applicable, and no limitation being elsewhere made by our statute law, such imprisonment may be continued indefinitely, and as it is held with practical unanimity that imprisonment for mere nonpayment of a fine is not imprisonment for debt, and it being reasonably clear that the contempt in such a case as this is a criminal as distinguished from a civil contempt and that mere inability to pay the fine will not be a sufficient warrant for discharge from imprisonment under sections 1143 et seq., Code of Civil Procedure (see *In re Wilson*, 75 Cal. 580, 17 Pac. 698), such imprisonment may be continued indefinitely, even though the imprisoned party is without any property from which to pay such fine. Such imprisonment may be ordered by any court of justice, including a justice's court. This is the necessary effect of the opinion. And this conclusion is reached although there is no provision in the law applicable to such contempt proceedings that expressly or impliedly authorizes imprisonment for nonpayment of a fine.

In my opinion, if section 1205, Penal Code, has no application in such cases, it follows that a court is without power to imprison for mere nonpayment of a fine imposed by it as a punishment for contempt of court in proceedings had under section 1209 et seq., Code of Civil Procedure.

The punishment that may be prescribed for such contempts is expressly specified in the statute. "A fine may be imposed on him not exceeding five hundred dollars, or he may be imprisoned not exceeding five days, or both." Section 1218, Code Civ. Proc. Section 1219, Code of Civil Procedure, specifies the only case in which other imprisonment may be required, being as follows: "When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he have performed it, and in that case the act must be specified in the warrant of commitment." The contempt in the case at bar was not of this character, and the section is without application. Section 1007, Code of Civil Procedure, which undoubtedly is applicable to such contempt proceedings, provides: "Whenever an order for the payment of a sum of money is made by a court, pursuant to the provisions of this Code, it may be enforced by execution in the same manner as if it were a judgment." This section affords a remedy by execution in such cases, which, to my mind, is the only method authorized by law for the enforcement of such a fine, if section 1205, Penal Code, is not applicable.

This being the condition of the statutory law in this state, the opinion necessarily proceeds upon the doctrine declared in *Fischer v. Hayes* (C. C.) 6 Fed. 71, "that where a statute authorizes or prescribes the infliction of a fine as a punishment, either for a contempt of court or for a defined offense, it is lawful for the court inflicting the fine to direct that the party stand committed until the fine be paid, although there be no specific affirmative grant of power in the statute to make such direction." It is to be observed that no distinction is made here between contempts of court and other offenses. In any case, the power to impose a fine carries with it the power to adjudge imprisonment for nonpayment of the fine and until the fine be paid.

I do not think that the doctrine of this case can properly be held applicable in this state. It is generally recognized that a judgment imposing a fine in a contempt matter, where the fine is solely punitive and in no way remedial, stands on the same plane as a judgment imposing a fine in the case of an ordinary criminal prosecution. 7 Am. & Eng. Ency. of Law (2d Ed.) p. 67. The fine is simply a punishment for an offense. The Supreme Court of Ohio in *Brown v. State*, 11 Ohio, 277, where a defendant was convicted of crime and judgment of fine given, with a commitment to imprisonment until the fine and costs were paid, held that the commitment was unauthorized, saying: "When common-law jurisdiction is entertained, and courts proceed according to its course, this power exists; but, when offenses are statutory, punishments regulated by statute, and no such authority of commitment is declared, it is a power not inferred, does not exist, and cannot be exercised." In *Lougee v. State*, 11 Ohio, 72, the same court said: "Unless it is so provided by statute, the court has not power to order that a criminal stand committed for the nonpayment of a fine." The correctness of the view stated in *Brown v. State*, supra, will not, I think, be doubted. Is it not applicable in California? In the absence of statute, no act or omission is here punishable as a public offense, and only such punishments can be awarded as are authorized by statute. Our Codes and other statutes undertake to cover the whole field of public offenses and the punishments that may be imposed therefor. By section 4 of the Code of Civil Procedure it is declared that "the Code establishes the law of this state respecting the subjects to which it relates." It has always been recognized by our Legislature that statutory authorization for imprisonment for nonpayment of a fine is essential to its exercise, as is shown by sections 1205 and 1446 of the Penal Code, where such authority is conferred, to be exercised with certain prescribed limitations. In *Ex parte Rosenheim*, 83 Cal. 388, 23 Pac. 372, by the judgment pronounced on convic-

tion of a public offense, both imprisonment and fine were imposed, as was authorized by law, and it was further adjudged that, in the event of the nonpayment of the fine, the defendant be further imprisoned until the fine be satisfied at a certain rate per day. This court concluded that section 1205, Penal Code, had no application to a judgment by which both imprisonment and fine were imposed, and, having so concluded, held that, as there was no statutory authority for imprisonment for nonpayment of the fine in such a case, the judgment to that extent must be held void and the prisoner discharged. It was said: "Unless it (the Legislature) has clearly conferred upon the court authority therefor, it is our duty to hold that the additional penalty cannot be imposed." This case has been followed several times, and clearly decides that express statutory authority is essential to warrant imprisonment for mere nonpayment of a fine. There is, as already said, no material difference in the case of the imposition of a fine on conviction for a criminal contempt of court under section 1209 et seq., Code of Civil Procedure.

It has been held in New York that where a statute authorizing a fine on conviction of a public offense prescribes a particular method for the enforcement, as by docketing the fine and issuing execution thereon, the court has no authority to sentence the defendant to imprisonment for nonpayment of the fine (*People v. Stock*, 26 App. Div. 564, 50 N. Y. Supp. 483, affirmed in 157 N. Y. 681, 51 N. E. 1092). We have seen that our Code of Civil Procedure prescribes such a remedy for the enforcement of a fine (section 1007), and this is the only remedy expressly prescribed unless the Penal Code sections are applicable.

There is no opinion of this court that contains anything in conflict with the foregoing other than the opinion in *Ex parte Crittenden*, 62 Cal. 534. The decision in *Ex parte Abbott*, 94 Cal. 333, 29 Pac. 622, was by the Chief Justice in a matter heard and decided by him alone, and he very properly considered himself bound, as expressly stated in his opinion, by the opinion of the court in *Ex parte Crittenden*, supra. The whole discussion of the question at bar in the opinion of the court in the case last mentioned consists of the quotation from *Fischer v. Hayes*, supra, set forth in the main opinion herein, and no question appears to have suggested itself as to the applicability of the doctrine therein enunciated in view of such statutes as we have in this state. As already indicated, I believe that the opinion in *Ex parte Crittenden*, supra, is erroneous, and that it is directly in conflict with *Ex parte Rosenheim* and kindred cases, and that the views therein expressed should be disapproved by this court.

I do not desire to be understood as assenting to the view that section 1205, Penal Code, has no application in such cases as this. It has never been so held by this court; the only decision to that effect in our reports being *Ex parte Abbott*, supra, a decision made by a single justice. It may be that section 11, Penal Code, on which that decision is based, can reasonably be held to have no reference to such contempts as are purely criminal as distinguished from civil. If section 1205, Penal Code, does apply, the time during which the petitioner may be imprisoned for mere nonpayment of the fine had expired. If it does not apply, there was never in my opinion any authority for his imprisonment at all for such nonpayment.

The decisions from other states cited in the majority opinion, with the exception of the Georgia decisions, will each be found upon examination to be based upon the conclusion that a statute of the state either expressly or by necessary implication authorized imprisonment for the nonpayment of the fine. The only Georgia decision in point is that of *Brock v. State*, 22 Ga. 100, decided in the year 1857. The other Georgia decisions cited do not involve the point under discussion.

For the reasons stated, I am of the opinion that the petitioner should be discharged from custody.

I concur: HENSHAW, J.

160 Cal. 410

Ex parte GOODRICH. (Cr. 1,625.)

(Supreme Court of California. July 31, 1911.)

1. STATUTES (§ 185*)—CONSTRUCTION—INTENTION OF LEGISLATURE.

There can be no intent in a statute not expressed in its words; and there can be no intent upon the part of the framers of the statute which does not find expression in its words.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 264; Dec. Dig. § 185.*]

2. STATUTES (§ 216*)—AIDS TO CONSTRUCTION—LEGISLATIVE DEBATES.

Legislative debates are not appropriate sources from which to discover the meaning of the language of the statutes.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 292; Dec. Dig. § 216.*]

3. MUNICIPAL CORPORATIONS (§ 120*)—ORDINANCES—AIDS TO CONSTRUCTION—OPINIONS OF OFFICIALS.

The testimony or opinions of individual members of a legislative body are not admissible to show what in fact was intended or meant by an ordinance; and hence the opinion of a chief of police as to the purpose of a city council in passing an ordinance fixing rates to be charged for electricity, and that a later ordinance not referring to it was intended to aid and supplement it, and the opinion of a city engineer who furnished information and recommendations to the council, before the passage of the ordinance, are not admissible to show the intent of the

council, since that must appear from the ordinance itself.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 274-280; Dec. Dig. § 120.*]

4. STATUTES (§ 215*)—AIDS TO CONSTRUCTION—EVIDENCE BEFORE LAWMAKING BODY.

It is permissible in certain cases as tending to show the meaning of language used in a statute to show what evidence the lawmaking body had before it while framing the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 291; Dec. Dig. § 215.*]

5. ELECTRICITY (§ 11*)—SUPPLIED FOR LIGHT OR POWER.

The duty of a quasi public corporation engaged in supplying electricity for light and power to the general public is to supply it in safe and convenient form, and to charge no more than the reasonable maximum rate, which may be fixed by municipal ordinance.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 11.*]

6. ELECTRICITY (§ 11*)—CHARGES—MUNICIPAL REGULATIONS.

A municipality has the power to pass ordinances reasonably regulating public service corporations in matters of safety and convenience and touching the manner of the supply and the prices to be charged, such power being a matter of supervisory control over the business, administration, and functions of the corporations in its dealings with the public, but beyond these matters the regulations cannot go; and the fact that as a matter of private arrangement a corporation has been doing a particular thing not pertaining to its public functions does not justify the municipality in an attempt to make the continued doing of that thing compulsory.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 11.*]

7. CONSTITUTIONAL LAW (§ 298*)—DUE PROCESS OF LAW—FURNISHING ELECTRIC LAMPS FREE.

The city of Los Angeles passed an ordinance, complete in itself, fixing the rates to be charged by companies furnishing electricity for light and power, which imposed no duty or burden as to furnishing lights free of charge, and later enacted an ordinance, containing no reference to the rate-fixing ordinance, which made it unlawful for any person, firm, or corporation, or agent thereof, supplying electric current for lighting purposes to the city or its inhabitants, to make any charge or to demand any payment, deposit, or advance for furnishing, installing, or renewing any carbon filament incandescent lights of eight or more candle power; and further provided that the refusal or neglect to furnish on demand free of charge for original installation or for renewal of lights which had burned out a sufficient number of lights for all the fixtures belonging to, or used by, any person or corporation to whom electric light was supplied was unlawful. *Held*, that such ordinance imposed a duty on the corporations which did not pertain to their public functions, and was invalid as a confiscation of property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 847; Dec. Dig. § 298.*]

8. ELECTRICITY (§ 11*)—MUNICIPAL REGULATION—REQUIRING FURNISHING OF LIGHTS FREE OF CHARGE—VALIDITY.

The city of Los Angeles, with knowledge that the various electric companies either by contract with consumers or by practice had been furnishing incandescent lights free of charge, passed a rate-fixing ordinance, complete in itself, which imposed no duty or burden as to

furnishing such lights, and later, in a separate ordinance containing no reference to the rate-fixing ordinance, made it unlawful for any person, firm or corporation, or agent thereof, supplying electric current for lighting purposes to the city or its inhabitants, to make any charge or to demand any payment, deposit, or advance for furnishing, installing, or renewing incandescent lights of eight candle power or more, and made it unlawful to refuse or neglect to furnish on demand, free of charge, either for original installation or for renewal of lights that had burned out, a sufficient number of lights for all the fixtures belonging to or used by each person or corporation to whom electric current was supplied. *Held*, that the ordinance attempted to impose on the lighting corporations a burden and a duty in no way pertaining to or growing out of its public functions, and was beyond the powers of the city council and void, and hence that an agent convicted under the ordinance would be discharged.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 11.*]

In Bank. Habeas Corpus by F. B. Goodrich against Alexander Galloway, chief of police, city of Los Angeles. Petitioner discharged.

W. A. Cheney, H. H. Trowbridge, and O'Melveny, Stevens & Millikin, for petitioner. John W. Shenk, City Atty., and Guy Eddie, City Prosecutor, for respondent.

HENSHAW, J. Petitioner is one of the officers and agents of the Pacific Light & Power Company. The Pacific Light & Power Company is a quasi public corporation, engaged in supplying electricity for light and power to the general public in the city of Los Angeles. Petitioner was convicted criminally of a violation of Ordinance No. 20,455 (new series) of the city of Los Angeles. He seeks his discharge under this writ, contending that the ordinance is void. The ordinance in terms declares it to be unlawful for any person, firm, or corporation, or agent thereof, supplying electric light or electric current for lighting purposes to the city of Los Angeles, or to the inhabitants thereof, "to make any charge or to demand, collect or receive any compensation or consideration, or any payment, deposit or advance for furnishing any carbon filament incandescent light of eight or more candle power to or for installing the same * * * or for renewing any such lamp that shall have burned out." The ordinance further provides that it shall be unlawful for any person, firm, or corporation, or the agent thereof so furnishing or supplying electric light or electric current "to fail, refuse or neglect to furnish on demand free of charge, either for original installation or for renewal of lamps that have burned out, a sufficient number of carbon filament incandescent lamps to light all electric light fixtures belonging to or used by each person, firm, or corporation, to whom electric light or electric current for lighting purposes is furnished or supplied." It is for petitioner's refusal, as the agent of the Pa-

cific Light & Power Company, so to furnish incandescent lamps free upon demand that he has been convicted and adjudged to suffer imprisonment, as provided by the terms of the ordinance.

The return to the writ is made by Alexander Galloway, chief of police of the city of Los Angeles. Besides the usual statement that he holds the body of the prisoner by virtue of a commitment under a criminal judgment which he believes to be legal, the return sets forth many allegations of evidentiary matter which will hereinafter be considered. The return is accompanied by an affidavit of Theodore B. Comstock, the contents of which affidavit is also a matter for later consideration.

It will facilitate the understanding of the questions if a narrative résumé be given of the facts. The various companies and corporations supplying electric light and power to the inhabitants of the city of Los Angeles filed with the city council, as the law requires them to do, itemized statements of their respective incomes, expenses, and physical properties. The information derived from these statements, with such other knowledge and information as the city council of Los Angeles might acquire, was to be used in the performance of the duty and power imposed and conferred of fixing the rates which could be charged consumers for the use of electricity. No question arises over the right, duty, and power of the city council in this regard. The statements filed by these companies with the council showed the cost to the companies of furnishing free of charge to their consumers incandescent lamps. No ordinance or other law at this time compelled, or attempted to compel, the companies so to furnish these incandescent lamps free of charge, but it appears from affidavit, and is undisputed, that the practice of so furnishing incandescent lamps to consumers free of charge was one that grew up amongst the electric companies, owing to competition, in their efforts to retain old consumers and to secure new ones, and thus increase the sale of their fluid. The matter rested in each instance upon contract between the company and the private consumer.

In the performance of its duty to fix rates for electricity the council by Ordinance No. 20,327 (new series) fixed such rates for the year commencing July 1, 1910, and ending June 30, 1911. This ordinance made no attempt to impose upon the electric companies the duty of furnishing incandescent lamps. Subsequently, by a separate and independent ordinance, in no way referring to the rate-fixing ordinance, the council passed the penal ordinance here in question, making it mandatory upon all electric companies to furnish incandescent lights upon demand free of charge.

Such is the case shown by the record. The contention of petitioner is that the council

had not the power to impose upon the quasi public companies and corporations supplying electricity the burden of furnishing free incandescent lamps, and that the attempt to do so was a confiscation of property; that, treated as a regulatory provision, it was equally in excess of the powers of the company and void, first as being foreign to any of the functions of the corporation over which the council could exercise regulatory power; that the council's regulatory powers could only go to the rates charged and to the methods of safety and convenience by which electricity was conveyed to the consumer, whereas this so-called regulation commanded them to do a thing in no respect pertaining to their public business of purveying electricity for general use; and, second, because, if treated as regulatory, it was mere confiscation under the guise of regulation.

Respondent undertakes to meet these objections by the return of the chief of police and the affidavit of Theodore B. Comstock. The chief of police declares that the city of Los Angeles in fixing the price of electricity by Ordinance No. 20,327 (the rate-fixing ordinance) "took into consideration and allowed in said valuation the cost of furnishing and equipping the customers of said persons, firms and corporations with carbon filament incandescent lights of eight or more candle power," and that the city of Los Angeles "allowed as a part of the expenditure charges" of electric companies the "specific expenditure for renewing to the customers of said persons, firms and corporations supplying electric light and electricity the furnishing free upon demand to the said customers the carbon filament incandescent lamps." The chief of police further asserts "that the city, when so fixing said rates as aforesaid for the year commencing July 1, 1910, and ending June 30, 1911, contemplated and intended that the said custom of furnishing and supplying said carbon filament incandescent lamps free and without charge should and would be continued without change by said persons, firms and corporations," etc. Further, the chief of police deposes that the city of Los Angeles, after the passage of Ordinance No. 20,327, new series (the rate-fixing ordinance), ascertained that the electric companies proposed to charge for incandescent lamps, "and that, after so ascertaining the intention of the aforesaid persons, firms, and corporations, the said city of Los Angeles further exercised its power to regulate the sale and use of electric light, and fixed and determined the price to be charged for the same in the city of Los Angeles, by enacting Ordinance No. 20,455, new series (the ordinance under which petitioner was convicted)." It is then alleged that this last-named ordinance "was enacted by the city of Los Angeles for the purpose of reinforcing and aiding said Ordinance No. 20,327, by prohibiting persons, firms, and corporations

* * * from defeating or evading the rate provisions of said Ordinance No. 20,327 (new series), by making the aforesaid additional charge for furnishing carbon filament incandescent lamps of eight or more candle power."

Theodore B. Comstock in his affidavit joins the chief of police in declaring what the members of the city council of the city of Los Angeles had in mind when they legislated, and what their legislation means. He makes affidavit that since the 5th of January, 1910, he has been the executive officer and engineer of the board of public utilities of the city of Los Angeles. Amongst the duties of the board of public utilities is to make each year a thorough investigation into the affairs of all persons, firms, or corporations supplying electricity for public use, and to gather data upon this subject to present to the consideration of the city council in aid of their rate-fixing powers and processes. Further, the board of public utilities is "to analyze the statements made to the city council by said persons, firms and corporations bearing upon their income and expenses and physical properties relating to the business of furnishing electric current for lighting purposes." Mr. Comstock deposes that the board of public utilities entered upon the discharge of these duties, and that he, as executive officer and engineer, has been in direct charge of the work of collecting such information and data. As part of this work he has examined the statements filed with the city council by the Pacific Light & Power Company and by other persons, firms, and corporations dealing in electricity; that those statements "include in the inventory of the plant and property thereof, the value and cost of the carbon filament incandescent lamps of eight or more candle power furnished by said persons, firms and corporations to consumers and customers free of charge during the year 1909, and said statements also include in the expense accounts of said persons, firms and corporations the cost of renewing and replacing such lamps free of charge to consumers for said year." Mr. Comstock then deposes that the board of utilities made its recommendation to the city council, which recommendation included a schedule of charges for the service of supplying electricity, and that the board of utilities "took into consideration and allowed in the said plant and property valuation above mentioned the item of expense of furnishing to consumers free of charge carbon filament incandescent lamps of eight or more candle power, and took into consideration and allowed in the disbursements the item of expense for renewing said carbon filament incandescent lamps of eight or more candle power free of charge to the customers of said persons, firms and corporations." Mr. Comstock next deposes that the council "adopted the rates and schedule of charges for such service so recommended by said

board of public utilities." He proceeds further to depose that he believes, after careful study and consideration, that the revenues of the companies furnishing electricity in obedience to Ordinance 20,327 (new series), and 20,455 (new series), will be equal to or greater than the revenue received by such companies in the preceding year; further, that he has made a careful investigation of other cities, and states that "50 important cities of the United States have reported on the subject, and that in 36 thereof the persons, firms, and corporations furnishing electric current for lighting purposes supply and furnish to customers and consumers carbon filament incandescent lamps of eight or more candle power free of cost to consumers, and in 14 of said cities a charge is made for such lamps," and, finally, that his investigations show that the Los Angeles electric companies "for many years prior to the passing of said Ordinance No. 20,455 (new series) furnished, supplied, and renewed carbon filament incandescent lamps of eight or more candle power to consumers free of charge."

In thus setting forth the declarations of the chief of police and of Mr. Comstock, it is not to be assumed that this court will disregard all the principles of law governing the interpretation of statutes. The exposition is made so as fully and fairly to present the contentions of respondent.

[1] But it still remains true, as it always has, that there can be no intent in a statute not expressed in its words, and there can be no intent upon the part of the framers of such a statute which does not find expression in their words. 2 Lewis' Sutherland, Stat. Construction, § 388.

[2] It still remains true that even legislative debates are not appropriate sources of information from which to discover the meaning of the language of the statute. *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *American Net & Twine Co. v. Worthington*, 141 U. S. 468, 12 Sup. Ct. 55, 35 L. Ed. 821.

[3] And it still remains true that even the testimony or opinions of individual members of the legislative body are not admissible for the purpose of showing what in fact was intended or meant by an act. *State v. Burk*, 88 Iowa, 661, 56 N. W. 180; *Richmond v. Supervisors*, 83 Va. 204, 2 S. E. 26; *People v. Smith*, 78 Hun, 179, 28 N. Y. Supp. 912. It is neither permissible nor possible, therefore, for either the chief of police or Mr. Comstock to say what was in the mind of the city council in framing their rate-fixing ordinance, or what by it the city council intended to include or exclude, other than as these facts shall appear from the face of the ordinance itself. Nor is their testimony admissible to establish that any relationship or interdependence exists between Ordinance 20,327 (new series) and Ordinance 20,455 (new series), for, if such interdependence or relationship does in fact exist, it must be shown

from an inspection of the laws themselves, or it cannot be shown at all.

[4] So, for the same reason, it is permissible in a proper case to show what evidence the council had before it, but the conclusions which it reached from that evidence are to be found alone from the expressions in the ordinance and are not a subject for extrinsic evidence. Thus, it is permissible to show that the statements of the electric companies established that they had been furnishing incandescent lamps to consumers without charge, and the cost to which the companies were put by so doing. It is a fair inference that this evidence was weighed and considered by the city council in fixing the rates, but not even the members of the city council themselves, and, of course, not the chief of police or Mr. Comstock, attempting to speak for them, would be permitted to say what they meant or intended concerning this matter in the ordinance which they framed and adopted. The ordinance itself must speak upon this matter, or no one can speak. *Delaplane v. Crenshaw*, 15 Grat. (Va.) 457.

What, then, is the legal presentation of this matter? It is that the city council had before it evidence that by private convention and contract between the various electric companies and their consumers these electric companies had been in the practice of furnishing to their consumers free of charge, under certain restrictions, incandescent electric lights. With this knowledge they passed a rate-fixing ordinance, complete in itself, prescribing the compensation which such companies might exact of consumers who used their electricity. This ordinance in no way attempted to impose any duty or burden upon the companies in the matter of furnishing incandescent lamps. Subsequently, by a separate ordinance, containing no reference whatsoever to the rate-fixing ordinance, the city council declared that every company furnishing electricity must furnish free incandescent lamps, or be subject to fine and imprisonment in every case of failure so to do. In point of law these ordinances are independent and unrelated. The second ordinance does not in matter, substance, form, time, or term deal directly or indirectly with the rates which had theretofore been fixed. But, if it did, if it had made express reference to the rate-fixing ordinance and declared that it was amendatory thereof and supplemental thereto, which is the utmost for it which respondent can or does claim, the legal situation would not be different.

[5, 6] What is the legal situation? The duty of these public service corporations was to supply their commodity in safe and convenient form to the general public. Over these matters of safety and convenience the city council had the unquestioned power to pass regulatory ordinances. It was also the duty of these companies to charge no more for their commodity than the maximum rate which might be fixed by the council. The

correlative rights of the council in the matter were to pass reasonable regulations touching the mode and manner of the supply, and reasonable regulations touching the price.

The argument of respondent is that the sole question of the compulsory supplying of incandescent lights by the companies free of charge is the question of the reasonableness of the provision as a regulatory measure. He demonstrates to his satisfaction that it is reasonable, and concludes that this is an end of the discussion. His argument here follows: "Does the requirement of furnishing incandescent lamps place it within the definition of being reasonable and of being natural to and consistent with the kind of business which is required to furnish them? Its reasonableness is obvious: First, it is an unmistakable convenience to consumers; second, it is a necessity and should be supplied to the consumer at the least possible cost and least possible trouble to himself; third, it is a necessary incident to the supplying of electric light; fourth, it is no more foreign to or inconsistent with the business than supplying the electrical manufacturing machinery, the wires to conduct electricity, the poles to sustain the wires, or the meters to measure the quantity consumed; fifth, it is already the practice of the companies supplying electric light, in accordance with one method or another, to supply these incandescent lamps. That furnishing these incandescent lamps is natural to and consistent with the business of electric lighting companies has been answered by the foregoing remarks on reasonableness." But every word of this, except the fifth specification, which is without legal value upon the question of reasonableness, would apply as well to an ordinance compelling electric companies to wire the houses, since, first, the wiring is unmistakably a convenience to consumers; second, it is a necessity which should be supplied to the consumer at the least possible cost and trouble to himself; third, it is a necessary incident to the supplying of electric light; and, fourth, it is no more foreign to or inconsistent with the business than supplying electrical manufacturing machinery. Indeed, the same could be said of an ordinance requiring gas companies to put in the gas plumbing and fixtures free of charge, or to an ordinance requiring water companies to do the same with water plumbing and fixtures. The primary question is not at all one of reasonableness, but one of legislative power. Only after the existence of the power is shown does the question of the reasonableness of its exercise arise. Thus there was a time under earlier republics when sumptuary laws to restrain reckless expenditures were deemed important and even essential to the existence of the government. In this extravagant age the reasonableness of a law limiting women's expenditure in the matter of attire, or men's expenditure in the indulgence of their appetites, could be sug-

ported with much plausibility. But the argument would never reach the question of reasonableness, since it would cease and the question would be determined solely by consideration of the want of legislative power.

The power and the limitations upon the power of the council in dealing with these public service corporations has been indicated. That power is a power of supervisory control over the business, the administration, and the functions of the corporation in the latter's dealings with the public. Beyond these matters the city council cannot go. The whole subject is epitomized in the following language of the Supreme Court of the United States in *Chesapeake & Potomac Tel. Co. v. Manning*, 186 U. S. 238, 247, 22 Sup. Ct. 881, 885, 46 L. Ed. 1144: "A railroad company may, if authorized by its charter, carry on not simply its strictly railroad business, but also an establishment for the manufacture of cars and locomotives. The fact that it is engaged in these two different works would not in itself subject the manufacture of cars and locomotives to the supervision of the Legislature, although such body would have the right to regulate the charges for railroad transportation." The city council can no more compel a public service corporation to do or abstain from doing anything not pertaining to the public service itself than it can compel a private individual; for, outside of its public functions, the corporation is a private corporation. Nor does the fact that as a matter of private arrangement the corporation has been doing a particular thing, not pertaining to its public functions, justify the legislative body in an endeavor to make the continued doing of that thing compulsory under the law. This argument was completely answered by the Supreme Court of the United States in *Lakeshore & M. S. Ry. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858, in the following language: "What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature. Persons may voluntarily contract to do what no legislature would have the right to compel them to do. Nor does it furnish a standard by which to measure the reasonableness of the matter exacted by the Legislature. The action of the company upon its own volition, purely as a matter of internal administration, and in regard to the details of its business which it has the right to change at any moment, furnishes no argument for the existence of a power in a legislature to pass a statute in relation to the same business imposing additional burdens upon the company." See, also, *Missouri Pacific Ry. Co. v. Nebraska*, 164 U. S. 403, 17 Sup. Ct. 130, 41 L. Ed. 489; *Missouri Pacific Ry. Co. v. Nebraska*, 217 U. S. 196, 30 Sup. Ct. 461, 54 L. Ed. 727.

[7, 8] No one can seriously assert that the furnishing of incandescent lamps is a part of the public duty of a quasi public corporation supplying electricity for light or power.

No law of the state attempts in the remotest extent to impose such a duty. The public duty of such a corporation is fully performed when it has brought its commodity safely and conveniently to the door of the consumer. Within that door the company is not by law obliged, and may not by law be compelled, to go for any purpose foreign to the public service it is called upon to render, and that the purpose here contemplated is foreign is abundantly established. *Snell v. Clinton Electric L., H. & Power Co.*, 196 Ill. 626, 63 N. E. 1082, 58 L. R. A. 284, 89 Am. St. Rep. 341; *Burke v. Mead*, 159 Ind. 252, 64 N. E. 880. So that, aside from the fact that the execution of this criminal ordinance would work an unconstitutional confiscation of property, a fact itself conclusive against the validity of the ordinance, it attempts by law to impose upon a public service corporation a burden and a duty in no wise appertaining to or growing out of its public functions. It has been said that, the fact that these companies were furnishing incandescent lights to the consumers free of charge being in evidence before the municipal council, it is a legitimate inference that this fact was considered by the council in fixing the rates. This is true, but the determination which they reached, after such consideration, must be discovered from the ordinance itself. As has been pointed out the rate-fixing ordinance contains no expression upon the subject. What is to be deduced from its silence, therefore, is solely by way of argument, and if, as respondent argues, the city council did in fact make an allowance to these companies because of the gifts which they were making to their consumers, the answer is that this was a very improper thing for the council to do. The council has no right to recognize and allow for gifts, donations, or charitable bestowals made by public service corporations, however commendable from the ethical point of view these things may be. A gas company may furnish the gas and the gas fixtures to a hospital free of charge. It might donate \$50,000 a year to the maintenance of some worthy charity, but the council could not allow a return to a company for such donations. Still less could it exact that their continuance for succeeding years should be compulsory.

As has been said, to treat the penal ordinance as amendatory of the rate-fixing ordinance does not relieve the difficulty. It would then amount to a declaration by the city council that the companies could collect the fixed sum for supplying electricity, provided that they furnish the consumers with free incandescent lamps. This would be, again, but the imposition of an illegal condition upon the right to transact a public business, and it would be a failure to fix rates at all, as to all companies which were unwilling to conform to the condition.

No case cited by respondent in any wise supports his contention that the Legislature may regulate or control a public service cor-

poration in its private affairs as distinguished from its public duties, or that it may compel such a corporation to do or abstain from doing anything not pertinent to its public functions as a condition precedent to its right to perform those functions. One and all the cases are addressed to the familiar principle herein repeatedly announced, that the Legislature may pass reasonable rules and regulations touching the performance of these public functions. They do not, therefore, call for extended review, but, as typical of them, may be instanced *State v. Gas Co.*, 34 Ohio St. 572, 32 Am. Rep. 390, where the gas company, under a special charter, was invested "with franchises to be exercised to subserve the public interest," and it was held that under express law the regular rates which the gas company could charge for the use of meters was subject to regulation. *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247, a case in which respondent finds a strong resemblance to the case at bar, is simply this: A declaration by the Supreme Court of the United States that the business of grain elevating is a business charged with a public trust, and therefore subject to rate regulation; that the public business consisted, first, in shoveling grain to the leg of the elevator to keep the elevator buckets full; and, second, the hoisting, transferring, and weighing of the grain elevated by the buckets; that it was not unreasonable in fixing a rate not exceeding five-eighths of a cent a bushel for the performance of the latter duty, to prescribe also that the former duty should be done at actual cost, since the reasonable purpose of the provision was to prevent collusion between the elevator owners and the shovelers' union, whereby the rate fixed could be evaded and the amount charged greatly increased. It should be apparent, we think, that these principles and this decision have nothing in common with an ordinance requiring a public service corporation to engage in the private enterprise of making gratuitous distribution of incandescent lamps to their consumers upon demand.

The ordinance in question, therefore, being plainly in excess of the legislative powers of the city council of the city of Los Angeles, and therefore void, it is ordered that the prisoner be discharged.

We concur: LORIGAN, J.; SLOSS, J.;
SHAW, J.; ANGELLOTTI, J.; MELVIN, J.

(160 Cal. 547)

In re WALKER'S ESTATE. (S. F. 5,491.)
(Supreme Court of California. Aug. 8, 1911.)

EXECUTORS AND ADMINISTRATORS (§ 315*) —
TRUSTS (§ 94½*)—WILLS (§ 203*)—PROBATE
AFTER DISTRIBUTION OF ESTATE AS INTES-
TATE.

Though a decree of distribution of an estate as intestate is not subject to attack after it has become final, yet a will, being thereafter discovered, is properly established by the probate court, that those entitled to take under it may be in a position to prosecute their rights in equity against the distributees as their involuntary trustees.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1305-1309; Dec. Dig. § 315;* Trusts, Cent. Dig. § 144; Dec. Dig. § 94½;* Wills, Cent. Dig. §§ 502, 503; Dec. Dig. § 203.*]

Sloss and Angellotti, JJ., dissenting.

In Bank. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

In the matter of the estate of William Walker, deceased. From an order admitting a will to probate, appeal is taken. Affirmed.

Joseph H. Skirm, for appellant. Benjamin K. Knight, for respondent.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

HENSHAW, J. William Walker died in September, 1906. He was a resident of the county of Santa Cruz and left real and personal property therein. He was thought to have died intestate. Letters of administration were issued to the public administrator and administration upon the estate was duly had. The decree of final distribution was made and entered in August, 1908. The property was delivered to the distributees, and the administrator was discharged in February, 1909. More than eight months after the decree of distribution, and after the discharge of the administrator, Frank D. Ennor filed an alleged will of the deceased and petitioned for its probate. The distributees contested and in their contest set forth the facts above related. Petitioner demurred to this contest, the demurrer was sustained, the contest overruled, and the will after proof admitted to probate. This appeal is from the latter order. It is argued that the decree of final distribution is a conclusive adjudication of the title to the property of the estate which prevents the probate court from taking any further action in regard thereto. It is further argued that the admission of the purported will of William Walker to probate is in the nature of a collateral attack upon the decree of distribution and that the decree is immune from such attack.

Respondent's position is that neither the order admitting the will to probate, nor the effect of that order, is in any wise an attack, direct or collateral, upon the decree of distribution; that if through accident, fraud, or mistake the distributees are holding property under the decree, to which they are not entitled, equity will do justice, not by overthrowing the decree of distribution, but by declaring the distributees to be involuntary trustees of the rightful owners of the property. This principle is, of course, well established. Civ. Code, § 2224; *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *Wingert v. Wingert*, 71 Cal. 105, 11 Pac. 853; *Mulcahey v. Dow*, 131 Cal. 73, 63 Pac. 158; *Sohler v. Sohler*, 135 Cal. 323, 67 Pac. 282, 87 Am. St. Rep. 98; *Parsons v. Weis*, 144 Cal. 419, 77 Pac. 1007; *Bacon v. Bacon*, 150 Cal. 481, 89 Pac. 317; *Insurance Co. v. Hodgson*, 7 Cranch, 332, 3 L. Ed. 362; *Case of Broderick's Will*, 21 Wall. 503, 22 L. Ed. 599. Respondent further argues that only in the probate court can the status of the instrument offered for probate be established as a will (*McDaniel v. Pattison*, 98 Cal. 86, 27 Pac. 651, 32 Pac. 805; *Estate of Christensen*, 135 Cal. 674, 68 Pac. 112), and that in the absence of the establishment of the status of the instrument as a will the devisees and legatees named therein could have no standing in a court of equity. Therefore it was right and proper, if adequate proof of the execution and character of the instrument were established, for the court to grant it probate.

This reasoning, we think, is indisputably

sound. The sanctity and immunity of a decree of distribution which has become final attaches to the decree itself, and not to those who under it may have derived an unconscionable advantage through fraud, accident, or mistake. Such questions the probate court does not possess the requisite machinery to try. They belong in a court of equity. *Estate of Hudson*, 63 Cal. 454; *Dean v. Superior Court*, 63 Cal. 473; *Wickersham v. Comerford*, 96 Cal. 433, 31 Pac. 358. Nor are we here called on to anticipate the decision of any such question which may in future arise. It is sufficient on this appeal to say that it was proper for the probate court to establish the last will of the deceased to the end that those entitled to take under that will might be in a position to prosecute their rights in equity.

The order appealed from is therefore affirmed.

We concur: SHAW, J.; LORIGAN, J.; MELVIN, J.

BEATTY, C. J. I concur in the judgment, but I do not think it was essential or appropriate to offer the will for probate in the probate court as such. The exclusive jurisdiction of the probate court is a jurisdiction in rem, the res being the estate of the decedent which is to be administered and distributed with due regard to the rights of creditors, heirs, devisees, legatees, and all the world. For this purpose a method of procedure is provided appropriate to a proceeding in rem, and if it has been regular, and has resulted in a final decree of distribution of the residue of the estate to the heirs of the decedent under a decree which declares that he died intestate, there is no longer any res for the probate court to deal with, and its function is ended. But if it turns out that there was a will, which was suppressed, by an heir for the purpose of defrauding devisees or legatees, or, as in this case, lost and undiscovered until after distribution, the remedy of the devisee or legatee against the heir who has received what was rightfully his is in equity to charge the heir as his trustee, and to require him to account and to transfer what he has acquired through the fraud, accident, or mistake. The action in such case is not in rem, but inter partes, and the proper court of equity may determine as between the parties before it whether the will is genuine and duly executed or not, and may in an action between the devisee and a fraudulent spoliator establish the will as against him, upon slighter evidence than would suffice to establish it against all the world in the probate court. I know that what is here said is contrary to what a bare majority of this court decided in *McDaniel v. Pattison*, 98 Cal. 86, 27 Pac. 651, 32 Pac. 805, but I am nevertheless convinced that it is the law and

supported by the weight of reason and authority.

The court, however, and the parties in this case were bound by the decision in the McDaniel Case to prove the will in the probate court, and since the same person is judge of the probate court and of the court of equity in which, according to my opinion, the question of the validity of the will should properly have been tried, and since the parties in interest had notice and appeared, the irregularity of the proceeding, if irregular, was without prejudice and for that reason, if for no other, the order appealed from should be affirmed.

SLOSS, J. I dissent. I quite agree that a court of equity may, in the cases supposed in the majority opinion, give relief by declaring the distributees to be trustees for the rightful owners of the property. But I do not see that the probate of the will is a necessary, or even a proper, prerequisite to the granting of such relief.

The judgment of the probate court is final with respect to the question of testacy or intestacy as well as with respect to the succession to the decedent's property. An action in equity to charge the distributees as trustees does not question the validity of the decree of distribution. It recognizes that decree as adjudicating that the legal title has passed to certain persons, but impresses such title with a trust. As the majority opinion itself points out, this is not an attack upon the finality of the proceedings in probate. The right to have a trust declared depends upon the very fact that the probate court has, as the result of some fraud or mistake, conclusively adjudicated the title to be in some one other than the true owner. It is not claimed by any one that the decree of distribution should or can be set aside or supplanted before equity can give relief. Why, then, is it necessary as a preliminary to such equitable suit to have the will proved in probate? The court has in this very proceeding adjudged that the decedent died intestate. It cannot, after such judgment has become final, again take jurisdiction of the same question and decide it the other way. If the case of *McDaniel v. Pattison*, 98 Cal. 96, 27 Pac. 651, 32 Pac. 805, decides anything in conflict with these views, I think it should not be followed.

I concur: **ANGELLOTTI, J.**

160 Cal. 435

BUTLER v. NG CHUNG et al. (S. F. 5,305.) (Supreme Court of California. Aug. 3, 1911.)

1. MECHANICS' LIENS (§ 231*)—MATERIALMEN—RIGHT—PARTIAL DESTRUCTION OF BUILDING.

Where, after a fire which destroys a building under construction, a substantial part of

the structure remains, a lien exists for work done and material furnished on the building, even though the language of the mechanic's lien law contemplates a lien upon the structure as well as the land.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 413; Dec. Dig. § 231.*]

2. MECHANICS' LIENS (§ 231*)—MATERIALMEN—OWNERS' LIABILITY.

Where a contract between the original contractor and owner is filed, the right of materialmen to enforce liens against the owner depends on whether the original contractor had a money demand against the owner arising out of the contract, and where, when the building was destroyed by fire, the owner owed the original contractor a certain sum, materialmen were entitled to satisfy their liens out of such sum.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 231.*]

3. MECHANICS' LIENS (§ 164*)—MATERIALMEN—EXTENT OF OWNER'S LIABILITY.

An owner who has complied with all of the terms of his contract with the original contractor is only liable to materialmen to the extent of the contract price.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 285-296; Dec. Dig. § 164.*]

4. MECHANICS' LIENS (§ 113*)—MATERIALMEN—RIGHTS.

Materialmen, by filing their liens, have a lien on the property to secure the satisfaction of their claim out of any money owing the original contractors by the owner under the contract.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 148; Dec. Dig. § 13.*]

5. MECHANICS' LIENS (§ 304*)—OWNER'S LIABILITY TO MATERIALMEN—PERSONAL JUDGMENT.

The service by materialmen of notice upon the owner to withhold from the original contractor an amount sufficient to satisfy their claim, pursuant to Code Civ. Proc. § 1184, operated as a garnishment or equitable assignment in favor of the materialmen of the amount due the original contractor, so that the materialmen were entitled to a personal judgment against the owner; there being an indebtedness due from him to the original contractor.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 632-635; Dec. Dig. § 304.*]

6. MECHANICS' LIENS (§ 231*)—INSURANCE OF BUILDING.

A provision in a contract for the erection of a building that, if it was wholly or partially destroyed by fire before completion, the loss should be sustained by the owner, who thereby agreed to carry insurance for the amount of labor and material as the work progressed, obviated the usual rule, which places the risk of fire upon the contractor, and required the owner to insure for the mutual benefit of himself and the contractor to the value of the labor and material rendered useless by fire.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 413; Dec. Dig. § 231.*]

7. APPEAL AND ERROR (§ 931*)—REVIEW—PRESUMPTIONS—FINDINGS.

Where the evidence in a materialman's proceeding to enforce a mechanic's lien is sufficient to warrant a finding that the contract between the owner and original contractor was abandoned by mutual consent, the Supreme Court must presume that the trial court so found, especially where the contract was abandoned immediately after the fire following the

great California earthquake, which fire partially destroyed the building.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 931.*]

8. MECHANICS' LIENS (§ 281*)—MATERIALMAN—PROCEEDINGS TO ENFORCE LIEN—AMOUNT DUE CONTRACTOR.

Evidence in a materialman's proceeding to enforce a mechanic's lien held to sustain a finding that \$5,500 was due from the owner to the original contractor when the contract was abandoned by the contractor.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 281.*]

9. MECHANICS' LIENS (§ 280*)—MATERIALMAN—PROCEEDINGS TO ENFORCE LIEN—ADMISSION OF EVIDENCE.

In a proceeding to enforce a materialman's lien for work and material after the contract had been abandoned by the original contractor, evidence was not admissible that after the fire, which partially destroyed the building before it was completed, the original contractor carried away nearly all of the material on the lot, not tending to show that the abandonment of the contract was due to the original contractor's fault, or that the amount due him was less than that claimed by the materialmen.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 280.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by Thomas Butler against Ng Chung and others. From a judgment for plaintiff against part of defendants, and an order denying a new trial, such defendants appeal. Affirmed.

John A. McGee and F. J. Drum, for appellants. Thomas Butler and Roger Johnson, for respondent.

PER CURIAM. Action to foreclose liens of materialmen and subcontractors. The court gave the plaintiff as assignee of the original claimants a judgment against the owners for \$2,988.40, with interest, and also for the foreclosure of a lien upon the property for said amount. The said owners appeal from the judgment, and from an order denying their motion for a new trial.

The complaint is in six counts, each setting up the claim of one of plaintiff's assignors. The plaintiff alleged the due execution and filing of a written contract between the appellants, as owners, and the defendants Jordan & Cram, as contractors, for the erection of a four-story and basement brick building for the agreed price of \$14,000. It is averred that Jordan & Cram proceeded with the construction of the building until on or about the 17th day of April, 1906, when said contract was abandoned, but no notice of cessation of labor has ever been filed. The assignors of plaintiff filed their respective claims of lien, and each during the progress of the work served upon the owners written notice of the furnishing of materials and the performing of labor in the amounts claimed. Code Civ. Proc. § 1184. Each count

alleges upon information and belief that at the time of so serving notice, and at all times since, there was and now is due and unpaid from the owners to the contractors on account of the contract price more than \$5,000, "which is applicable to the aforesaid claim, and the lien therefor." The answers of the owners undertake to deny (although the denial is perhaps insufficient in form) that at the time of the service of the notices, or thereafter, anything was due from the owners to the contractors. They deny the furnishing of labor or materials by the respective assignors of plaintiff, and allege affirmatively that the building was on the 18th day of April, 1906, destroyed by fire. They allege, further, that the contract has never been completed, and that no money is due or owing to the original contractors. The court found that all the allegations of the complaint (except the third count thereof) were true. With reference to the affirmative matter pleaded, there was a finding "that on the 19th day of April, 1906, a general conflagration took place in the above city and county, by which said building was partially destroyed, without any fault of defendants, but that a material part thereof, of the value of \$5,000 remained intact; that at the time of said fire said building was almost but not entirely completed, and had not been accepted, but there was then due to the contractors, Jordan & Cram, by said owners, pursuant to the terms of said contract between them for the erection of said building, the sum of \$5,500, no part of which has ever been paid." Judgment followed as above stated.

The briefs of counsel are in large part devoted to a discussion of the question whether the rule declared in Humboldt Lumber Mill Co. v. Crisp, 146 Cal. 686, 81 Pac. 30, 106 Am. St. Rep. 75, is applicable here. In that case it was decided that a mechanic's lien for work and materials furnished for the construction of a building could not attach where the building had without the fault of the owner been destroyed before it was completed and before the claim of lien was filed. This conclusion was based upon the "peculiar language of our mechanic's lien law," providing for a lien, not only upon the building, but also upon the land covered by it and so much other land as may be required for its convenient use and occupation, a mode of expression which, as the court says, "looks to an existing house that can be occupied in the future, and not to a vacant lot upon which no house exists." A further reason for denying a lien in case of the destruction of the structure was found by the court in the view that the true consideration for the lien is the benefit conferred upon the owner by placing labor and materials in his building, and that, where

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the building is destroyed before completion, no such benefit can be enjoyed by the owner.

[1] We think neither of these grounds is applicable where the destruction is only partial and a substantial part of the structure remains to the owner. There can be no insurmountable difficulty in determining the amount of ground necessary for the convenient use and occupation of a building which has been damaged, but which may be restored and completed so as to be fit for occupancy. Nor is the owner, by such partial destruction, necessarily deprived of all benefit of the labor and materials which have gone into the structure of which a material part remains.

[2] Where a valid contract has been filed, as was done here, the lien claimants are merely substituted to the original contractors, and their right to enforce their liens against the owners depends on whether or not the original contractor has a money demand against the owner growing out of the building contract.

[3] "The liability of an owner, who has on his part complied with all the terms of a valid contract, is limited to the price which by his contract he has agreed to pay." *Hoffman-Marks Co. v. Spires*, 154 Cal. 111, 97 Pac. 152; *Kellogg v. Howes*, 81 Cal. 179, 22 Pac. 509, 6 L. R. A. 588; *Stimson Mill Co. v. Braun*, 136 Cal. 122, 68 Pac. 481, 57 L. R. A. 726, 89 Am. St. Rep. 116; *Latson v. Nelson* (Cal.) 11 Pac. C. L. J. 589.

[4] But up to this limit of liability the claimants by filing their liens acquire a right to share in any money owing from the owners to the original contractors on account of the contract, and their right, to this extent, is secured by a lien on the property. The court in this case found that at the time of the fire there was due from the owners to the contractors under the contract the sum of \$5,500, no part of which has been paid. The effect of the filing of the liens was to transfer from the contractors to the lien claimants the right to receive this money, so far as necessary to satisfy the liens. If the owners are liable for the amount, it does not concern them whether they pay it to the contractors or to the lienors. There being a substantial structure to which the liens may attach, they should be held good to the extent of the amount due from the owners to the contractors.

[5] The finding that this balance was due from the owners to the original contractors justified also the personal judgment against the owners. The service of notices to withhold pursuant to the provisions of section 1184 of the Code of Civil Procedure, operated, in effect, as a garnishment or equitable assignment of the amounts due or thereafter becoming due to the contractors under the contract, and entitled the persons serving the notice to receive so much of said amounts as would satisfy their claims. *Bates v. Santa*

Barbara Co., 90 Cal. 543, 27 Pac. 438; *Bianchi v. Hughes*, 124 Cal. 24, 56 Pac. 610. The appellants attack, as unsupported by the evidence, this finding that \$5,500 was due from the owners to the contractors and was applicable to the payment of the liens. The twelfth clause of the contract, so far as material, is as follows: "In case said work herein provided for shall, before completion, be wholly or partially destroyed by fire, * * * then the loss occasioned thereby shall be sustained by the owners, and the owners agree to carry an insurance for the full amount of labor and material as the work progresses."

[6] This clause does away with the rule in ordinary cases, that the risk of fire is upon the contractor, and that he must rebuild if, before completion, the building is burned. It puts such loss upon the owner, and, in effect, requires him to insure for the mutual benefit of himself and the contractor to the full value of the labor and material that may be subject to destruction by fire during the progress of the work. The owners in this case had taken out a policy of insurance for this purpose in the sum of \$10,000. If the progress payments had been made promptly and were sufficient to repay the contractors the full cost of the structure destroyed, the contractors would not have been entitled to any share in the insurance money. But these payments do not usually equal such cost, and in the form in which this contract was drawn it is apparent that they would be insufficient to reimburse the contractors. The parties must be deemed to have contemplated this and to have contracted accordingly for insurance for their mutual benefit.

[7] The pleadings, findings, and evidence do not show the reasons which led to the abandonment of the contract. The owners made no attempt to show that it was by reason of the fault of the contractors, nor was there any attempt by the plaintiffs to prove that it was because of the owners' default in the payments or otherwise. The familiar circumstances following the great fire of April, 1906, which destroyed not only this building, but a vast area of buildings comprising the entire business district and a large part of the residence section of San Francisco, and interrupted for months every enterprise in the city, are a part of the history of the country, and, in connection with the facts of this case, are sufficient to warrant the conclusion that the abandonment was by the mutual consent of the parties. We must presume that the court below found this to be the fact. This would leave the rights of the owners and contractors to be adjusted in accordance with the principles of equity, justice, and the terms of the contract, so far as they can be applied. The contract price of the building was \$14,000, and extra work had been done of the

value of \$2,147. The building required only four days' work and the expenditure of about \$800 to complete it. The contractors had received \$5,250 on the contract price and \$520 on the extra work. This left a balance of \$9,577 unpaid on the work done by the contractors at the contract price at the time of the fire. This sum represented the contractors' loss from the fire. Under the circumstances, the contractors would, in justice and equity, be entitled to demand of the owners a much larger sum than the \$5,500 found due by the court.

[8] The finding is therefore sustained by the evidence, and it affords an adequate basis for the judgment of foreclosure, as well as for the personal judgment against the owners.

The finding as to the value of the part of the building remaining after the fire is supported by the evidence of one of the contractors which it is not necessary to discuss further.

[9] It is urged that the court erred in refusing to permit the appellants to show that after the fire the original contractors had carried away all materials remaining on the lot except the foundation and the part of the walls which had not fallen. The evidence was properly excluded. Unless it had some tendency to show that the abandonment of the building was due to the fault of the contractors, or to reduce the contractors' loss to less than \$5,500, it was immaterial. There was no proposal to show that their conduct in taking away these materials was without the consent of the owners, or that it was not done pursuant to the agreement of abandonment. With these facts it might have a slight tendency to prove that the abandonment was the act of the contractor alone, but without these additional facts we cannot perceive that any inference to that effect could be drawn. No evidence that they had any value whatever was offered.

The judgment and order appealed from are affirmed.

160 Cal. 497

LITCH v. WHITE, City Marshal, et al.
(Sac. 1,895.)

(Supreme Court of California. Aug. 5, 1911.)

1. MUNICIPAL CORPORATIONS (§ 173*)—CITY MARSHAL—LIABILITIES—OFFICIAL BONDS.

Under a city ordinance which declared that all porches or roofs in a fire district should be kept in a safe condition, and that whenever dilapidated or unsafe, so as to menace the safety of firemen required to go thereon in case of fire, should be made safe on five days' notice by the city marshal, and that on neglect to make safe they should be declared nuisances, which the marshal should abate after five days' notice to the owner, the marshal is not bound to make an inspection of all structures in a district, but must give the notice required only when he has notice of the dangerous or unsafe condition,

and he or the surety on his official bond is not liable for injuries to a fireman caused by the falling of a porch on which he had been required to go to extinguish a fire, where it is not shown that there was any patent defect in the porch or that the marshal had actual knowledge or notice of its unsafe condition.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 173.*]

2. NEGLIGENCE (§ 48*)—CONDITION OF BUILDING—OWNER'S KNOWLEDGE OF DEFECT OR DANGER.

Under an ordinance which declared that porches and roofs in a fire district should be kept in a safe condition, and that, if they became unsafe for firemen required to go thereon in case of fire, they should be made safe on notice from the city marshal, or, if not made safe, should be declared nuisances, an owner is only required to put his roof or porch in such a condition as may be specifically required of him by the city authorities with a view to the proper protection of firemen, so that an owner is not liable to a fireman injured by the falling of his porch, where it is not shown that he had any notice or knowledge of its dangerous condition or of facts from which such notice or knowledge might be inferred.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 51; Dec. Dig. § 48.*]

Department 1. Appeal from Superior Court, Butte County; K. S. Mahon, Judge.

Action by A. G. Litch against Harry D. White, Marshal of the City of Chico, the United States Fidelity & Guaranty Company (a corporation), and L. Van Vlack. Judgment for defendants, and plaintiff appeals. Affirmed.

Lon Bond and W. H. Carlin, for appellant. Guy R. Kennedy, Richard White, Thomas Gerstle, and Frick & Beedy, for respondents.

ANGELLOTTI, J. This is an appeal by plaintiff from a judgment for defendants, in an action for damages for personal injuries, given upon sustaining the demurrers of defendants to his complaint, and his failure to file an amended complaint.

The complaint substantially states the following facts: During the whole of the year 1906, the defendant Van Vlack was the owner and in the possession of a lot of land with a one-story building situated thereon, fronting on Broadway street, in the city of Chico, known as 218 Broadway street, "together with that certain porch or awning connected with said building, and being approximately 12 feet in width and 20 feet in length, and approximately 14 feet above and extending over the sidewalk along Broadway street at said place." This property was within the limits of a fire district of said city lawfully created by the board of trustees thereof. The said "awning or porch * * * was not in or kept in a safe or substantial condition, but, on the contrary, was in an unsafe and dangerous condition, and was, and during all the said times continued to be, in such an unsafe and dangerous condition as to menace and it did menace, and was a menace to, the safety of firemen or any fireman required to

go thereon in case of fire." On July 23, 1906, a fire broke out near said premises of Van Vlack. Shortly thereafter, plaintiff, a member of the fire department of Chico, "was required to, and did in the exercise of his duties as such fireman and for the purpose of extinguishing such fire, go upon said porch or awning," and while so upon such porch or awning, "because of and owing to the said unsafe, dangerous, and unsubstantial condition of said porch or awning, the same fell to the sidewalk beneath it, precipitating plaintiff down to and upon" the sidewalk beneath, injuring him seriously, to his damage, it is alleged, in the sum of \$20,000. There was an ordinance of the city of Chico, section 9 of which was as follows: "All awnings, porches, sheds or roofs in said fire district [the district including Van Vlack's property] shall be kept in a safe and substantial condition, and wherever the same or any part thereof shall become dilapidated or be in a dangerous or unsafe condition, so as to menace the safety of pedestrians passing on the sidewalks or firemen required to go thereon in case of fire, the same shall be put in a safe state of repair on five days' notice by the city marshal, and in case the owner or agent of said awning, porch, roof or shed refuses or neglects to so repair the same, it is hereby declared to be a nuisance and shall be abated or removed in the manner provided in section six of this article." Said section 6 authorizes and directs the marshal to himself abate a nuisance after five days' notice to the owner, etc. During the whole of the year 1906, defendant White was the city marshal of said city, and the defendant United States Fidelity & Guaranty Company was the surety on his official bond as such marshal. "Notwithstanding said dangerous and unsafe condition of said porch or awning during said time, neither said owner, said Van Vlack, nor said Harry D. White, marshal of said city of Chico, because of their, and each of their, negligence and failure to perform their duties in the premises, did anything whatever, neither gave nor served any notice, nor took, nor caused to be taken, any steps to repair, or cause the same to be repaired, or put in a safe or substantial state or condition, or removed or abated."

[1] The complaint fails to state a cause of action against White, the city marshal, and consequently against the Fidelity & Guaranty Company, his surety. It is nowhere alleged therein that White had any notice or knowledge that the "porch or awning" was in such a condition "as to menace the safety of pedestrians passing on the sidewalk or firemen required to go thereon in case of fire," nor are any facts alleged from which it may be concluded that he should have had such knowledge. There is absolutely nothing to show that there was any patent defect therein, or, indeed, any defect that would have been discovered upon a reasonably care-

ful inspection of the premises. We do not, however, think that the ordinance should be construed as making it the duty of the marshal to make an inspection of all the structures mentioned with a view to ascertaining their condition in the respects mentioned. Certainly that duty is not in terms imposed by any provision of the ordinance, and we think that the utmost that can be claimed in regard thereto is that the marshal must give the notice required whenever he has notice of the dangerous or unsafe condition. Such notice might perhaps be inferred from the appearance of the structure in certain cases, but where there is nothing in the appearance of the structure to indicate that the same is in a dangerous or unsafe condition, and actual knowledge of such condition has not been acquired by the marshal in any other way, there is no liability on his part for failure to give the notice to the property owner or to otherwise proceed under the ordinance. It follows that knowledge or notice by the marshal of the defective condition must be alleged in order to state a cause of action against him. The case of *Doeg v. Cook*, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171, is not opposed to this view. In that case the duty of maintaining a highway in good repair was expressly imposed upon the marshal and trustees, and they were directly charged with negligence in the performance of that duty.

[2] As to defendant Van Vlack, the owner of the premises, the complaint is also without any allegation of notice or knowledge of any defect, or of facts from which such notice or knowledge must be inferred. The building is alleged to be a one-story building, and, as we read the complaint, the "porch or awning" extended from the top thereof over the sidewalk below, and was nothing more than a covering designed simply to protect from the sun or weather, and was obviously not intended for occupancy by human beings. Nothing to oppose this theory appears in the complaint, which must be taken here as stating plaintiff's case as strongly as it can be stated. The sum and substance of the charge made by the complaint in relation to the condition of the "porch or awning" is that it was not substantial enough to support the weight of a person going thereon. In the absence of some valid law expressly providing otherwise, there was, of course, no duty resting on the owner to make such a "porch or awning" substantial enough to support a human being. No person was invited or could reasonably be expected by him to go thereon. The whole effect of section 9 of the ordinance, as we construe it, is to require the property owner to put his awnings, porches, sheds, and roofs in such a condition as may be specifically required of him by the city authorities with a view to the proper protection of pedestrians and firemen, failing to do which his structures will become a nuisance, abat-

able in the manner provided in the ordinance. In other words, the section imposes no obligation upon him in the absence of the five days' notice specified therein that does not exist independent of the ordinance.

It follows from what we have said that the complaint does not state facts showing a liability on the part of Van Vlack independent of the ordinance, and that the facts alleged are not sufficient to make him liable to plaintiff under the provisions of the ordinance. We have assumed without deciding the question that the ordinance is in all respects valid.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

(160 Cal. 515)

WELLER v. BROWN et al. (S. F. 5,289.)
(Supreme Court of California. Aug. 7, 1911.)

1. DEEDS (§ 165*)—CONDITION—COMPLIANCE WITH COVENANTS.

In the absence of a provision that title shall revert in case of a breach of a covenant as to the use of land conveyed, such covenant will not be construed as creating a condition, so that a provision of a deed, executed by defendant to plaintiff, of land lying between other lands of defendant, that it was mutually agreed that the land conveyed should be used as a public street and not as a building lot, was not a condition so as to make title to revert to defendant on plaintiff's failure to comply with the covenant.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 521; Dec. Dig. § 165.*]

2. COVENANTS (§ 70*)—COVENANTS RUNNING WITH THE LAND—IMPOSING BURDEN.

A covenant in a deed by defendant to plaintiff of land located between defendant's other lands that the strip conveyed should be used as a public street, and not for a building lot, was not a covenant running with the land, not being made for the benefit of the lot, but imposing a burden thereon; Civ. Code, § 1461, providing that only the covenants specified in the title and those incidental thereto shall run with the land, and section 1462 providing that every covenant in a grant which is made for the direct benefit of the property runs with the land.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 70, 71; Dec. Dig. § 70.*]

3. EASEMENTS (§ 12*)—CONTRACTS.

While easements are usually acquired by grant or prescription, they may be acquired by contract where it is evident from the nature of the subject-matter that the parties contemplated that privileges intended for the permanent use of the property should be an incident of the principal contract.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 35-41; Dec. Dig. § 12.*]

4. EASEMENTS (§ 14*)—RIGHT OF WAY—CONTRACTS.

Where the grantor of a strip, when the deed was executed, owned land lying on either side thereof, an agreement in the deed that the strip conveyed should be used as a public street and not for a building lot was a reservation to the grantor of such rights in the strip conveyed as he would have in a public street, and a negative easement prohibiting the erection of a

building upon such strip, though the grantee orally agreed at the same time to hold the strip and convey it to the city for a street upon payment to him of the amount paid by him.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 40; Dec. Dig. § 14.*]

5. DEEDS (§ 124*)—CREATION OF FEE SIMPLE—REPUGNANT CONDITIONS.

There is no repugnancy between a conveyance of the fee and a reservation of the easement requiring the grantee to keep the land for use as a street, and not for building purposes.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 344-435; Dec. Dig. § 124.*]

In Bank. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by H. A. Weller against R. M. Brown and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded for new trial.

J. W. Preston and Preston & Preston, for appellants. Mannon & Mannon, for respondents.

SLOSS, J. This is an action to quiet title to a parcel of land 200 feet in length and 60 feet in width, situated in the city of Ft. Bragg, county of Mendocino. Plaintiff recovered judgment, and the defendants appeal.

The complaint contained the usual allegations that the plaintiff was the owner of the property in question, that the defendants claimed an adverse interest therein, and that their claim was without right. The answer admits that the defendants claim an interest in the land, and alleges that they are the owners of an easement therein, to wit, the privilege of ingress and egress over the same as a public highway or street and an easement for a right of way appurtenant to the lands of the defendant Louisa M. Brown adjoining the lands described in the complaint. As a separate defense the defendants allege that on July 7, 1906, defendant Louisa M. Brown owned a lot or block of land and that the parcel described in the complaint constituted a strip of land 60 feet in width running through the center of said land; that the land on either side of said strip belongs to the defendants; that on said July 7, 1906, the plaintiff took a deed from Louisa M. Brown for the parcel in controversy, with the understanding and agreement that said land should not be used as a building lot; and that it should be and become a public street or highway for public use, and likewise that it should be and become an easement appurtenant to the remaining lands so owned by the defendant Louisa M. Brown for the purpose of ingress and egress to and therefrom. It is alleged that the right and privilege to use the said land is necessary and convenient for the use and occupation by said defendant of her adjoining land, and that she owns an easement or right of way over and upon said

land, which easement is appurtenant to her adjoining lands.

The court found that the plaintiff is, and ever since the 7th day of July, 1906, has been, the owner in fee of the land in controversy; that on and prior to July 7, 1906, the defendant Louisa M. Brown owned the block of land described in her answer, including the strip in controversy, and that the defendants now own the lands adjoining said strip on either side; that on July 7, 1906, the defendants had executed and delivered to plaintiff a grant, bargain, and sale deed of the land described in the complaint, which deed contained, after the granting clause, the following covenant: "It is hereby mutually agreed between the parties of the first part (defendants) and the party of the second part (plaintiff) that the above described land is to be used as a public street and not as a lot for building purposes." The plaintiff accepted said deed and paid as consideration therefor the sum of \$450, which was the full value of said land. At the time of the execution and delivery of the deed the plaintiff verbally agreed with the defendants that he would pay them the full value of said land and hold possession of the same, and that, if the city of Ft. Bragg could be induced to buy said land for street purposes, the plaintiff would deed said land to the city on receipt of the amount he paid the defendants therefor, and thereupon the same might become a public street. It was found that there was no other or further agreement between the parties respecting the lands in controversy; that the right to travel and use the lands in controversy is not necessary, but is convenient for the use and occupation by the defendant Louisa M. Brown of the lands she owns that adjoin the land in controversy. It is then found that Louisa M. Brown does not and never has owned an easement over said land, and that her claim to such easement is without right. Upon these findings, conclusions of law followed to the effect that plaintiff was the owner in fee simple of the land and that defendants have no right, title, or interest therein, and judgment quieting plaintiff's title was entered.

The evidence is brought up in a bill of exceptions, and we shall set forth so much of it, in addition to the facts disclosed by the foregoing findings, as may be necessary to the consideration of this appeal. As above stated, the plaintiff derived title to the strip in controversy by means of a grant, bargain, and sale deed from the defendants, the deed containing a covenant whereby the parties agreed that the land conveyed was to be used as a public street and not as a lot for building purposes. The strip, as appears from a plat introduced in evidence, runs east and west. A street, known as Main street, runs north and south across the westerly end of the strip, and bounds, as well, the remaining land of Mrs. Brown in

the same block. A street named Bush street intersects the westerly line of Main street directly opposite the end of the strip in controversy, in such manner that the strip, if opened, would form a continuation eastward of Bush street. The question to be decided is whether the deed, read in connection with these circumstances existing at the date of its execution, reserved to the grantors any interests in the land conveyed.

[1] It is quite clear that the grant to plaintiff was not conditional upon his compliance with the terms of the covenant. In the absence of a provision that title shall revert in case of breach of a covenant regarding the use of the land, such covenant is not construed as creating a condition. *Behlow v. Southern Pacific Co.*, 130 Cal. 16, 62 Pac. 295; *Los Angeles Terminal Co. v. Muir*, 136 Cal. 36, 68 Pac. 308; *Hawley v. Kafitz*, 148 Cal. 393, 83 Pac. 248, 3 L. R. A. (N. S.) 741, 113 Am. St. Rep. 282.

[2] Nor is the covenant one running with the land. "It was not made for the benefit of the lot conveyed but purported to impose a burden thereon by restricting its use; and, while a benefit will pass with the land to which it is incident, a burden will adhere exclusively to the original covenantor, unless a privity of estate or tenure subsists or be created between the covenantor and the covenantee at the time the covenant is made." *Los Angeles Terminal Co. v. Muir*, supra; Civ. Code, §§ 1461, 1462. Then, too, the covenant in question does not purport to bind the successors in interest of the grantee or inure to the benefit of the successors of the grantor. Viewed as a covenant, it is a purely personal one, and would not be enforceable at law except as between the parties. In that aspect it creates no limitation upon the absolute title conveyed. Under the form of the present action, we are not called upon to consider whether such covenant would be specifically enforced in equity as against the covenantor or one succeeding to his interest with notice of the covenant. The defendants are not seeking to enjoin the violation of the covenant, but are asserting that they are the owners of an interest in the land conveyed.

Apart, however, from the various considerations above suggested, there still remains a way by which the restrictive words of the deed may be given effect; that is, by construing them as intended to reserve an easement in the land granted for the benefit of the remaining and adjoining land of the grantors.

[3] "While easements are generally acquired by grant or prescription, it is also true that they may be acquired by contract, where from the nature of the subject-matter it is evident that the parties intended that privileges designed for the permanent use of the property should form an incident of the principal contract." *Jones on Easements*, § 104; *Hogan v. Barry*, 142 Mass. 538, 10

N. E. 253; *Shannon v. Timm*, 22 Colo. 167, 43 Pac. 1021. In *Coudert v. Sayre*, 46 N. J. Eq. 386, 395, 19 Atl. 190, 193, Vice Chancellor Van Fleet used this language: "That when it appears to be the true construction of the terms of a grant that it was the well-understood purpose of the parties to create or reserve a right, in the nature of a servitude or easement in the property granted, for the benefit of other land owned by the grantor, no matter in what form such purpose may be expressed, whether it be in the form of a condition, or covenant, or reservation, or exception, such right, if not against public policy, will be held to be appurtenant to the land of the grantor and binding on that conveyed to the grantee, and the right and burthen thus created and imposed will pass with the lands to all subsequent grantees."

Thus in *Hathaway v. Hathaway*, 159 Mass. 584, 35 N. E. 85, the deed contained a clause providing that as part of the consideration the grantee agreed to open and construct a public way to lead in a certain direction across her land and the land therein conveyed, and to prepare and keep the same open for travel until accepted by the city. It was held that this agreement operated by way of reservation or implied grant, and created an easement over the land then conveyed for the benefit of the grantors of the remaining land.

[4] The case last cited is in its essential facts not distinguishable from the one at bar. It is here alleged and found that the grantors of the strip in question were at the time of the grant, and have ever since remained, the owners of the land on either side of the strip. The deed contains an agreement or covenant that the strip conveyed is not to be used for building purposes, but is to be used as a public street. The natural and reasonable conclusion to be drawn from these facts is that the covenant or agreement was required by the grantors for the benefit of their remaining land. It is true that this agreement would not in and of itself effect a dedication of the strip as a public street. It was, however, sufficient as between the parties to constitute a reservation in favor of the owners of the adjoining land of such rights as they would have in a public street, and, further, to reserve to them a negative easement prohibiting the erection of any building upon the strip. The circumstance that the defendants received from the plaintiff the full value of the land conveyed is in no way inconsistent with this conclusion. It is not claimed that the transaction was induced by fraud, mistake, or misrepresentation, or that the deed did not truly express the agreement of the parties. If the instrument, correctly interpreted, reserves an easement which lessens the value of the property

conveyed, the fact that the purchaser may have made a disadvantageous bargain does not justify a court in destroying the reservation. Likewise, the oral testimony to the effect that plaintiff agreed to hold the land and to convey it to the city for a street upon payment to him of the amount he had paid shows no more than that an immediate dedication to the public was not contemplated. Such agreement (assuming that evidence of it may be considered as against the written terms of the deed) may be given full effect without setting aside the covenant restricting the grantee's use of the land pending a purchase by the city. A private easement, equivalent to that of an abutter on a public street, may exist, although the public has acquired no right.

[5] We see no force in the contention that the covenant must fall as being irreconcilable with the granting clause. Civ. Code, § 1070. There is no repugnancy between a conveyance of the fee and a reservation of an easement affecting the land conveyed. In accordance with these views, we think the finding that the plaintiff never had any agreement or understanding with the defendants that "the lands in controversy should be or become an easement appurtenant to the remaining lands conveyed by the defendant Louisa M. Brown for the purpose of ingress thereto or egress therefrom" must, if not regarded as a mere conclusion erroneously drawn from the other facts found, be held to be contrary to the evidence. So, too, the findings that the defendant Louisa M. Brown does not and never did own an easement over the land in question, and that she had no right, title, or interest in said lands, are unsupported by the evidence.

Upon the facts shown in the record, the court below should have found that the defendant Louisa M. Brown was the owner of an easement in the land as above stated, and should in its decree have declared the plaintiff's title to be subject to such easement.

The judgment is reversed, and the cause remanded for a new trial.

We concur: SHAW, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

160 Cal. 501

OSBORN v. HOPKINS. (S. F. 5,632.)

(Supreme Court of California. Aug. 5, 1911.)

1. LIMITATION OF ACTIONS (§ 183*)—PLEADING—SUFFICIENCY OF ALLEGATIONS.

The defense of the statute of limitations is sufficiently pleaded by an answer, though the section and subdivision of the statute are not alleged, where the facts showing the bar of the statute are pleaded.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 683-692; Dec. Dig. § 183.*]

2. NEW TRIAL (§ 128*)—MOTION—STATEMENT AS TO GROUNDS—SUFFICIENCY OF EVIDENCE.

The specification in a motion for new trial, under the heading, "Specification of particulars in which the evidence is insufficient to justify the verdict," was that the evidence showed that the statute of limitations had run as to the services alleged to have been rendered by plaintiff's assignor in certain legal proceedings. *Held*, that the specification of insufficiency of evidence as to the question of limitations as a ground for new trial was sufficient, since a specification is sufficient where it is of such a nature as to fully inform the trial court and the opposing party of the point to be made as to the insufficiency of evidence.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 128.*]

3. LIMITATION OF ACTIONS (§ 43*)—ACCRUAL OF RIGHT OF ACTION.

The statute of limitations begins to run upon the accrual of the right of action; that is, when a suit may be maintained, and not until that time.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 217-219; Dec. Dig. § 43.*]

4. LIMITATION OF ACTIONS (§ 50*)—ACCRUAL OF RIGHT OF ACTION—SEPARATE OR CONTINUING CONTRACTS—ATTORNEY'S PROFESSIONAL SERVICES.

An attorney was retained and employed by defendant, who anticipated that several suits would be brought against him by his wife, to represent him in any and all litigation which his wife might prosecute against him arising out of their marital relations and the enforcement of their marital rights and obligations, including any action or actions she might bring for divorce, or for separate maintenance for herself and a minor child, or for the custody of said child. The contract was not in writing, and there was no understanding as to the amount of compensation, or as to the time when the right to it should accrue. An action against defendant for divorce was terminated in 1902, and an action of prohibition instituted by the wife was terminated the same year, and the wife's action for maintenance was undetermined and pending when the attorney's assignee, after demand in November, 1906, began an action to recover for services. *Held*, that the services were not rendered upon an entire or continuing contract, but that at the termination of the separate divorce and prohibition proceedings the attorney's right of action for services accrued, and the statute was set in motion, and that, as to services in those proceedings, his right of action was barred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 273-279; Dec. Dig. § 50;* Attorney and Client, Cent. Dig. § 363.]

In Bank. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by William C. Osborn against William F. Hopkins. Judgment for plaintiff, and, from an order granting a new trial, plaintiff appeals. Affirmed.

Samuel M. Shortridge, for appellant. C. H. Wilson, for respondent.

ANGELLOTTI, J. Plaintiff brought this action to recover the sum of \$1,500 as the reasonable value of legal services rendered by plaintiff's assignor to defendant. The services rendered by plaintiff's assignor were rendered by him (1) in representing

the defendant, as his attorney, in an action for divorce brought against him by his wife in the latter part of the year 1901 or the early part of the year 1902, which action was finally terminated in the early part of the year 1902 by a dismissal by plaintiff of her action; (2) in representing the superior court of San Francisco, on behalf of defendant, in a proceeding instituted in this court by defendant's wife to prohibit said superior court from proceeding with the trial of said divorce action after her dismissal thereof, which proceeding in prohibition was terminated by judgment of this court on June 13, 1902; and (3) in representing defendant, as his attorney, in an action brought against him by his wife for maintenance and support, commenced shortly after the termination of the prohibition proceedings, and pending undetermined at the date of the commencement of this action, which was December 31, 1906. The action for maintenance was terminated by the death of defendant's wife on February 18, 1907, plaintiff's assignor continuing to represent defendant therein until that date. On November 17, 1906, plaintiff's assignor sent to defendant a bill for his services already rendered, specifying \$1,000 as the amount due for services in the divorce action and the prohibition proceedings and \$500 for his services in the maintenance action, and subsequently commenced this action therefor. Defendant, among other defenses, interposed the plea of the statute of limitations as to all services rendered by plaintiff's assignor in the divorce action and the prohibition proceeding. The jury gave a verdict in plaintiff's favor for \$1,125. Defendant made a motion for a new trial, which was ordered granted unless plaintiff remitted \$625 of said verdict and the judgment entered thereon. Plaintiff refused to consent to such reduction, and the court thereupon made its order granting a new trial "upon the sole and only ground that as to the said six hundred and twenty-five (\$625.00) dollars, the cause of action set up in the complaint is barred by the statute of limitation." This is an appeal by plaintiff from such order.

In view of the specification in the order as to the sole ground upon which the motion was granted, it must be assumed here, in accord with the allegations of the amended complaint, that defendant, prior to the commencement of the divorce action and in anticipation of litigation with his wife, "retained and employed" plaintiff's assignor "as his attorney to represent him in any and all litigation which his said wife might institute and prosecute against him, arising out of their relationship of husband and wife, for the enforcement of their marital rights, duties, and obligations, including any ac-

tion or actions she might bring for divorce or for separate support and maintenance for herself and a minor child or for the custody of said child." The jury found, in response to special interrogatories submitted, that such a contract of retainer and employment was then entered into that defendant then anticipated that there would be more than one suit brought against him by his wife and intended to contract with reference to more than one suit, and that such contract of employment extended to and covered service other than such service as might be rendered in the divorce suit. The contract was not in writing, and there was no understanding between the parties as to the amount of compensation, or as to the time or times when the right to compensation should accrue.

[1] There is no basis for the claim that the defense of the statute of limitations was not sufficiently set up in the answer. It was not necessary to plead the section and subdivision of the statute, if the facts showing the bar of the statute were alleged. It was alleged in the answer that as to all services rendered in the action for divorce and in the prohibition proceeding the statute of limitations had run against any claim for compensation, that all such services were rendered prior to the 13th day of June, 1902, and "that plaintiff's cause of action for compensation for said services did not accrue within two years next before the commencement of this action." This is a sufficient pleading of the facts showing the defense. *Adams v. Patterson*, 35 Cal. 124; *Caulfield v. Sanders*, 17 Cal. 571; *Boyd v. Blankman*, 29 Cal. 45, 87 Am. Dec. 146; *Hartson v. Hardin*, 40 Cal. 264.

[2] It is claimed that there is no sufficient specification of insufficiency of evidence in the statement on motion for new trial to have enabled the trial court to consider the matter of the sufficiency of the evidence on the question of the statute of limitations in determining the motion for a new trial. The specification on that subject was contained under the heading, "Specification of Particulars in which the Evidence is Insufficient to Justify the Verdict," and was as follows: "The evidence shows that the statute of limitations has run as to the services alleged to have been rendered by the attorney Linforth for the defendant in the matter of the case of *Hopkins v. Hopkins*, originally commenced in Alameda county, including the services in the Supreme Court on the writ of prohibition growing out of said suit." We have no doubt that this specification should be held to be sufficient. It certainly fulfilled the purpose of the statute requiring specifications of insufficiency of evidence, viz., "the bringing directly before the mind of the court the particular point the aggrieved party desires to be reviewed, and also to give notice to the ad-

verse party of the point of attack, and thereby enabling him to produce any additional evidence found in the record which may tend to support the finding of fact assailed by the specification." *Brenot v. Brenot*, 102 Cal. 297, 36 Pac. 672. The plain effect of the language of this specification was that the conclusion of the jury upon the issue of the statute of limitations was not sustained by the evidence—that the evidence was not sufficient to support such conclusion, and such language could not be understood by any reasonable person as meaning anything else. The mere form is of no consequence if such was the plain meaning. To hold otherwise would be to sacrifice substance to form in a case where any particular form is not made essential by written law. It is true that such a specification has been held insufficient (see *De Molera v. Martin*, 120 Cal. 548, 52 Pac. 825, and cases there cited), but this ruling has been repudiated by the later decisions of this court. See *Stuart v. Lord*, 138 Cal. 675, 72 Pac. 142; *Drathman v. Cohen*, 139 Cal. 311, 73 Pac. 181. As was said in *Bell v. Staacke*, 141 Cal. 194, 74 Pac. 776, the strict rule of some of the earlier decisions of this court in regard to specification of insufficiency of evidence has by the later decisions been much relaxed "in harmony with the more liberal view which will afford a hearing" on the merits "where reasonable and ordinarily careful precautions have been taken to present specifications, rather than to defeat the right to be heard upon purely technical grounds." If a specification is of such a nature as to fully inform the trial court and the opposing party of the point to be made in regard to insufficiency of evidence, there can no longer be any doubt as to its sufficiency.

This brings us to the main question presented on this appeal, that of the correctness of the ruling of the trial court in regard to the statute of limitations. Plaintiff's position is substantially that all of the services rendered were rendered under an entire contract, full performance of which was essential to any recovery, that this contract was not terminated until a time less than two years before the commencement of this action, and that the right of the plaintiff to recover reasonable compensation for any of these services is not barred by the statute of limitations until the expiration of two years from such termination. Logically, this view would appear to subject plaintiff's complaint to the objection that it does not state a cause of action, for it is distinctly alleged therein, in accord with the facts shown by the evidence, that the action for maintenance and support "still is pending and undetermined," and that the defendant therein "was and is represented in said action" by plaintiff's assignor.

[3] If the statute of limitations did not begin to run as to the compensation for any of the services rendered under the employ-

ment until the plaintiff's assignor had fully performed all services contemplated thereunder, it must also be true that no right of action on account of any such services accrued until such full performance was had, for it is elementary law that the statute of limitations begins to run upon the accrual of the right of action; that is, when a suit may be maintained, and not until that time. If plaintiff's view be correct, it would therefore seem to follow that the complaint showed on its face that a right of action had not accrued at the date of the commencement of the action; in other words, that the action was prematurely brought.

[4] We do not think that plaintiff's view of the nature of the contract of employment can be held to be correct. Of course, such a contract as plaintiff claims this to be could have been made by the parties, but we are satisfied that the contract alleged and found cannot reasonably be held to indicate an intention to make any such contract. In the absence of provision clearly indicating such an intention, no such effect can reasonably be given to a mere employment or retainer of a lawyer to represent the employer in all possible future litigation of a certain character, indefinite both as to the number of suits or proceedings that may be included, and the period of time within which such suits or proceedings may be instituted, where the attorney is to be paid simply the reasonable value of such services as he is actually called upon to perform in such litigation as may be instituted. And such was the employment or retainer in the case at bar, taking it in the aspect most favorable to plaintiff. The employment of plaintiff's assignor differed from a general retainer of an attorney to attend to all litigation in which the employer may become involved in the future, or even from a general retainer to attend to all the employer's legal business, only in the fact that it was limited by its terms to possible litigation of a specified character, a difference that we regard as altogether immaterial. It is clear that, under a general retainer contemplating services in possible distinct matters to be attended to separately, in the absence of any provision at all as to time or amount of payment, the attorney's right of action must accrue upon the performance and completion of the service as to each matter. See 19 Am. & Eng. Ency. of Law, 209. When in the course of such general employment the prosecution or defense of a suit is undertaken by the attorney, such suit undoubtedly constitutes a single, distinct matter, and the attorney's right of action for services therein accrues with the completion of his services therein, viz., at the termination of the suit, or other sooner termination of his employment therein. But his right of action is certainly complete at the termination of the suit, even though the general contract of re-

tainer is not terminated. See 25 Cyc. 1081. It can make no difference, so far as the rule we have been discussing is concerned, that the retainer or employment is limited to possible litigation of a specified character. We still have a retainer relating to several possible distinct matters, to be attended to separately as they may arise, with absolutely nothing to indicate that it was contemplated by the parties that the right to compensation for such services as might actually be rendered in one of such matters should be dependent upon the full performance of such services as might be necessary in the other matters, or that the attorney should not be entitled to enforce his claim for compensation in any one of such matters upon the completion of his services therein. So far as the retainer covers that particular matter, it is ended when such matter is concluded.

We are satisfied that, as was said by the District Court of Appeal in deciding this case, "when an attorney is retained generally to represent his client in such uncertain and unascertained suits as may be brought against the client by a designated person as in this case, the statute is set in motion, as to the services rendered in each suit, upon the full performance of the services in such suit." As we read them, none of the authorities cited by learned counsel for appellant is clearly in conflict with our views. The only cases so cited as to which there can be any doubt in this respect are *Meyer v. McCumber*, 75 Ill. App. 119, and *Davis v. Smith*, 48 Vt. 52. We think that the District Court of Appeal was correct in its conclusion that the first of these cases is distinguishable from the case at bar in that the contract there was one for the collection of a certain designated claim, which might well be considered a single matter, and all of the services of the attorneys were necessarily performed in accomplishing that purpose, viz., the collection of such claim. As said by the District Court of Appeal, it is not clear from the opinion in *Davis v. Smith*, supra, that the court held that, where there was a single retainer of an attorney in two suits, the mere fact that one of such suits was still pending would prevent the running of the statute of limitations as to services rendered in the other, which had been terminated.

The order granting a new trial is affirmed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

160 Cal. 508

SULLOWAY v. SULLOWAY. (Sac. 1,763.) (Supreme Court of California. Aug. 5, 1911.)

1. WATERS AND WATER COURSES (§ 40*)—IRRIGATION—RIGHT TO SUPPLY OF WATER.

Equal areas of land were devised by the same will to plaintiff and defendant, with the request that they use jointly the water and ir-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

rigating ditch, as they were desired to be joint owners of the ditch and of the water rights, and the decree of distribution followed the will. The irrigation ditch entered and was wholly upon defendant's land, and plaintiff extended the ditch from its terminus over defendant's land to the boundary of his own land, which without irrigation was worthless; that being the only way he could use the water rights devised to him. *Held*, in an action to be let into undisturbed possession of a part of the water rights and of the extended ditch, and to establish a perpetual easement on defendant's land for the benefit of plaintiff's land, that in view of Civ. Code, § 3522, declaring that one who grants a thing is presumed to grant whatever is essential to its use, if that be within the power of the grantor, plaintiff was entitled to extend the ditch, and to have an undisturbed use of it for the benefit of his land.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 40.*]

2. APPEAL AND ERROR (§ 1178*)—DETERMINATION OF CASE—REVERSAL—DIRECTING PROCEEDINGS.

A devisee of the use and benefit of an irrigation ditch jointly with another devisee, upon whose land the ditch entered and terminated, extended the ditch from its terminus to the boundary of his own land, and in his action to be let into possession of his moiety of the water rights and for an adjudication of his right to maintain and use the extended ditch the complaint did not allege the size or capacity of the original ditch, or the capacity and location of the extended ditch, and no issue was tendered as to these matters, or as to the plaintiff's right of joint user as the ditch existed before the extension. After the trial plaintiff's motion to open the case for the introduction of evidence as to those points was denied. *Held* that, the plaintiff's right to prevail on the merits being clear upon the finding, the absolute denial of his motion to introduce evidence was error, for which the judgment would be reversed, and the trial court directed to receive such evidence, to find the facts thereon, and enter judgment for the plaintiff.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1178.*]

In Bank. Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by John W. Sulloway against Charles F. Sulloway. Judgment for defendant, and plaintiff's motions to open the case after trial for the admission of additional evidence and for a new trial were denied, and he appealed. Order denying new trial affirmed and judgment reversed, with directions to the trial court to receive additional evidence, and find the facts thereon, and enter judgment for plaintiff.

Frank W. Hooper and James F. Farraher, for appellant. Taylor & Tebbe, for respondent.

ANGELLOTTI, J. Mary Sulloway, the mother of the parties to this action, gave to plaintiff by her last will certain real property in section 7, township 40 N., range 4 W., Mt. D. M., in Siskiyou county, being the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of said section. By the same will she gave to defendant certain real property in said section, including the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of said

section. By the same will she provided as follows: "I * * * give and devise unto my sons John W. Sulloway and Charles F. Sulloway, and request that they use jointly the water or irrigating ditch that now conveys water upon and to section 7 in township 40 north of range 4 west M. D. M., as I desire them to be joint owners of the said ditch and water right." The decree of distribution made May 15, 1902, in the matter of her estate gave to plaintiff the land devised to him by the will, the only portion thereof located in said section 7 being that above described, "together with the undivided one-half of the water right and ditch now used to convey water upon section 7 in township 40 north of range 4 west M. D. M.," and gave to defendant the land devised to him by the will, and also the undivided one-half, etc., of the water right and ditch by substantially the same language as that used in reference to plaintiff. It is not claimed that there is any material difference between the effect of the language of the will and that of the decree of distribution in this respect. The ditch referred to entered the S. W. $\frac{1}{4}$ of said section 7 at a point on land given to defendant, and traversed a portion of the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of said S. W. $\frac{1}{4}$, but did not reach plaintiff's portion of said S. W. $\frac{1}{4}$, ending, according to the findings, at a point "near to" the northerly boundary line of plaintiff's portion, and, according to the evidence, some "100 to 300 feet north of the north boundary of plaintiff's land." The extension of said ditch from its then terminus across defendant's land to plaintiff's land is the only means whereby plaintiff can conduct his waters upon such land and secure the use and enjoyment of his moiety in such water right and water ditch without working damage to defendant's land; and without such extension plaintiff's rights in the water and the water ditch will be rendered utterly valueless. Plaintiff's said land is agricultural in character, and capable, with proper irrigation, of producing large crops of hay, grain, grasses, and vegetables, but without irrigation it is of no value except for grazing purposes during a small portion of each year. The use of this water is necessary for such irrigation. Defendant never disputed the right of plaintiff "to use his half of said ditch and water right as the same existed at the death of said Mary Sulloway, but did deny the plaintiff the right to erect a ditch across any part or portion of defendant's lands, or to make a ditch or part of a ditch where there was no ditch at the time of the death of said Mary Sulloway." Plaintiff in October, 1904, did extend "said ditch" from its terminus across defendant's land to his northerly boundary line, and by means thereof conducted water to such land, and made a beneficial use thereof on such land. De-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

defendant subsequently stoppèd such use. In September, 1908, plaintiff repaired said ditch and extension and was attempting to make use thereof when defendant filled up a portion of such extension, and has ever since refused to allow plaintiff to obtain any use of the water or water ditch in the way proposed. The facts we have stated are alleged in plaintiff's complaint and established by the findings of the trial court.

By his complaint, plaintiff asked to be let into possession, use, and enjoyment of his moiety in said water right and water ditch, and of the extension of said ditch across defendant's land to his land for the purpose of conducting his moiety of said water to his land, that the court decree a perpetual easement to exist upon defendant's land in favor of his land in said extension of said ditch and that defendant be restrained from interfering with the same.

The case came on for trial February 8, 1909, and plaintiff introduced the testimony upon which he relied, and rested. Defendant introduced no evidence, and the matter was continued to February 11, 1909, for argument. At the argument defendant made the point that there was no evidence to show the amount of water owned or used by Mrs. Sulloway in her lifetime, or the capacity of her ditch, or the size or capacity of the proposed ditch which plaintiff claimed would be necessary to erect across defendant's land. Plaintiff asked the court to open the case and permit him to introduce testimony on these points, and, defendant objecting on the ground that the witnesses had been allowed to go, and that the proposed evidence would not be material under the pleadings, the court denied the application of plaintiff. The case was then submitted, and on March 6, 1909, judgment was given in favor of defendant that plaintiff take nothing by his action.

This is an appeal by plaintiff from such judgment and from an order denying his motion for a new trial.

[1] It is to be observed that what plaintiff sought by his complaint, so far as an extension of the old ditch was concerned, was an adjudication of his right to maintain and use a ditch which had been already constructed and maintained by him over defendant's land. It was the ditch already laid out and constructed by plaintiff over defendant's land as to which a decree was sought; in other words, the ditch already marked out and constructed by him on the lands of defendant. No more definite description of the route of the ditch was essential in the complaint under the circumstances. Defendant by his answer admitted the construction of this ditch by plaintiff, his own filling up of the same, the subsequent cleaning out of the ditch by plaintiff, and his own second filling up of the same. Defendant made no claim in the lower court, and makes no claim here, that the route actually selected for the ditch

was not the most reasonable and practicable route that could have been selected, nor did he claim by his answer that, so far as size or capacity was concerned, there was anything unreasonable in the ditch as constructed by plaintiff. His claim was simply that the particular portion of the S. W. $\frac{1}{4}$ of section 7 given by the mother's will to plaintiff had never been irrigated by water from said ditch prior to the mother's death, and that, therefore, plaintiff had acquired no right to extend the ditch from its terminus over defendant's land, for the purpose of obtaining water for such irrigation.

It seems very clear, in view of the facts stated, that plaintiff was entitled to extend the water ditch from its terminus on defendant's land, over such land, to the northerly boundary of the land in section 7 that he had acquired under his mother's will, for the purpose of using on such land the moiety of the water to which he was entitled under the will. The will and the decree of distribution made thereon are, in view of the circumstances, susceptible of no other construction than that he was thereby granted such right. If this be so, it can make no difference that the land given him by the will had never been irrigated with water from this ditch in the lifetime of Mrs. Sulloway. If it was her intention, expressed in her will, that the plaintiff should have such right, he obtained it by the will regardless of the conditions existing prior to and at the time of Mrs. Sulloway's death. The will created the right in plaintiff for the benefit of the land in section 7 given him thereby, and made the land in the same section given thereby to defendant the servient tenement for that purpose. The defendant, taking such land under the same will, necessarily took it subject to this burden. As we have said, the intention of the will and decree of distribution are clear. By the will, Mrs. Sulloway divided her land in the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of said section 7 between plaintiff and defendant, and also made them joint owners of her water rights and of the water ditch used by her to convey water to the lands so divided, which ditch terminated on the portion of the land given to defendant, with the request that they jointly use the same. A beneficial use on the part of plaintiff as to the land in section 7 given to him by the will was plainly intended. The undisputed facts establish that such use was impossible without an extension of the ditch to said land over defendant's land. Indeed, it is clear that plaintiff could have no beneficial use whatever of the ditch, either as to his portion of section 7, or any other land, unless permitted to extend it from where it ran on the land devised to defendant. It was essential to any beneficial use by plaintiff as to the land devised to him that he should have the right to extend the ditch to such land over defendant's land. It is declared by our law that "one who grants a thing is presumed to grant also whatever is

essential to its use" (section 3522, Civ. Code), provided, of course, it is within the power of the grantor to do it, and there is absolutely nothing to indicate that such was not the intent of testatrix in the case at bar.

[2] In view of what has been said, there is much to be said in support of the claim that plaintiff was entitled to judgment upon the findings for the relief asked by his complaint. The fifth finding, which is apparently the one upon which the court based its judgment against plaintiff, is as follows: "That there was no evidence to show the amount of water owned by said Mary Sulloway in her lifetime, or used by her. That there was no evidence to show the capacity of the said ditch owned by said Mary Sulloway in her lifetime, and no evidence to show the size or capacity of the proposed ditch which plaintiff claimed would be necessary to erect across the lands of defendant." There was no allegation in the complaint as to any of these matters, and no issue tendered by defendant's answer in respect thereto. It was not necessary to show the amount of water owned or used by Mrs. Sulloway. Plaintiff was not seeking to have ascertained the specific amount to which he was entitled, but simply to have it adjudged, in accord with the will and decree, that he was entitled to the use and enjoyment of one-half of whatever there was, and no issue was tendered by the answer which made it essential, for the purpose of giving him all the relief asked, that the amount of water should be shown. No claim is made that plaintiff is not entitled to one-half of the water. Nor was any question as to the capacity of the ditch owned by Mrs. Sulloway material to the controversy between these parties. Admittedly, plaintiff is the owner of one-half thereof, whatever its capacity, and in view of the fact that no point was made by defendant, either by answer or on the trial, as to the reasonableness of the location of the extension ditch actually constructed by plaintiff, or of its size or capacity, and that plaintiff was simply seeking to be let into the possession, use, and enjoyment of the ditch as he had actually constructed it on the ground, there was no necessity for any evidence as to the exact location, size, or capacity of the extension ditch that had been constructed, unless, by reason of the filling in of the same by defendant, there was some question as to one or more of these matters. As to the location of such ditch there appears to be no question. If evidence was necessary to definitely settle any question of the size or capacity of such ditch, we are satisfied that it must be held that the trial court should have granted the request of plaintiff to be allowed to reopen his case and introduce such evidence. He might properly have been required, as a condition precedent to the granting of his application, to reimburse defendant for the

expense of bringing back his witnesses, but the absolute denial of his application to be allowed to introduce evidence on the matters referred to, when he was so clearly entitled to prevail on the merits, and where the effect of a judgment against him would be to practically deprive him for all time of any use or enjoyment of the water rights given him by the will, must be held to constitute prejudicial error.

We can see no necessity for a new trial of the issues made by the pleadings. The only questions as to which it may be necessary to receive any additional evidence are those of the location, size, and capacity of the extension ditch constructed by plaintiff on defendant's land. Upon the findings already made, plaintiff is entitled to maintain a ditch on defendant's land, located on the line of the constructed extension ditch and of the same size and capacity.

The order denying a new trial of the issues made by the pleadings is affirmed. The judgment is reversed, with directions to the trial court to receive such evidence as may be offered by the parties on the question of the exact location on defendant's land of the extension ditch heretofore constructed by plaintiff, and the size and capacity of the same as so constructed, to find from such evidence the facts as to such location, size, and capacity, and to enter judgment in favor of plaintiff in accord with the prayer of his complaint, specifying in such judgment the exact location of the extension ditch therein referred to, and the size and capacity thereof.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

160 Cal. 446

SMITH v. GATE CITY OIL CO. (Sac. 1,897.)
(Supreme Court of California. Aug. 4, 1911.)

1. CORPORATIONS (§ 90*) — ASSESSMENT OF STOCK—PROCEEDINGS FOR ENFORCEMENT.

Civ. Code, § 345, provides that the dates fixed in any notice of assessment or notice of delinquent sale of corporate stock may be extended from time to time for not more than 30 days. Section 346 provides that no assessment is invalidated by a failure to make publication of the notices hereinbefore provided for, nor by the nonperformance of any act required in order to enforce the payment of the same. *Held*, that the sections are not inconsistent, but that section 345 merely prevents a sale on the original proceeding subsequent to assessment, where there has been no seasonable publication or extension of the time for such sale; while section 346 allows a sale notwithstanding such failure, on the institution and completion of new proceedings subsequent to assessment, without a new assessment.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 90.*]

2. CORPORATIONS (§ 90*) — ASSESSMENT OF STOCK—PROCEEDINGS TO ENFORCE.

Civ. Code, § 334, providing that the order levying an assessment on corporate stock shall fix the date of delinquency at not less than 30

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
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days nor more than 60 days from the date of the order, applies only to the order levying the assessment; and not to new proceedings subsequent to the assessment, under section 336, where the original proceedings subsequent to assessment have become void because of failure to advertise the delinquency sale as first ordered.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 90.*]

Department 1. Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Action by J. Jerome Smith against the Gate City Oil Company. From an order dissolving an injunction, plaintiff appeals. Affirmed.

Charles H. Fairall, for appellant. W. R. Jacobs and Frank H. Gould, for respondent.

SHAW, J. The plaintiff appeals from an order dissolving a preliminary injunction, restraining the sale of corporate stock upon a delinquent assessment. The order was made upon the ground that the facts stated in the complaint were not sufficient to warrant the injunction.

Plaintiff owns 22,000 shares of the capital stock of the defendant corporation. On September 3, 1909, the corporation directors made an order levying an assessment of five cents a share upon the capital stock, declaring the same payable on October 16, 1909, and fixing November 1, 1909, as the day on which the assessment should become delinquent, if unpaid and December 27, 1909, as the day of the sale of such delinquent stock. No order extending the time for that sale was ever made, and no advertisement of said sale was made. On March 26, 1910, the directors made an order declaring that the aforesaid assessment was payable immediately, that all stock upon which said assessment remained unpaid on May 5, 1910, should then become delinquent and would be advertised for sale, and that said sale should take place on May 26, 1910. The necessary notices and advertisements have been regularly given and made as required by law, so far as the last order is concerned. The object of the suit was to enjoin the sale proposed to be made on May 26, 1910.

[1] The first objection made to the proceedings by the appellant is that it is in violation of the provisions of section 345 of the Civil Code, to the effect that "the dates fixed in any notice of assessment or notice of delinquent sale" of corporate stock "may be extended from time to time for not more than thirty days." It is claimed that, if the mode of procedure here followed is allowed, it would be within the power of directors to extend the dates for the payment, the delinquency, and the sale of the stock, respectively, for more than 30 days, and indefinitely for any period, contrary to

said statute. The procedure is authorized by section 346 of the Civil Code, and it appears to be entirely regular under that section. It reads as follows: "No assessment is invalidated by a failure to make publication of the notices hereinbefore provided for, nor by the nonperformance of any act required in order to enforce the payment of the same; but in case of any substantial error or omission in the course of proceedings for collection, all previous proceedings, except the levying of the assessment, are void, and the publication must be begun anew." The failure to make the publication for the delinquent sale of December 27, 1909, first ordered, made the proceeding for a sale on that day, or on any subsequent day to which that sale should be postponed under section 345, void. It did not avoid the assessment, but it made it necessary to repeat all the proceedings except the assessment. A new date of maturity was to be fixed. This was done by declaring it payable immediately. A new date of delinquency was necessary, and it was declared to be May 5, 1910. A new day of sale was required, and it was fixed for May 26, 1910. The necessary notices for this new delinquency and sale were given and the proceeding thereby became complete and valid. Sections 345 and 346 must be construed together, and the provisions of both give force, if possible. They are not inconsistent. One provides for the extension of time in the case of proceedings for collection by sale which it is proposed to complete. The other provides for the inauguration of an entirely new proceeding for collection, in case the first attempt becomes invalid because of any substantial error or omission. The decision in *San Bernardino Inv. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487, and other cases following it, cited by appellant, merely hold that where the company has lost the right to proceed with the sale, because of a failure to take a necessary step in the proceeding at the proper time, it also loses the right to declare, under section 349, that it waives proceedings to sell the stock and elects to collect the assessment by action. They have no application to the question of the right of the company to begin anew the proceedings for collection by sale of the stock under the statute.

[2] The only other objection is that the order of March 26, 1910, is void, because the time of delinquency thereby fixed was more than 60 days after the order of September 3, 1909, levying the assessment. This, it is claimed, violates section 334 of the Civil Code. That section declares what the order levying the assessment shall specify. Among other things, it says that the order must fix the date of delinquency at a time "not less

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

than thirty nor more than sixty days from the time of making the order levying the assessment," and the day of sale not less than 15 nor more than 60 days thereafter. The order of March 26, 1910, did not purport to levy a new assessment, but only to initiate new proceedings for collection of the previous assessment. Section 346, as above stated, provides that no new assessment is necessary, but that all proceedings subsequent thereto are void and must be begun anew. The position of appellant would require us to hold, either that the new proceeding under section 346 must be begun early enough to allow the new day of delinquency to fall within the 60 days following the original order, or that the respective dates of delinquency and sale must be postponed from time to time, under section 345, to the new dates fixed by the new proceeding. This would make the new proceeding impracticable in many cases. The postponement in order to be valid and preserve the original proceeding, must be made before the time originally fixed expires. The fatal omission might not be discovered until after that period, and it might not occur until after the original date of payment had passed. That date could not then be postponed and the whole proceeding would lapse, including the levy, which section 346, by necessary implication, declares shall not lapse because of such defect. Section 346 was obviously intended to provide for just such a case. Section 334 provides that the day of delinquency fixed in the original order must be not more than 60 days after the date of the order levying the assessment, but it does not purport to declare that no later day can by any means be fixed, and its provisions in that respect are necessarily modified by the other sections. Accordingly, we find that under section 345 the days fixed in the original order may be postponed from time to time by merely republishing the original notice thereof, with the order of postponement appended; and that, under section 346, it may be fixed anew at any later date, without any order of postponement, by making a new order fixing new dates and making an entirely new publication thereof. When either of these methods of changing the original days is adopted, the change is fully authorized by the section under which it is taken and the proceeding is valid, notwithstanding the aforesaid provision of section 334. No prejudice is caused to the delinquent stockholders by a new proceeding, for they must have notice of the new order, precisely as in the case of the original order.

The order dissolving the injunction is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

(160 Cal. 522)

SMITH v. FURLONG et al. (L. A. 2,565.)
(Supreme Court of California. Aug. 7, 1911.)

1. TAXATION (§ 679*)—SALE TO STATE—RE-SALE—MAILING NOTICE.

Pol. Code, § 3897, requires the tax collector, before selling for the state land sold it for taxes, to mail a copy of notice of sale to the person to whom the land was last assessed next before the sale at his last known post-office address. *Held*, that failure to do so could not be excused on the ground that the address of such person was not known, even if such was not given in the assessment book for the year of such last assessment, the person to whom the land was there assessed being the same one to whom it was assessed for the year, for the taxes of which it was sold to the state, and his address being given in the assessment book for that year; section 3650 requiring the assessment book to give the names and addresses of persons to whom property is assessed imposing on the tax collector when making such sale the duty of making a search of the assessment books for the addresses.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 679.*]

2. TAXATION (§ 695*)—SALE TO STATE—RIGHT TO REDEEM—ATTEMPTED RESALE.

The original owner of land sold to the state for taxes having the right under Pol. Code, §§ 3780, 3817, to redeem the same from such sale at any time before the state disposes of it, his right is not affected by an attempted disposal of the property by the state invalid because of notice not being mailed as required by section 3897 to the person to whom the land was last assessed.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 695.*]

3. TAXATION (§ 789*)—SALE OF LAND FOR NONPAYMENT—TAX DEED—CONCLUSIVENESS.

As Pol. Code, § 3898, provides that the deed from the state to land sold it for taxes shall only be prima facie evidence of the fact of notice recited therein, and as the giving of notice by mail, as required by section 3897, is a jurisdictional prerequisite to a valid sale by the state, a sale without actual notice by mail will be invalid despite the recitals in the deed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1556-1569; Dec. Dig. § 789.*]

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge. Action by J. H. Smith against Ida B. Furlong and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Walter J. Horgan and C. A. Stice, for appellant. Porter & Sutton, for respondents.

LORIGAN, J. A rehearing was granted in this matter after decision in department.

The department decision was written by Justice Shaw, and is as follows:

"The appeals are from the judgment and from an order denying plaintiff's motion for a new trial.

"The complaint stated a cause of action to quiet title to a city lot in Pasadena. The plaintiff relied solely on a tax title. He introduced in evidence a deed of the lot from the county tax collector to the state, executed on July 2, 1907, in pursuance of a sale of the lot made on July 1, 1902, for

delinquent taxes for the year 1901. No objection is made to the regularity of the assessment or to the validity of this deed. Plaintiff also introduced in evidence a deed of the lot from the county tax collector to the plaintiff, executed on June 10, 1908, in pursuance of a sale at public auction by the tax collector for the state, made on that day, as provided in section 3897 of the Political Code. This deed was regular on its face. Section 3898 of the Political Code provides that this deed shall recite 'the facts necessary to authorize such sale and conveyance,' and that it 'shall be prima facie evidence of all facts recited therein.'

[1] "Section 3897 provides that before making the sale the tax collector must publish in a newspaper and by posting on the land a notice of the time and place of sale, for three successive weeks, and that 'it shall be the duty of the tax collector to mail a copy of said notice, postage thereon prepaid and registered to the party to whom the land was last assessed next before the sale, at his last known post office address.' The mailing of this copy was one of the facts necessary to authorize the tax collector to make the sale. With respect to it the recital in the deed was as follows: 'And whereas, the address being unknown, W. O. Welch, tax collector as aforesaid did not mail a copy of said notice postage thereon prepaid, to the party to whom the land was last assessed next before such sale.' In rebuttal of the prima facie effect of this recital, the defendant showed that the assessment book for the year 1901, and the delinquent list of taxes for that year, each contained in a column headed 'Tax Payer's Name,' opposite the assessment of this lot, the words 'Ida B. Furlong, N. W. Cor. Los Robles & Walnut St. Pasadena, Cal.' The lot was on the corner of Raymond avenue and California street in Pasadena. It was admitted that Ida B. Furlong was the person to whom the lot was last assessed next before said sale to the plaintiff. The evidence showed, further, that Ida B. Furlong had resided at the northwest corner of Los Robles avenue and Walnut street in Pasadena from 1881 to 1903; that in 1903 she moved to the adjoining city of South Pasadena, where she has ever since resided; and that every year from 1902 to 1907, inclusive, the tax on the lot had been regularly paid by her and receipts therefor regularly given to her. Section 3650 of the Political Code requires the assessor to prepare an assessment book of all property within the county, showing, among other things, 'the name and post office address if known, of the persons to whom the property is assessed.' After the taxes against the property are computed and extended on this book it is to be delivered to the tax collector (section 3732), who must thereupon collect the taxes therein assessed. (Sections 3746 to 3753.) He must

then make a delinquent list of taxes unpaid, describing the property and stating therein the address of each taxpayer, as in the assessment book. (Sections 3759, 3760.) After the final settlement by the tax collector with the auditor for the taxes of each year, including delinquencies, the assessment book and delinquent list of that year, it seems, are given into the keeping of the auditor. (Sections 3789, 3799.) The tax collector thus has convenient access to these books, and by reason thereof has at hand means of knowledge of the address of the person to whom the property was last assessed. The deed in which he recited that this address was unknown was founded on the assessment book for the taxes of 1901 and on the subsequent deed to the state aforesaid. This deed to the state recited that the property was assessed to Ida B. Furlong for the year 1901. The assessment book and delinquent list for that year showed her address at that time. It does not appear whether the subsequent books showed her address or not. If not, then the address as shown on the books of 1901 constituted her last known post-office address, so far as the tax records were concerned, unless the tax collector had other information of a different address. From the fact that these books are required to show the address of the taxpayer, we think it may be inferred that the tax collector was required to consult these books for the purpose of learning the address of the persons to whom the property was last assessed. It is evident, therefore, that if the address was unknown to the tax collector it was because he had failed to avail himself of the ample means of knowledge readily accessible to him and furnished by law for that purpose, one of these books being the record of the assessment from which his authority to make the deed was derived. In view of this evidence and these provisions of law we think we may assume that the court found that this recital in the deed to the plaintiff was false and that the post-office address of Ida B. Furlong was by legal intentment known to the tax collector. We do not intend to lay down the rule that in cases where the deed declares that such address is unknown, and no copy of the notice of sale is registered and mailed, the question whether or not the address is in fact unknown is always open to dispute and subject to proof by evidence aliunde the tax records. But we think the provisions requiring the entry of the post-office address of each taxpayer on the assessment book and delinquent list were designed for the purpose of affording the proper officers ready means of information thereof, and that the safer rule is that where the assessment book for the year for which property is sold shows such address, and the last assessment is to the same person, it is the duty of the officer making the subse-

quent sale by the state to examine such assessment book for the purpose of ascertaining the address and that where that book shows it and the subsequent assessments of the same property do not show any address, the tax collector cannot truthfully say the address is unknown and make a valid sale of the property without mailing and registering the notice to the address so shown. He must take notice of the information contained in the record of the tax sale in virtue of which he executes the deed. This recital being false in contemplation of law, it would follow that the deed to the plaintiff was invalid.

[2] "The statute gives to the original owner of land sold to the state for taxes the right to redeem the same from such sale at any time before the state shall have disposed of it. Pol. Code, §§ 3780, 3817. The attempted sale to the plaintiff being invalid because of the failure to mail a notice to the person to whom it was last assessed, the state has not yet disposed of the lot, and the right of Ida B. Furlong to redeem the same still continues. The plaintiff having obtained no title by his purchase aforesaid, judgment was properly given for the defendant.

"The judgment and order are affirmed."

On further consideration of this matter we are satisfied that a proper conclusion was reached in the above opinion, and it is adopted as the opinion of the court in bank.

On this rehearing counsel for appellant urges no additional reasons to those presented in department why the judgment and order of the trial court were not correct. He, however, insists now, as he did in his briefs on the original submission in department, that in holding it to be a jurisdictional prerequisite to the validity of a sale by the tax collector for the state that notice of such sale should be mailed to the last known post-office address of the person to whom the lands were last assessed before the sale as provided by section 3897 of the Political Code several cases are ignored which distinguish between omissions to give notice required upon proceedings relative to tax sales which are jurisdictional and those which are not; that in these cases a defective notice or omission to give the notice required, which notice there under consideration was as important as the notice to be mailed under consideration here, was held not to invalidate the tax deeds. These cases referred to are *Bank of Lemoore v. Fulgham*, 151 Cal. 240, 90 Pac. 936, *Fox v. Wright*, 152 Cal. 61, 91 Pac. 1005, and *Warden v. Browne*, 9 Cal. App. 172, 98 Pac. 252. In the latter case a petition for a further hearing here after decision by the District Court of Appeal was denied. These cases were not overlooked or ignored in disposing of the appeal in department. They were not referred to simply because they had no ap-

plication to the question involved in the appeal.

In *Bank of Lemoore v. Fulgham* the court was considering objections made to the validity of a deed to the state for delinquent taxes. With respect to such deeds the provisions of the Code are different from those applying to deeds from the state. As to the former, section 3787 of the Political Code provides that such a deed shall be conclusive evidence of the regularity of all proceedings from the assessment by the assessor up to the execution of the deed. As to the latter, that the deed shall recite the facts necessary to authorize the same and shall be prima facie evidence of all facts recited therein. Pol. Code, § 3898.

In the *Bank of Lemoore Case* the attack was on the validity of the deed to the state for failure on the part of the assessor to enter (as required by section 3680 of the Political Code) upon each subsequent assessment of the property after its sale for delinquent taxes the words "sold for taxes," with the date of sale. This was not done, and it was claimed that the making of such a memorandum by the assessor constituted a part of the notice which, in addition to the notice of sale to be given by publication, as provided by law, should be given to the delinquent owner, and that failure to give it amounted to depriving him of his property without due process of law. It was held that notice by publication of the sale being all the notice that a delinquent owner was constitutionally entitled to, it was not essential that the Legislature should have provided for giving this memorandum notice at all; that the Legislature in the first instance might have dispensed with this notice provided to be given by the assessor entirely, or, having provided for it, make, as it did by section 3787, the deed to the state conclusive evidence that it had been given.

In *Fox v. Wright* it is true that the attack was on the validity of a deed from the state. Among other points made it was claimed that the published notice of sale was defective for failure to set forth the name of the delinquent owner. In disposing of this particular objection it was held that "under section 3787 upon the issuance of the deed the presumption of the regularity and sufficiency of the notice became conclusive." As, however, the court was there considering a deed from the state and the regularity of proceedings taken on a sale by the state, section 3787, referred to, making the deed to the state conclusive, had no application, and section 3898, making such a deed prima facie evidence, alone controlled. Hence the decision in *Fox v. Wright* on the point referred to, as it is based solely on a section which was inapplicable, cannot be considered as authority on that point.

The case of *Warden v. Broome* has no application whatever. The attack there was

on the deed to the state on the ground of a radical defect in the notice of sale under which the state acquired the property. As the giving of the notice of sale in the manner required by law is a jurisdictional prerequisite to the validity of the sale to the state, and as the notice in question there was radically defective, it was held, as it is well settled, that no jurisdiction to make the sale to the state was acquired, and that section 3787 as to the conclusiveness of a deed to the state could not apply to jurisdictional matters. The question of the notice to be given on a sale by the state or anything concerning the effect of the deed from the state, as to the matter of such notice, was not involved in the case, and nothing respecting it was decided.

Having pointed out the inapplicability of these decisions to the only question presented on this appeal, it is hardly necessary to add anything further. The opinion quoted fully discusses the one question involved.

[3] It is true as said in *Fox v. Wright*, supra, that it is not necessary for the state after it has acquired the title to property under delinquent tax sales to provide for any notice to the delinquent owner that the state intends to sell the property; that it could provide for disposing of it at private sale. But the state has not pursued this course. It has provided that a sale shall be made by it after notice to the delinquent owner and provided how that notice shall be given. No distinction is made in the Code provisions between the right of the delinquent owner to notice by publication and notice by mail when his last known post-office address appears upon the assessment roll. It was deemed equally important by the Legislature that he shall be given both kinds of notice when it can be done. The intention doubtless proceeded from the fact that as it was the last opportunity the delinquent owner would have to save his property as complete a method of giving him notice as was practicable should be adopted. It must be admitted that the mailing of notice to the last known address is a very beneficial provision, and we cannot perceive why it should be held to be unimportant. If the Legislature intended that a failure to comply with the law in this respect should not defeat a sale by the state, it could have provided as it did with reference to sales to the state that the deed should be conclusive evidence. On the contrary, it is provided that the deeds shall recite the facts as to notice and shall be only prima facie evidence of those facts. The giving of notice by publication and by mail and making the sale are about the only substantial things a tax collector is to do and the most important facts to be stated in the deed. The only purpose to be subverted in making the deeds prima facie evidence of the facts

recited was to afford an opportunity to the delinquent owner to show that express and substantial requirements of the law for his benefit had not been complied with, and hence the deed was invalid. If this was not the purpose, then nothing was subverted by making the deed only prima facie evidence of the facts recited. In effect, any contrary view would make it conclusive.

We are satisfied that the giving of notice by mail, as section 3897 requires, is a jurisdictional prerequisite to a valid sale by the state, and that as under section 3898 a deed made thereunder is only prima facie evidence of the fact as to the notice recited therein, if the notice was not given the sale by the state is invalid.

The judgment and order are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

160 Cal. 441

HEIER v. KRULL et al. (Sac. 1,831.)

(Supreme Court of California. Aug. 4, 1911.)

1. WATERS AND WATER COURSES (§ 119*)—
SURFACE WATER—DRAINAGE.

While the natural flow of surface water onto one's land may not be complained of, he may complain of its discharge thereon, by interference with natural conditions, in greater quantity or in a different manner than would occur under natural conditions.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 131-134; Dec. Dig. § 119.*]

2. WATERS AND WATER COURSES (§ 126*)—
SURFACE WATERS—INJUNCTION—PLEADING.

Striking out the denial of the answer raising the material issue, as to which defendants are entitled to trial, on the allegations of the complaint, constituting the gist of the cause of action for injunction, that waters falling on lands north of a ridge will, by reason of excavations of defendants sought to be enjoined, be carried on plaintiff's lands south of it in greater quantities than would occur under natural conditions, is error.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 126.*]

3. WATERS AND WATER COURSES (§ 119*)—
SURFACE WATERS—DRAINAGE.

The mere fact that a drainage district was formed to drain lands in the vicinity of plaintiff's lands, and for that purpose purchased a right of way over his lands, and constructed a ditch thereon, does not show it has right to divert thereto additional waters from the other side of watershed, making it overflow its banks and injure his lands.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 119.*]

Department 1. Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by Henry Heier against Joseph Krull and others. Judgment for plaintiff. Defendants appeal. Reversed.

A. H. Hewitt, for appellants. W. H. Carlin, for respondent.

SHAW, J. The defendants appeal from a judgment in favor of plaintiff.

The object of plaintiff's suit was to enjoin the defendants from enlarging Old Live Oak slough and from constructing or maintaining a certain proposed ditch, and from doing any other act or thing whereby any of the waters falling upon the lands northeasterly of a certain alleged ridge, some six miles northerly of plaintiff's lands, might be precipitated, or the flow thereof accelerated, to or upon the plaintiff's lands. He also asks for a mandatory injunction requiring defendants to fill up so much of said ditch as had been dug before the suit was begun.

The plaintiff's lands consist of 180 acres. He alleges that about six miles north thereof there is a high ridge of ground which, unless interfered with by the defendants, does and will effectually prevent the water falling upon the land northerly and easterly thereof from flowing down to and upon his own land. He further alleges that south of said ridge there extends from said ridge, in a southerly direction, for a part of the distance to his land a slough known as Old Live Oak slough, with which is connected an artificial ditch extending therefrom to and through his land, by means whereof the waters of the slough are drained and carried away to lower lands. With respect to the acts of the defendants complained of, he alleges that they are engaged in digging a ditch through said ridge of land, which will cut through the same and drain the waters falling upon the lands northerly and easterly thereof into the slough and through the ditch leading therefrom to and upon the lands of the plaintiff, and that they also threaten to, and, unless restrained, will, deepen, widen, and extend the slough from the point where the defendants' proposed ditch enters the same in a northeasterly direction, thereby bringing into said slough and down to and upon the lands of the plaintiff a vast body of water which falls and accumulates upon lands northeasterly of section 8, in which section said ridge is situated, which water would not at all reach plaintiff's lands without the doing of said threatened work by the defendants, and that by reason of said additional water coming into said ditch crossing plaintiff's lands it will be caused to overflow plaintiff's lands and render them unfit for cultivation to his great damage.

The answer to the complaint consisted of denials and affirmative defenses. The court on motion of the plaintiff struck out the affirmative defenses and a part of the denials, and thereupon it sustained a general demurrer to the answer without leave to amend, and rendered the judgment appealed from. This judgment enjoins the defendants from digging the proposed new ditch or from deepening, widening, or extending the slough or doing any other act or thing which will cause the waters from the lands northerly and northeasterly of said ridge to flow down to

and upon the plaintiff's lands. It also commands the defendants to refill with earth the lower 30 feet of the ditch which they have dug northerly from Old Live Oak slough. The defendants in support of their appeal urge that the court erred in striking out the portions of the answers and in sustaining the demurrer to the remainder thereof.

The gist of the threatened injury alleged in the complaint is the making of the new ditch and the alteration of the slough in such a manner that the water falling on the land north of the alleged ridge, and which did not before reach plaintiff's lands, will be carried to and upon said lands through said proposed ditch across the ridge.

[1] Every landowner must bear the burden of receiving upon his land the surface water naturally falling upon land above it and naturally flowing to it therefrom, and he has the corresponding right to have the surface water naturally falling upon his land or naturally coming upon it, flow freely therefrom upon the lower land adjoining, as it would flow under natural conditions. From these rights and burdens, the principle follows that he has a lawful right to complain of others, who, by interfering with natural conditions, cause such surface water to be discharged in greater quantity or in a different manner upon his land, than would occur under natural conditions. This is the settled law of this state. *Conniff v. San Francisco*, 67 Cal. 49, 7 Pac. 41; *Ogburn v. Connor*, 46 Cal. 351, 13 Am. Rep. 213; *McDaniel v. Cummings*, 83 Cal. 519, 23 Pac. 795, 8 L. R. A. 575; *Gray v. McWilliams*, 98 Cal. 162, 32 Pac. 976, 21 L. R. A. 593, 35 Am. St. Rep. 163; *Stanford v. San Francisco*, 111 Cal. 198, 43 Pac. 605; *Hicks v. Drew*, 117 Cal. 305, 49 Pac. 189; *Rudel v. Los Angeles Co.*, 118 Cal. 288, 50 Pac. 400; *Cushing v. Pires*, 124 Cal. 665, 57 Pac. 572; *Cloverdale v. Smith*, 128 Cal. 233, 60 Pac. 851; *Larrabee v. Cloverdale*, 131 Cal. 99, 63 Pac. 143; *Wood v. Moulton*, 146 Cal. 317, 80 Pac. 92.

[2] The fifth paragraph of the answer was stricken out. In it the defendants deny that they are now or ever have been engaged in digging a ditch through said ridge of land, or that any ditch as planned or now in course of construction by them will cut through said ridge. These allegations merely refer to the construction of a ditch cutting through the ridge. This act is not the essential part of plaintiff's action. It is the making of excavations which will so alter natural conditions that additional surface water will be discharged upon plaintiff's land that constitutes the ground of his complaint. This paragraph, however, also contains the following: "Defendants deny that any ditch or canal now being dug or constructed by them or which they have, previous to the commencement of this action, been engaged in digging and constructing, will connect the territory lying north of said alleged ridge with said Old Live Oak slough, or that it will effectually

ally drain all or any water falling upon said lands to the north and northeast of said alleged ridge into said slough, and through said artificial ditch or canal mentioned in plaintiff's complaint to and upon the lands of plaintiff or any part thereof in any greater volume or in any different manner than that in which they have heretofore since the year 1896 been accustomed to flow and drain." It appears from other allegations in the answer which were also stricken out that in the year 1896 the ditch running through the plaintiff's lands was constructed by the defendants for the purpose of draining the waters from Old Live Oak slough, and that it has ever since that time been maintained for that purpose. This explains the allusion to the accustomed flow of water since 1896, in the part of the answer above quoted. The effect of this denial is to raise an issue upon the allegations of the complaint that the waters falling upon lands northerly and easterly of the alleged ridge will be carried upon the plaintiff's lands, by reason of the alleged excavations of the defendants, in greater quantities than would occur under natural conditions. This is the gist of the plaintiff's cause of action, and without it he would not be entitled to the judgment he obtained. The denial raised a material issue upon which the defendants were entitled to a trial. For this reason the court erred in striking out this portion of the answer.

In paragraph 6 of the answer there is an allegation that none of the work as planned or in process of construction by the defendants, when completed, will cause any additional surface water to flow through said slough and ditch to the injury of the plaintiff in any manner or at all. This is but a repetition of the matter above quoted from paragraph 5, and it is perhaps more in the nature of a conclusion than a statement of fact. It might well have been stricken out as unnecessary, because it is, at most, but a repetition of a previous denial.

[3] Other allegations in connection with the part of the answer which was stricken out were to the effect that a drainage district was formed in the year 1895 for the purpose of draining lands in the vicinity of plaintiff's land, that this drainage district, under proper proceedings for that purpose, constructed the ditch over the plaintiff's land for the purpose of draining the waters of said slough, and that the district purchased and now owns a right of way over the plaintiff's lands for that purpose. These matters were wholly immaterial to the case. Granting that the drainage district had procured a right of way to construct the ditch now existing across the plaintiff's lands, it would not at all follow that it or any other person would have the right to cause additional surface water to flow therein sufficient to

make it overflow its banks and injure the plaintiff's lands. It is not alleged that said district has ever obtained, or now has, the right to cause such overflow. These matters were properly stricken from the answer.

The order striking out paragraph 5 of the answer and the giving of judgment for the plaintiff, under these circumstances deprived the defendants of the substantial right of having a trial upon the material issue of fact which they had tendered, and for that reason the judgment is erroneous.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

160 Cal. 450

In re RICKS' ESTATE.

RICKS v. RICKS. (S. F. 5,246.)

(Supreme Court of California. Aug. 4, 1911.
Rehearing Denied Sept. 2, 1911.)

1. WILLS (§ 316*)—CONTEST—DEMURRER TO EVIDENCE.

As in other civil actions, whether the evidence on a contest of a will is sufficient to go to the jury is to be determined by viewing the entire evidence presented from a point most favorable to contestant, disregarding all contradictory evidence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 742-749; Dec. Dig. § 316.*]

2. WILLS (§ 155*)—VALIDITY—"UNDUE INFLUENCE."

Undue influence invalidating a will must be an influence exerted prior to or at the time of the making of the will, and such as destroys free agency, constraining testator at the time the will is made to make a disposition of his estate contrary to and different from what he would have made had he been left to the free exercise of his own inclination or judgment.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 375-381; Dec. Dig. § 155.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7166-7172; vol. 8, pp. 7823-7825.]

3. WILLS (§ 163*)—CONTEST—UNDUE INFLUENCE—EVIDENCE—CONFIDENTIAL RELATIONS.

A finding of undue influence is not warranted from the mere fact of the principal beneficiary having been testatrix's son and her confidential business agent; there being no presumption of abuse of the confidential relations.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 388-402; Dec. Dig. § 163.*]

4. WILLS (§ 153*)—VALIDITY—FRAUDULENT REPRESENTATIONS.

Fraudulent representations, which will invalidate a will, must have been made prior to or at the time of its execution.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 371; Dec. Dig. § 153.*]

5. WILLS (§ 166*)—CONTEST—FRAUD—EVIDENCE.

Evidence on a will contest on the issue of proponent having fraudulently represented to testatrix that contestant had made a certain agreement *held* insufficient to show he had made any representation to her on the subject.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 166.*]

6. WILLS (§ 153*)—FRAUD.

The jury on a contest of a will could declare it invalid on the issue of fraudulent rep-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

representations by proponent to testatrix that contestant had made a certain agreement only on evidence showing, not only that no such agreement existed, but that proponent had falsely represented and induced testatrix to believe it did, and that the will was the product of this belief thus fraudulently created.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 371; Dec. Dig. § 153.*]

7. WILLS (§ 166*)—CONTEST—UNDUE INFLUENCE AND FRAUD—EVIDENCE—DECLARATIONS OF BENEFICIARY.

Declarations of proponent of a will, made to testatrix years after its execution, evidencing merely his opposition to changing it to the advantage of contestant, are insufficient to show undue influence or fraud on his part.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

8. WILLS (§ 165*)—CONTEST—EVIDENCE—DECLARATIONS OF TESTATRIX.

Declarations of testatrix subsequent to execution of the will are never admissible as proof by themselves of undue influence or fraud.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 415-420; Dec. Dig. § 165.*]

9. WILLS (§ 353*)—CONTEST OF WILL AND CODICIL—NONSUIT AS TO ONE BRANCH—JUDGMENT—TIME OF ENTRY.

Though the contest of a will and a codicil thereto is by a single petition, and nonsuit is ordered only as to one branch of the contest, judgment may be entered on the order prior to final determination of the entire contest.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 353.*]

In Bank. Appeal from Superior Court, Humboldt County; G. W. Hunter, Judge.

In the matter of the estate of Adaline A. F. Ricks, deceased. There was a contest of deceased's will and the codicil thereto by Thomas F. Ricks, and from a judgment on a nonsuit as to the contest of the will contestant appeals. Affirmed.

See, also, 117 Pac. 539.

Knight & Heggerty and Selvage & Cutten, for appellant. Barclay Henley, L. F. Puter, and Mahan & Mahan, for respondent.

LORIGAN, J. The testatrix by will dated December 16, 1890, devised and bequeathed her estate to two of her sons, the respondent, Hiram L. Ricks, and Casper S. Ricks, giving to her other son, the appellant here, a nominal legacy. Casper S. Ricks died August 7, 1896. On November 8, 1901, testatrix executed a codicil giving to said Hiram L. Ricks the portion of her estate bequeathed in her will to Casper S. Ricks. Testatrix died November 26, 1903, and on December 1, 1904, her will and the codicil thereto were admitted to probate. On August 28, 1905, the appellant Thomas F. Ricks filed a contest of said will and codicil on the grounds of undue influence and fraud alleged to have been exerted and practiced on the testatrix by said Hiram L. Ricks. The contest came on for trial before the court and a jury, and on September 26, 1907, contestant having rested his case, respondent moved for a nonsuit,

both as to the contest of the will and codicil. The court granted the motion as to the contest of the will, and denied it as to the contest of the codicil. On February 28, 1908, a judgment was entered on the order granting the nonsuit as to the will, and from this judgment contestant appeals.

The evidence on the hearing of the contest of the will is brought here on a bill of exceptions, and the main point urged for the reversal of the order granting the nonsuit is that there was sufficient evidence produced on the trial to call for the submission of the case on trial to the jury. While the contest filed by the appellant was a single one and attacked the validity of both the will and the codicil and the evidence adduced on the hearing up to the time when contestant rested his case was directed to both instruments, we are concerned on this appeal with the evidence only which bore on alleged undue influence and fraud with respect to the execution of the will itself and which contestant claims made a sufficient case to go to the jury. It appears that, after the order granting the nonsuit as to the will and denying it as to the codicil was made, the parties proceeded with the trial as to the validity of the codicil, which resulted in a disagreement of the jury. Thereafter another jury trial was had upon the codicil, resulting in a verdict against its validity, from which a separate appeal has been taken to this court by the present respondent, disposition of which will be made later. In the petition of contest filed by appellant as the basis thereof he alleged that at the time her will was made and for a long time prior to the making thereof, and continuously thereafter till her death, the respondent, Hiram L. Ricks, was a partner in business with his mother and her confidential agent and business adviser and conducted her entire business to the exclusion of all other persons; that the mother knew nothing of the amount of property possessed by her or of the business conducted in her name or in the name of the partnership, taking no part in the conduct thereof, but relying absolutely on said Hiram L. Ricks for information thereof, the latter conducting and controlling said business absolutely; that their mother had absolute confidence in the integrity, fair dealing, honesty, and capability of said Hiram L. Ricks, and because of said belief intrusted the whole of her property and business to him; that long prior to executing said will said Hiram L. Ricks had the desire and intent to influence and induce their mother to make a will bequeathing the whole of her property to said Hiram L. Ricks and disinherit the petitioner; and that he took advantage of the confidential relation existing between his mother and himself to unduly influence her in the execution of her will.

It is then further alleged: "That, pursu-

ant to the aforesaid design and intent, the said Hiram L. Ricks, for the purpose of prejudicing the said Adaline A. F. Ricks against this petitioner, willfully and falsely represented to her, the said Adaline A. F. Ricks, deceased, and persuaded her to believe, that your petitioner had received from her estate and her property in a division of his father's estate all of the property he was to receive or which he might inherit from her or his brothers by reason of their death or otherwise, and that upon such partition he agreed to and with the said Hiram L. Ricks, Adaline A. F. Ricks, and Casper S. Ricks, a brother now deceased, that he accepted and would take the amount of property so granted to him as a compromise in full of any and all rights which he might have or which might become his by reason of the death of his mother Adaline A. F. Ricks, or his brothers. That said representations were false, and said respondent knew them to be false, and said Adaline A. F. Ricks, deceased, believed said representations to be true and acted upon the same, and because of said representations she signed and executed said documents purporting to be the will and codicil thereto, if the same were ever signed and executed by her, and she would not have so executed said will or said codicil thereto had she known that said representations so made as aforesaid were false and untrue."

The evidence introduced by contestant showed that prior to his death in 1888 the husband of testatrix and father of the appellant and respondent and Casper S. Ricks was the owner of a large amount of property in Eureka, Humboldt county, which a short time prior to his death he deeded to his wife and his three sons, who, until the division hereafter mentioned held it in common. After the death of her husband, testatrix took no part in the management of the business, leaving it to be conducted jointly by the respondent, Hiram L. Ricks, and the contestant, the latter principally conducting it. This joint conduct of the business continued practically until about December 16, 1890, at which date a division of the property held in common by the Ricks family was made. Some time prior to December 16, 1890, the harmony which had prevailed between the contestant and Hiram L. Ricks became disturbed, owing principally to the objection of contestant to certain expenditures and investments of money in the improvement of a public waterworks system in the city of Eureka, owned by the Ricks family. This in-harmony became so acute that contestant demanded a partition of the property held in common by the family. His mother and his other brothers wished to keep the property intact in the family and seriously objected to any division. Contestant, however, insisted on it, with the result that his mother, who strongly objected until she saw that contestant would not recede from his demand, and,

as she declared, to keep peace in the family, finally consented to a partition, and on December 16th and 17th deeds were interchanged between the parties whereby the other members of the family conveyed certain property theretofore held in common to contestant, he conveying to them jointly his interest in the remainder. As far as the record shows, no partition was had between the other members of the family—Mrs. Ricks and Hiram L. and Casper S. Ricks—they continuing to hold their interests in the property in common. After the segregation of the interest of contestant, the management of the remainder of the property which was still held by the other members of the family in common was undertaken by Hiram L. Ricks. Casper S. Ricks had never given any attention to the business affairs, leaving that to contestant and respondent. And this assumption of the management of the business by the respondent after the division was not self-assumed, not against the wish or consent of his mother, or by reason of any dominating influence over her. Mrs. Ricks was adverse to taking any part in the conduct of the business, and as after the death of her husband the contestant and respondent had given it their attention, when the contestant drew out his interest, the respondent continued as he had theretofore done to manage it, and so continued to take exclusive charge of it up to the death of his mother. Casper L. Ricks being in failing health, on April 26, 1896, conveyed all his property to his mother for life, the remainder in fee to Hiram L. Ricks. On April 29, 1896, Mrs. Ricks executed a deed conveying all her property to Hiram L. Ricks, which deed she deposited with the cashier of a bank in Eureka accompanied by written instructions wherein she directed the said cashier to hold said deed, and on her death to record it and deliver it to Hiram L. Ricks. This written letter of instructions contained the following statement of her purpose in making the conveyance to Hiram L. Ricks: "My reason for conveying to him (Hiram L. Ricks) all of my property described in such deed is because at the time my son T. F. Ricks withdrew his interest in the Ricks estate and deeds were made to him therefor by myself and my two sons, Casper S. and H. L., it was then understood and agreed that he was not to have any share in my property or estate and that the same was to go to my other sons as I might choose."

The attorney who prepared the deed in escrow, as a witness called for appellant, testified that he prepared it at the request and under instructions from Mrs. Ricks alone; that she wanted her reasons for making the deed to her son Hiram L. set forth in the escrow, stating to him that when the contestant withdrew his interest in the Ricks estate after she had tried to persuade him to hold their interests together, and deeds

were made by herself and her sons Hiram and Casper to him, it was then understood and agreed that contestant was not to have any share in her property and estate; that contestant had said that she might leave her property to whomsoever she pleased, and that she was now going to do it. On October 12, 1903, Mrs. Ricks executed a deed to Hiram L. Ricks conveying all of her real property to him, which deed was recorded by said grantee on December 2, 1903, after the death of his mother. About the middle of August, 1903, the contestant being about to depart for San Francisco on a temporary visit of some weeks, went to the home of his mother to bid her good-by. As to what occurred, he testified: "Well, as I started to go in the door, I heard some loud talking. They were eating breakfast, Lam (Hiram) and my mother, and, as I went in, I said 'What is the matter here?' and mother said, 'We were just talking over what you said about what Matty (the wife, since deceased, of Hiram L. Ricks) said that I was going to disinherit you. She said Lam said at the time of the division that you agreed not to take any more of my property,' and Lam said 'Yes, he did.' I said I never did such a thing, I said he lied, I never agreed to no such thing in the world. I said I have not got a thing. 'All I got was father's quarter that he gave me, and he has all the property, your property and Cas's, the whole of it, and I have not got a thing from either one of you.' He denied it, and he and I had some words. We were engaged in conversation I suppose about 10 or 15 minutes. That is what I remember. Of course, there was a whole lot of talk, and we both got pretty mad as we always did whenever we got together. I then got up and bid mother good-by and kissed her good-by and went off and got my team. I think I was gone three weeks." It was further shown that the day previous to her death one of contestant's sons—Charles C. Ricks—called upon his grandmother, and a conversation was had between Mrs. Ricks, Hiram L. Ricks, and himself. He testified that Hiram L. Ricks at the request of his mother stated to him the agreement his father had made at the time of the division—that he had agreed not to take any more from the estate. At the request of Hiram, he told his grandmother of some disagreement he had had with his father, whereupon she expressed her intention of giving him (Charles) \$10,000. Hiram suggested to his mother that she give the \$10,000 to all the boys—that is, \$8,000 to Charles and \$1,000 each to his two brothers. His grandmother asked Charles if this would be satisfactory to him, and, on his assuring her that it was, she said: "I have not done right by Tom (contestant), he should have more." Whereupon Hiram spoke up and said: "You can give Charlie whatever you like, but you can't give Tom a cent."

A witness, Mrs. M. J. Herrick, stated that within a month before the death of Mrs.

Ricks she approached the residence of the latter with the intention of calling on her. As she did so, she heard Hiram L. Ricks say: "If you make any change in that property, I will law away every dollar of it." This was all she heard said. She did not then go in the house, did not see any one there, and did not know to whom the statement of Hiram L. Ricks was addressed.

Appellant further testified that no agreement had been entered into between his mother and himself, as testified to by respondent, or between his mother and his brothers Hiram L. and Casper when the division of the property was made that he should not have any portion of whatever property his mother might leave.

Hiram L. Ricks, called as a witness by contestant, stated that at one of the conferences about the division of the property, and after contestant, over the strenuous protests and objections of the other members of the family, was insisting on a division, his mother said: "Tom (contestant), if you insist upon withdrawing your interest from the estate, it must be final, you must draw all your interest, and what you expect to get out of the estate or out of the Ricks property"; and "I don't know whether at that conversation or not, either at that one, or at some others, probably afterward, anyhow, Tom agreed to do what my mother said. 'You must select what you want as a final settlement so you boys will never be brought together in business again.' This is as near as I can tell the identical words. This conversation was between Tom, my mother, Cas, and myself."

It was in evidence further that Mrs. Ricks, while adverse to business cares and responsibilities, was a woman of remarkable mental power. She read a great deal and was a woman of decided opinions, perfectly capable of knowing and understanding what she was doing with respect to any matter, and attended to her own household affairs, and was never ill in her life until her last sickness, which lasted some 47 hours. There was no allegation in the complaint of any want of mental capacity or the existence of any weakness of intellect which at the time when the will was made or subsequent thereto would render her susceptible to undue influence. On the contrary, the evidence on the part of contestant shows her possession of superior intellectual powers up to the time of her death. While the appellant and contestant subsequent to the division of the property were not on friendly terms, the mother was at all times on affectionate terms with all her children. After the division the visits and interviews between the respondent and his mother were, by reason of his management of the business, coupled with the fact that his business office was situated close to her residence, more frequent than those between his mother and contestant, although affectionate relations between his mother and contestant always existed.

Having set forth the evidence relied on, we address ourselves to the merits of the appeal.

[1] The rule is well established that in contests of wills, as in other civil actions, in determining whether the evidence presented was sufficient to take the case from a jury, the entire evidence presented is to be viewed from a point most favorable to the contestant. Disregard is had of any contradictory evidence. All facts supporting the case of contestant must be taken as true, and all presumptions from the evidence and all reasonable inferences susceptible of being drawn therefrom must be considered as facts proven in his favor. *Estate of Arnold*, 147 Cal. 583, 82 Pac. 252. But with this rule in view, and applying it here, we are satisfied that the order of the trial court granting the nonsuit was proper. While the evidence presented bore both on the validity of the will and the codicil, in determining whether any case was made by the contestant showing undue influence as to the execution of the will, or fraud practiced on the testatrix in its execution, the evidence must be considered separately and treated with reference to the different dates when the two instruments were executed, as particular evidence which might be considered with reference to the execution of the will or the codicil might not be applicable to both, and whether it is applicable to either must be determined under a consideration of well-recognized rules of law. The allegations in the petition of contestant are that the execution of the will of December 16, 1890, was procured through the undue influence of Hiram L. Ricks over his mother, and was likewise procured by fraud upon her in falsely representing that contestant had agreed at the time the division of property took place that he should receive no portion of her property at her death.

[2] It is, of course, elementary that undue influence invalidating a will must be such as destroys free agency constraining the testator at the time the will is made to make a disposition of his estate contrary to and different from what he would have done if he had been left to the free exercise of his own inclination or judgment. "Undue influence of that kind which will affect the provisions of a testament must be such as subjugates the mind of the testator to the will of the person operating upon it, and, in order to establish it, proof must be made of some fraud practiced, some threats or misrepresentations made, some undue flattery or some physical or moral coercion employed; so as to destroy the free agency of the testator." 29 *Ency. of Law*, p. 103. And as said in *Re Kaufman*, 117 Cal. 288, 295, 49 Pac. 192, 194, 59 Am. St. Rep. 179: "The undue influence which will avoid a will must be such as operates upon the mind of the testator at the time of making the will, and must be an influence relating to the will itself." And "unless there was such evidence tending legiti-

mately to prove that some fraud had been practiced upon the testatrix at that time, or that some misrepresentation had then been made, or that some physical or moral coercion had been employed, such as to destroy her free agency, the court erred in submitting to the jury the question whether undue influence had been exerted. It was inviting them to find as a fact that of which there was no evidence, and which the law as well as reason presumed had no existence." It must be borne in mind that when we speak of undue influence which will affect a testamentary act it must be such influence operating upon the very act itself; an influence exerted and used prior to or at the time of the making of the will and of which the will is the product.

With these rules in view, we come to the points made by the appellant.

[3] It is claimed, first, that at the time the will was made there existed the confidential relation between testatrix and respondent of mother and son, coupled with the fact that at that time he was also her confidential agent, the manager of her business, and acting for her exclusively in her business affairs; and it is argued that this situation warranted a deduction by the jury that respondent had taken advantage of such confidential relations to procure from his mother the execution of her will as one of the main beneficiaries.

While counsel for appellant have cited various sections of the Code, and general authorities on the subject of confidential relations, to the effect that testamentary disposition procured by an undue exertion of influence springing from such relation is invalid, they have not pointed out any conduct or acts on the part of respondent, or any circumstances attending the execution of the will, upon which they rely in support of their claim that the will was the result of undue influence exercised by respondent over his mother as far as confidential relations are concerned. They rely simply upon the proposition that, because the relation of mother and son existed and her son was also her business agent at about the time the will was made, a confidential relation existed from the existence of which a jury would be warranted in finding that respondent had taken advantage of that relation and had unduly influenced his mother to execute her will in favor of himself and his brother Casper to the exclusion of contestant. But no warrant is given to a jury to find that undue influence was exerted at the time the will was made from proof merely of such relation alone. Undoubtedly the relation between respondent and his mother was affectionate and confidential, and that he would have a general influence over his mother proceeding from such relation. But the existence of such relation and this general influence raises no presumption that

undue advantage was taken of it by respondent. There is no legal suspicion of undue influence arising from the existence of such a relationship, which imposes upon the son the necessity, when a will in his favor is attacked, of assuming the burden of proof that he had not unduly influenced his mother in making the will. The confidential relation and the opportunity afforded therefrom to exercise undue influence may, of course, always be taken into consideration with other evidence, when the question of undue influence is in issue. But the relation itself and opportunity are not sufficient alone to warrant a finding that undue influence was actually exerted. Proof merely that confidential relations existed between a testator and the main beneficiary under his will is not sufficient to destroy its validity, but there must be some proof, in addition to the relation, of facts or circumstances showing the use of that relation at the time the will was made overcoming the free will and desire of the testator, in order to invalidate the testament. As said in a case quoted from in *Estate of Nelson*, 132 Cal. 194, 64 Pac. 299: "The presumption of undue influence is not raised by proof of interest and opportunity alone. In order to set aside a will for undue influence, there must be substantial proof of the pressure which overpowers the volition of the testator at the time the will was made. In order to establish that a will has been executed under undue influence, it is necessary to show, not only that such undue influence has been exercised, but also that it has produced an effect upon the mind of the testator, by which the will which he executes is not the expression of his own desires. Substantial evidence must do more than raise suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proved which are inconsistent with the claim that the will was the spontaneous act of the alleged testator. In order to justify the submission of any question of fact to the jury, the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged."

Now, a careful examination of the testimony in this contest fails to disclose any fact or circumstance showing that the respondent had anything to do with the making of the will of his mother in favor of himself and his brother Casper.

It is conceded that Mrs. Ricks was a woman of firm will and decisive mind, a woman of remarkable intellectual powers, and fully capable of understanding and knowing what she was doing at all times. No question is made about her mental capacity at the time the will was executed. There is not a pretense that she was then mentally infirm, and her will, as far as its provisions

are concerned, expresses clearly her intention as to the disposition of her property. There is nothing in the will itself which suggests any undue influence in making it. It is true that it leaves her estate to the respondent and his brother Casper to the exclusion of the contestant, but that does not indicate that the favorable bequests to those two to the exclusion of the contestant was the effect of undue influence. She had a right to dispose of her property as she saw fit, and the motives which actuated her in doing so are neither concern of jury or court. When it appears that the testatrix had testamentary capacity, which in this case was conceded, the fact that she made a distinction between her children as to the share of her estate they should receive is of no moment unless the preference was the result of undue influence or fraud, and no presumption of such undue influence or fraud arises from the fact merely that she made such preference. But aside from the fact that the testatrix in this case was at the time her will was made a woman of strong mentality, self-willed, and disposed to exercise her own judgment in all matters, and that this condition of mentality and character continued down to the time of her death, that she allowed her will to stand as she had written (except for the codicil) down to that time, there are further important facts and circumstances to be taken into consideration.

No evidence was introduced relative to the execution of the will. Nothing as to who drew it, where it was executed, or the presence of any one in connection with its making; nor any testimony from the persons who were witnesses to it. In fact, the record is barren of any evidence on the subject. As far as the record discloses, the testatrix kept her own counsel and made her will secretly. She does not appear to have consulted any member of the family, or any one else, as to how she should dispose of her estate. In addition, there is not only an entire absence of the slightest proof of any agency on the part of respondent in procuring the execution of the will, but it affirmatively appears that he did not know that his mother contemplated making one, or that she had done so, until after its execution, when it was delivered to him by either his mother or his brother Casper.

In the absence, therefore, of any evidence tending to show that undue influence proceeding from their confidential relation had been exercised by respondent in procuring the making of his mother's will in favor of himself and his brother Casper, it was the duty of the court to refuse to submit that issue to the jury. The further allegation in the petition of contestant was of fraudulent representations made by respondent to testatrix, which we have set forth

above, and it is claimed that sufficient proof thereof was made to require the issue in that respect to be passed on by the jury.

[4] The rule with reference to proof of fraudulent representations relied on to defeat a will is the same as governs the proof of undue influence claimed to have been employed. It must appear that such fraudulent representations were made prior to or at the time the will was executed. Contestant recognized the rule and alleged that undue influence was exercised and the fraudulent representations made prior to or at the time the will was executed.

[5] But there was not a particle of proper or legitimate evidence introduced in the case showing that on or prior to December 16, 1890—the date of the will—any representations were made by respondent to the testatrix that an agreement had been entered into by contestant with his mother, or with her and respondent and his brother Casper, at the time the division of the property left by his father was made, whereby contestant relinquished all right to participate in any of the estate left by his mother at her death. As stated in discussing the claim of undue influence, there is not a particle of evidence that at any time the respondent spoke to his mother about making a will, or that he had any conversation with her, or made any statements or representations of any character to her respecting the disposal of her property, or of the existence of any agreement made by contestant. He was ignorant of the execution of any will until after it was made. It is true that almost 13 years after the will was made a bitter quarrel arose between contestant and respondent in the presence of their mother, and the statements which were then made are relied on by contestant in support of his claim of fraudulent representations. We have heretofore set forth in detail what then occurred. But, giving that conversation the greatest probative force, it falls far short of supporting the claim of contestant that it shows that prior to or at the time the will was made respondent had represented to his mother that contestant had agreed to relinquish all right to any of her estate. It tends to show nothing of the kind. There was no mention in that conversation of the respondent having at any time, either before or after the making of the will, spoken to his mother about the existence of such an agreement. The matter then in dispute between the parties was not as to any statement being made at any time by respondent to his mother as to any agreement having been made by contestant, but simply as to whether, when the division of the property was made, the contestant had, in fact, made such an agreement. Respondent insisted that he had, and contestant denied it. This is all that is disclosed in that conversation. No statement was then made by Mrs. Ricks that respondent had ever said anything to her

about an agreement. In fact, from the testimony of contestant as to what occurred there, his mother took no part in the conversation. She said nothing one way or another on the subject, whether an agreement had been made or not, or whether any one had ever spoken to her on the subject. She only spoke of what Matty said that Lam (the familiar name of respondent) said that contestant at the time of the division had agreed not to take any of her property. This was all. Aside from this being purely hearsay testimony on the subject of what Matty said respondent said, it did not even, as such, indicate that respondent had mentioned the agreement to his mother, but only that he had spoken of it to Matty.

[6] Now, while under the evidence in the case there is a dispute as to whether such an agreement was made by contestant, the existence or nonexistence of such an agreement was not the controlling point in the contest. It was an important one, but the validity of the will of testatrix under the issue as to fraud did not depend upon the solution of that question alone. The decisive question to be determined under the contestant's allegation of fraud was, did the respondent falsely and fraudulently represent to his mother that such an agreement was made, when in fact it had no existence? The jury might have found that there was no such agreement. It may be even assumed that the testatrix believed that there was; but that she was in error respecting the matter. But this would not warrant the jury under the issue of fraudulent representation, in declaring the will invalid. Under that issue it could only be so declared upon evidence which showed not only that no such agreement existed, but that the respondent had falsely represented and induced his mother to believe that it did, and that the will was the product of this belief thus fraudulently created, and there is no evidence in the case which would support a verdict of the jury to that effect.

[7] Our attention is directed to the declarations made by Hiram L. Ricks testified to by Mrs. Herrick and Charles C. Ricks. These, at best, evidenced but opposition on the part of Hiram L. Ricks to any change in the will and codicil to the advantage of contestant. Aside from being declarations 13 years after the making of the will, in the absence of any other evidence tending to show undue influence or false representations on the part of Hiram L. Ricks, they would be insufficient to establish it.

[8] Certain declarations made by testatrix years after the execution of her will were admitted in evidence by the court during the trial. These declarations were offered by contestant avowedly for the purpose of proving undue influence and fraud, but these declarations in the absence of all other evidence are insufficient to sustain those issues.

Declarations of a testator made subse-

quent to the execution of a will are sometimes admissible when his mental capacity to make a will is involved. No question as to the mental capacity of Mrs. Ricks was involved here. They are admissible also to show the state of feelings of a testator towards and his relations with his children. When made contemporaneously with the execution of his will, if made under such circumstances as to constitute a part of the *res gestæ*, the declarations of a testator are also admissible. But declarations made subsequent to the execution of a will are never admissible as proof themselves of undue influence or fraud. After the execution of his will a testator is no more permitted to impeach its validity by declarations respecting it than can the validity of any other instrument be impeached by subsequent declarations of the maker respecting it. *Estate of Calkins*, 112 Cal. 296, 44 Pac. 577; *In re Kaufman*, 117 Cal. 288, 49 Pac. 192, 59 Am. St. Rep. 179; *Estate of Benton*, 131 Cal. 472, 63 Pac. 775; *Estate of Gregory*, 133 Cal. 137, 65 Pac. 315; *Estate of Donovan*, 140 Cal. 390, 73 Pac. 1081; *Estate of Arnold*, 147 Cal. 593, 82 Pac. 252; *Estate of Snowball*, 157 Cal. 301, 107 Pac. 598.

[9] The last point made by appellant is that the judgment appealed from entered upon the motion granting the nonsuit as to the contest of the will should be reversed because it was prematurely entered. His position is that as both the validity of the will and of the codicil were contested in a single petition, upon which the parties went to trial, that while the court might grant a nonsuit as to the contest of the will and deny it as to the contest of the codicil, or vice versa, still in law no judgment could be entered upon the order granting the nonsuit as to either until the entire contest, both as to the will and codicil, was finally determined. We do not think there is any merit in this point. Respondent had a right to move for a nonsuit, both as to the will and codicil, or as to either, at the close of contestant's case, and, if in the opinion of the court the evidence was insufficient to warrant submitting the question of the validity of either instrument to the jury, it was the duty of the court to grant a nonsuit accordingly. And, upon such nonsuit being granted, even if it applied to only one branch of the contest, the party in whose favor it is ordered is entitled to a judgment thereon. *Code Civ. Proc.* § 581.

Our attention is not called to any authority which would render a judgment entered upon a motion for a nonsuit, as was done in this case, erroneous.

The judgment appealed from is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; HENSHAW, J.; MELVIN, J.

(150 Cal. 467)

In re RICKS' ESTATE. (S. F. 5,152.)

(Supreme Court of California. Aug. 4, 1911.
On Rehearing, Sept. 2, 1911.)

1. WILLS (§ 271*)—CONTEST—AFTER PROBATE—CITATION—APPEARANCE.

Objection that citation in a will contest which *Code Civ. Proc.* § 1328, provides must issue within a year after probate to the executor and the legatees and devisees and resident heirs, was directed merely to R., by name, without describing him as executor, devisee, legatee, or heir, and was not separately served on him in each of said capacities, he being however the executor, and, with the exception of contestant, the sole devisee, legatee, and heir, was waived by R.'s appearance within the year, by demurring as "the proponent and legatee named in the will" to contestant's petition; it being presumed, in the absence of anything to the contrary, that, as was the natural course, he as executor was the proponent.

[Ed. Note.—For other cases, see *Wills*, *Cent. Dig.* § 626; *Dec. Dig.* § 271.*]

2. JUDGMENT (§§ 650, 663*)—RES JUDICATA.

Only final judgments are available as *res judicata*, so one time to appeal from which has not expired or appeal from which is pending is not so available.

[Ed. Note.—For other cases, see *Judgment*, *Cent. Dig.* §§ 1162, 1174; *Dec. Dig.* §§ 650, 663.*]

3. WILLS (§ 400*)—HARMLESS ERROR.

The will, though not the codicil, having been sustained on a contest thereof, any error in allowing amendment of contestant's petition by statements affecting only the will was harmless.

[Ed. Note.—For other cases, see *Wills*, *Dec. Dig.* § 400.*]

4. WILLS (§ 278*)—CONTEST—PETITION—UNDUE INFLUENCE.

The petition of contest of a codicil makes sufficient allegations as to exercise of undue influence, as distinguished from fraud, otherwise pleaded, by alleging that R., by reason of his confidential relations with testatrix, his mother, and her absolute confidence in him, persuaded her to believe that he was entitled to the whole of her property and that of her deceased son; that said representations were false, and known to be so by R., when he made them; and that, believing said representations and controlled by them, she made the codicil, which she would not have done had she not believed said false and fraudulent representations to be true.

[Ed. Note.—For other cases, see *Wills*, *Cent. Dig.* §§ 636, 637; *Dec. Dig.* § 278.*]

5. WILLS (§ 166*)—CONTEST—UNDUE INFLUENCE—EVIDENCE.

Evidence in a contest of a codicil held insufficient to sustain a verdict for contestant on the ground of undue influence.

[Ed. Note.—For other cases, see *Wills*, *Cent. Dig.* §§ 421-437; *Dec. Dig.* § 166.*]

6. WILLS (§ 158*)—CONTEST—UNDUE INFLUENCE—EVIDENCE OF FRAUD.

Evidence merely that beneficiary under a will, who occupied confidential relations with testatrix, his mother, falsely represented to her that contestant, his brother, had agreed at the division of his father's estate to relinquish all right or claim to her estate, is insufficient to sustain a verdict for contestant on the ground of undue influence; as while a will made under a belief of the truth of false representations, disinheriting one who, but for testatrix's belief in the truth thereof, would have been pro-

vided for therein, may be avoided on the ground of fraud on testatrix, yet to avoid it on the ground of undue influence, having its foundation in false and fraudulent representations made to testatrix, not only must the false representations have been made for the purpose of influencing testamentary disposition, but they must have been the basis of importunity and pressure on testatrix which controlled her mind when her will was made.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 385, 386; Dec. Dig. § 158.*]

7. EVIDENCE (§ 220*)—ADMISSIONS—FAILURE TO DENY.

Failure of the sole beneficiary under a will to deny the statement of testatrix, made when he was quarreling with his brother, disinherited by her will, that he had told her that the brother had agreed at the time of the division of their father's estate to take no more of the property, may be considered as an admission of the truth of the statement.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 771-785; Dec. Dig. § 220.*]

8. EVIDENCE (§ 222*)—WILL. CONTEST—ADMISSIONS AND DECLARATIONS OF BENEFICIARY.

Admissions and declarations against interest of the sole executor of and beneficiary under a will are admissible on a contest of will.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 768-808; Dec. Dig. § 222.* Wills, Cent. Dig. § 410.]

9. EVIDENCE (§ 265*)—ADMISSIONS AND DECLARATIONS OF BENEFICIARY—EFFECT.

Such admissions and declarations may be considered, not only for the purpose of showing the feelings and relations between the parties, but to establish any fact in issue on the validity of the will which they have a tendency to establish.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1029-1050; Dec. Dig. § 265.*]

10. WILLS (§ 165*)—CONTEST—DECLARATIONS OF TESTATRIX.

Declarations of testatrix, not part of the *res gestæ*, are admissible, on a contest of her will giving all her property to one of her children, not to prove the exercise of undue influence on her, but only to illustrate her relations to her children, her feelings towards them, and her condition of mind or belief as to their respective claims or rights to participate in her estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 415-420; Dec. Dig. § 165.*]

In Bank. Appeal from Superior Court, Humboldt County; Geo. W. Hunter, Judge.

In the matter of the estate of Adaline A. F. Ricks, deceased. There was a contest of deceased's will and the codicil thereto by Thomas F. Ricks, and from a judgment for contestant as to the codicil Hiram L. Ricks, the proponent, appeals. Reversed.

Rehearing denied; Beatty, C. J., dissenting.

Knight & Heggerty and Selva & Cutten, for contestant. L. F. Puter, Barclay Henley, and Mahan & Mahan, for respondent.

LORIGAN, J. This was a contest after probate, attacking a will and codicil. At the close of the case of contestant the court granted a nonsuit as to the contest of the will and denied it as to the codicil. Con-

testant appealed from the judgment on the nonsuit as to the will, which judgment in an opinion this day filed has been affirmed. Estate of Ricks, 117 Pac. 532, S. F. No. 5,246. On the denial of the motion for a nonsuit as to the codicil the trial thereon was proceeded with, resulting in a disagreement of the jury. On a second trial as to said codicil, a verdict was rendered in favor of contestant, and judgment entered revoking and annulling the probate of the codicil. From this judgment and the order denying his motion for a new trial, the appellant, Hiram L. Ricks, who was executor and principal devisee and legatee under the codicil, appeals.

The testatrix when she made her will, dated December 16, 1890, had three sons living, namely, Thomas F. Ricks, the contestant, Hiram L. Ricks, the appellant, and Casper Ricks. Her will bequeathed to Thomas F. Ricks the sum of \$5 and gave the residue of her estate to Hiram L. and Casper S. Ricks in equal shares. Casper S. Ricks died August 7, 1896. The codicil to her will was made November 8, 1901, and recited the fact of the death of Casper S. Ricks, revoked the bequest to him, and gave to Hiram L. Ricks all the property which had been given in the will to Hiram and Casper jointly. Hiram L. Ricks was in the codicil made sole executor. While the contest filed was directed against the validity both of the will and the codicil, we are concerned on this appeal only with the matter of the contest of the codicil.

[1] The first point urged by appellant for a reversal is that the court had no authority to entertain the contest because the citation was not issued and served as provided by section 1328, Code Civ. Proc., which provides that: "Upon filing the petition (for revocation of probate), and within one year after such probate, a citation must be issued to the executor of the will, or to the administrator with the will annexed, and to all the legatees and devisees mentioned in the will, and heirs residing in the state, so far as known to the petitioner, * * * requiring them to appear before the court on some day therein specified, to show cause why the probate of the will should not be revoked." There can be no question but that as a prerequisite to the maintenance of the contest the citation provided for must be issued within a year after probate, and the proceeding should be dismissed for any failure in that respect, if there is no voluntary appearance within a year of all persons entitled to a citation. Estate of Hite, 155 Cal. 390, 101 Pac. 8. In the matter at bar the superior court on August 28, 1905, when the petition for a revocation of probate was filed, made an order that a citation be issued by the clerk of said court to the executor and all the legatees, devi-

sees, and heirs residing in the state, and to all other persons interested in the estate, etc. A citation was issued by the clerk directed to Hiram L. Ricks, by name only, without describing him as executor, devisee, legatee, or heir. He was, however, the executor of both the will and codicil, was the sole devisee named in the codicil, and, with the exception of the contestant, was the only legatee thereunder and only heir of the decedent. There was therefore no other person who was entitled to a citation upon the petition for revocation of probate, and the citation was, in fact, served upon him, as shown by the return of the sheriff.

The only objection urged by the appellant as to the citation is that it was not addressed to him in his several capacities as executor, devisee, legatee, and heir of decedent, and was not separately served upon him in each of these capacities.

But appellant is not in a position to raise any question of defective issuance or service of the citation upon him on the grounds suggested, because he waived the right to object to the manner of issuance and service of the citation by voluntarily appearing in the proceeding. *Abila v. Padilla*, 14 Cal. 103. Within two weeks after the institution of the contest a demurrer was filed on behalf of Hiram L. Ricks as "the proponent and legatee named in the will of deceased." The proponent of a will is the person who offers it for probate. While any person interested in the estate may petition to have the will proved (Code Civ. Proc. § 1299), the law contemplates that the one upon whom this duty devolves primarily is the executor named in the will, for it is provided that he may upon failing to petition within a fixed time be held to renounce his right to letters. Code Civ. Proc. § 1301. And, except where the person named as executor desires to renounce his right, it is the almost invariable practice for him to file the will with his petition that it be admitted to probate. Therefore, while Hiram L. Ricks had the right to petition for probate in his capacity of executor, or in that of legatee, it is reasonable to suppose, in the absence of any showing to the contrary, that he followed the ordinary and natural course of petitioning as the executor named in the will. When in his demurrer he described himself as "proponent," he was, in effect, appearing as executor. If he had intended to appear in the capacity of legatee alone, there would have been no occasion for the double description of "proponent and legatee." The objection now urged does not appear to have been suggested until appellant filed his answer to the second amended petition, over two years after the contest had been instituted, and after there had been two trials upon the merits. Under these circumstances we are not disposed to view with great favor a plea which is designed to prevent a hearing upon the merits.

[2] As we have stated, the original contest was directed against both the will and codicil. On the first hearing as to both, the court granted a nonsuit as to the contest of the will, and denied it as to the codicil, and directed judgment of nonsuit to be entered accordingly. This order was made October 1, 1907, but the judgment thereon was not signed or entered until February 28, 1908. On February 21, 1908, contestant had filed a second amended petition of contest, answer to which was filed by proponent on March 16, 1908, in which he set up this judgment of February 28, 1908, and relied upon it as an estoppel. He claims now that the judgment of February 28, 1908, denying contestant relief upon one of his causes of action set up in his petition, namely, the contest of the will, was in law an adjudication of both causes of action, including the contest of the codicil, and that it could properly be pleaded as a bar to any subsequent litigation affecting the validity of the codicil. This position is not tenable. Only final judgments can be pleaded or proven as *res adjudicata*, and, as the time within which the contestant in that judgment might appeal had not expired when the answer setting up the judgment was filed, the judgment relied on had not become final (*Harris v. Barnhart*, 97 Cal. 546, 32 Pac. 589; *Story v. Story*, 100 Cal. 41, 34 Pac. 675; *Brown v. Campbell*, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314), and, when the issue as to the validity of the codicil was tried and the verdict of the jury rendered, an appeal had already been taken from the judgment pleaded as *res adjudicata* and was pending here.

[3] Complaint is made because the court allowed a second amended petition of contest to be filed after the expiration of one year after probate. While an amendment which states a new ground of contest may not be permitted unless filed within the year after probate allowed by the Code for the institution of such contests (*In re Wilson*, 117 Cal. 262, 49 Pac. 172, 711), the allegations claimed to state new matter in the second amended petition which was filed February 21, 1908, referred only to matters affecting the original will, and, inasmuch as the appellant has been successful upon the issue relating to that document by the order for nonsuit previously made on October 1, 1907, he could not have been prejudiced by the granting of leave to amend with respect to it.

[4] It is claimed that the demurrer to the amended petition, in as far as it attempted to state a cause of action through the exercise of undue influence, should have been sustained. The petition charged both undue influence and fraud on the part of Hiram L. Ricks in procuring the execution of the codicil. While these causes of action were not separately stated, we think there were sufficient allegations as to both. This contest was based on undue influence and

fraud. The undue influence alleged was that Hiram L. Ricks, by reason of his confidential relations with his mother and her absolute confidence in him, persuaded her to believe that he was entitled to the whole of her property and that of her deceased son, Casper S. Ricks, that said representations were false and known to be so by said Hiram L. Ricks when he made them, and that, believing said representations and controlled by them, she made the codicil to her will, disinheriting contestant, which she would not have done had she not believed such false and fraudulent representations to be true.

As to fraud. While the allegations respecting it were not separately stated in the petition, it was evidently intended to allege such a cause for revoking the codicil. And in that regard it was alleged that H. L. Ricks, long entertaining a design to have his mother devise and bequeath all her property to him, falsely represented to her that in a certain partition between the members of the family, had years previous to the making of the codicil, contestant had agreed to take and accept the amount given him in that partition in full and in lieu of any and all right which he might have or which would become his by reason of the death of his mother or his brother; that such representations were false and known to be false by Hiram L. Ricks when he made them, and that the codicil was the product of such false representations and was executed under the belief that they were true.

[5] The court submitted to the jury two questions to be answered by them. The first was whether the codicil was procured through undue influence exerted on the testatrix by said Hiram L. Ricks, which question was answered in the affirmative. The second question, "Was the codicil * * * to the said will procured to be made through the fraud or fraudulent representations of the said proponent Hiram L. Ricks?" was not answered by the jury. The appellant H. L. Ricks insists that there was no evidence to sustain the finding of the jury of undue influence, and that, if there was any evidence supporting the issue that the execution of the codicil was procured to be made through fraud on his part, the jury failed to find on that issue. The position of respondent is that the evidence fully sustained the finding of the jury on the issue of undue influence; that in determining that issue the jury had a right to take into consideration such evidence of fraud as was presented and base their finding upon that evidence alone. Before discussing these points a statement of the evidence is necessary.

On the second trial of the contest as to the codicil much of the evidence which was introduced by the contestant upon the first contest of the will and this codicil was again

submitted with additional and different evidence. That evidence, as far as it is necessary to state it for present purposes, shows these facts: Prior to 1890 Mrs. Ricks and her three sons were the owners, as tenants in common, of property in Humboldt county, which, immediately prior to his death, had been jointly conveyed to them by the husband of Mrs. Ricks and the father of these brothers. After the conveyance of the property, it was managed as the Ricks estate; the management thereof being in the hands of the contestant and Hiram L. Ricks. Some dispute arising between these brothers as to the management of the estate, the contestant insisted on separating his interest therein from that of the others. A division was objected to by the mother and other brothers. The negotiations in the matter covered several weeks, but, the contestant being insistent upon a division, it was finally agreed on and consummated, his mother and his brothers conveying to contestant certain property, and he conveying his interest in the remainder to them. The estate was largely indebted at the time of the division, and contestant assumed one-fourth thereof. The deeds between the parties, pursuant to the division, were made on December 16, 1890, the same day that the will of Mrs. Ricks was executed. After the division, Hiram L. Ricks managed the interests of his mother and himself and brother Casper in the property, which they still continued to hold jointly, and did so up to the death of his mother on February 26, 1903. His mother reposed great confidence in Hiram. She took little, if any, interest in her business affairs. She was naturally averse to being burdened with business cares or the responsibilities thereof, and left these matters exclusively to the attention of her son Hiram L. Ricks as previous to the division she had left them to be attended to by both the contestant and said Hiram. Her will, made on the same date the division was had, gave substantially all her estate to Hiram L. and Casper Ricks. Casper Ricks died in August, 1896. Prior thereto—on April 27, 1896—he had conveyed all his property to his mother for life, the remainder to Hiram L. Ricks. Two days after the deed from Casper to his mother and brother Hiram, Mrs. Ricks made a deed conveying all her property to Hiram L. Ricks. This deed was deposited with the cashier of the Bank of Eureka, accompanied by a letter of instruction signed by Mrs. Ricks. This letter instructed the cashier to retain the deed until her death, and thereafter have it recorded and delivered to Hiram L. Ricks and contained the following statement: "My reasons for conveying to him (H. L. Ricks) all of my property described in such deed is because that at the time my son T. F. Ricks withdrew his interest in the Ricks estate, and deeds were made to

him therefor by myself and my two sons Casper S. and H. L., it was then understood and agreed that he was not to have any share in my property or estate, but that the same was to go to my other sons as I might choose." On November 8, 1901, the codicil involved in this contest was executed by Mrs. Ricks, by which all her property was given to said Hiram L. Ricks. In August, 1903, a serious quarrel occurred between Hiram L. Ricks and this contestant at their mother's residence and in her presence. It appears that the evening previous to the morning when this quarrel took place contestant had called on his mother and some conversation was had between them about the will and deeds which his mother had made, information about which had come to him from some statements made by Matty Ricks, the wife, since deceased, of Hiram L. Ricks. As to what occurred at the quarrel, contestant testified that on that morning he went to his mother's residence to bid her good-bye, as he contemplated a temporary absence from Eureka. As he entered the house Hiram L. Ricks and his mother were talking pretty loud. (Mrs. Ricks was somewhat deaf.) We now quote from his testimony: "They said they were talking about what I was talking about the night before about what Matty said. My mother made that statement. She said something to me about it after that and right at that time. She said that Lam [the familiar name for Hiram L. Ricks] said I agreed not to take any more of the property when we dissolved—when I divided the property that I agreed to that. I said there was no such a thing said at the time. Lam stated there was an agreement at that time, he told my mother, he said there was an agreement of that kind at that time. She said he stated that at the time we dissolved or divided Lam stated there that I did say it. I replied, after he stated that, that it was a lie; I never made any such agreement at all. That there never was any such agreement. He said there was, and we quarreled after that about that agreement; what he said I agreed to do." Independent of what was said by him at the time of the quarrel on the subject of the agreement, contestant testified that there was in fact no agreement or understanding on his part had with his mother or brothers, or any of them, at the time of the division of their property, or at any other time, that he was to relinquish his right to take any portion of the estate of his mother. Hiram L. Ricks testified that there was such an understanding at the time of the division, but denied that he had ever spoken of it to his mother at any time afterward, assigning as a reason that, as she was fully aware of it, there was no necessity for mentioning the subject to her. As to what occurred at the time of the quarrel, Hiram L. Ricks testi-

fied that all that was said there was an assertion on his part that there was such an agreement, a denial of its existence by contestant, and the statement of his mother to contestant that he knew there was such an agreement. The day previous to her death there was a conversation between one of her grandsons, Charles C. Ricks—a son of contestant—and Mrs. Ricks and Hiram L. Ricks. In this interview Mrs. Ricks declared her intention to give Charles \$10,000. Hiram suggested that she give \$10,000 to all—\$8,000 to Charles and \$1,000 each to his two brothers, which was agreed to. Mrs. Ricks then said, "I have not done right by Tom [contestant]; he should have more." Whereupon Hiram L. said, "You can give Charlie and the boys whatever you like, but you can't give Tom a cent." A Mrs. Herrick testified that within a month prior to the death of Mrs. Ricks, when near the residence of the latter, she heard the appellant say: "If you make a change in that property, I will law away every dollar of it." This was said in the house and was all she heard. There was evidence, also, that Mrs. Ricks had stated to various persons that the contestant had made such an agreement.

From the time contestant withdrew his portion of the Ricks estate, the remainder, which was held in common by Mrs. Ricks, Hiram L., and his brother Casper, was managed, as we have said, by Hiram L., and he devoted all his time and energy to its management. It was heavily burdened with indebtedness at the time of the division, and from then until the death of his mother Hiram L. Ricks had paid in extinguishment thereof, out of his own personal funds, an amount somewhat exceeding \$50,000. After the making of the will, and for several years at intervals, the contestant lived with his mother. Hiram L. Ricks was married and maintained a residence of his own. Their mother had her own residence, and lived in it up to the time of her death. The relations between the contestant and his mother were always affectionate, as were her relations with all her children. In addition to this testimony was the undisputed showing that the testatrix was at all times, even up to the time of her death, a woman of strong mental and physical powers. She was highly educated, a woman of strong and decided mind; positive in her ideas and opinions. Contestant himself testified that he was not prepared to say that his mother was of a yielding, pliant disposition, and could be influenced by anybody; she might be, to save trouble, but it would have to be some strong reason, some strong persuasive force, and that he could not give a single instance where his mother was compelled to do anything which she did not want to do against her will. While disinclined to concern herself with the details of business, leaving them to be trans-

acted by her son Hiram, she was not indifferent in important business matters, but frequently discussed them with her son and others. In this connection she was much distressed about the heavy indebtedness on the Ricks estate, which during the years between 1892 and 1898, when business depression and "hard times" prevailed, threatened the estate with bankruptcy, from which it was saved only through the activity and careful management of Hiram L. Ricks and through aid given by the expenditure of his own personal funds. The evidence further shows that Hiram L. Ricks knew nothing about the making of her will by his mother until after it was made and handed to him. He was not consulted about its provisions. He had not spoken to his mother about making a will, nor had she spoken to him on the subject. As to the codicil, he knew nothing about her contemplated action in that respect until after it was made.

These constitute the main and principal facts in evidence in the case upon which the verdict of the jury that the codicil was procured through the undue influence of Hiram L. Ricks is based. A careful consideration of it satisfies us that the evidence does not sustain the verdict on that ground.

In the petition undue influence is predicated upon the charge that confidential relations existed between Hiram L. Ricks and his mother, and that he took advantage of this relation to persuade her to believe that he was entitled to the whole of her property and that of her deceased son, Casper L. Ricks. In the opinion filed this day in the matter of the appeal from the judgment on a nonsuit granted in the contest of the will (Estate of Ricks, 117 Pac. 532, S. F. No. 5,246) we considered and discussed the rule as to confidential relations, and upon practically the same evidence as is produced here held that no presumption of an abuse of such relation arose from the mere fact that the relation existed, and that there was no evidence whatever of its exercise by Hiram L. Ricks. Under these circumstances it is unnecessary here to particularly consider the matter with reference to this codicil.

There can be no question but that Hiram L. Ricks would have an influence with his mother—that general influence which an affectionate son, mindful of her comforts and protecting and managing her business interests, would naturally have. But there is not a particle of evidence that he took advantage of this for his own benefit and to the disadvantage of contestant, or for any purpose in connection with her testamentary disposition of her property. Mrs. Ricks was a woman of intelligence, of strong and decisive mind, and so remained up to the day of her death. The evidence showed that she consulted her attorney in making her will and codicil, and that Hiram L. Ricks, as we have pointed out, had nothing to do with the making of either, and did not know that his moth-

er contemplated making either of them, and knew nothing about them until after they were made. The codicil followed her will as far as any disposition in favor of contestant is concerned. Whatever her reasons were for leaving by her will all her property to Hiram L. and Casper, to the exclusion of contestant, and upon the death of the latter making a codicil leaving all her estate to Hiram, there is no evidence whatever that she was unduly or at all influenced so to do by Hiram L. Ricks.

[6] It is claimed, however, that, even if there was no other evidence showing that Hiram L. Ricks took advantage of the confidential relations existing between himself and his mother to persuade and prevail upon her to make the codicil in his favor, still, under the evidence as to the representation made by him to his mother, that contestant had agreed at the time of the division to relinquish all right or claim he might have to any estate left by her at her death, if the jury found that such representation was made, and was false, such finding was sufficient of itself to support the verdict of undue influence. We do not think this position is sound. Undue influence consists in the exercise of acts or conduct by which the mind of the testator is subjugated to the will of the person operating on it; some means taken or employed which have the effect of overcoming the free agency of the testator and constraining him to make a disposition of his property contrary to and different from what he would have done had he been permitted to follow his own inclination or judgment. Fraud, defining it generally, consists of false statements or false pretenses, or the employment of any trick or device or means of deception for the purpose of defrauding another. Undue influence and fraud are not identical. The one has reference to the subjugation of the will of the testator and controlling it. The other to a deception practiced upon the testator. In a sense undue influence is a species of fraud, but it may be exercised without any actual fraud, or false representation being made to the testator. One may by constant and persistent importunities and beseechings prevail upon another to make a will in his favor. The will is the result of these importunities, yielded to by the testator for the sake of peace. There may be no element of fraud or false representation in any of these importunities or beseechings. Nevertheless the effect of them has been in a broad sense to coerce the mind of the testator to defraud other heirs who, but for these importunities, would have been the recipients of the bounty of the testator. Upon the other hand, the undue influence may have its foundation in false and fraudulent representations made to the testator. To illustrate, the testator may be informed that the heir, whom otherwise he would have recognized, had attempted his life. Based upon this false statement are im-

portunities and mental pressure and coercion to exclude the heir because of his attempted crime. Here is presented a double fraud—a direct fraud upon the testator by these false representations, and fraud upon the disinherited heir who, by reason of the undue influence exercised through such misrepresentation, is deprived of the favor and bounty of the testator. In this sense there is always the element of fraud in the exercise of undue influence. If, however, the fraud be merely the fraudulent representation that the heir has attempted the life of the testator and is not accompanied or followed by a successful effort unduly to coerce the will of the testator, we have an example of fraud pure and simple; fraud which will avoid the will, but at the same time a fraud in which there is no more element of undue influence than there is in an ordinary fraudulent transaction of everyday life between contracting parties. In such a case a finding of undue influence will not be supported by evidence of pure fraud, as, on the other hand, a finding of fraud will not be supported by evidence showing solely the exercise of undue influence; for it is to be remembered that in a contest of a will of a testator on the ground of undue influence or fraud the law regards only the acts directed against the testator. It is the fraud against the testator and not the indirect resulting fraud against the disinherited heir which the law is considering in an attempt to avoid a will on that ground, and it is the undue influence—the coercing of the mind of the testator—and not the indirect but equally resulting fraud against the disinherited heir which alone the law is considering when the charge is on this latter ground. So that, when fraud or fraudulent representations made to the testator are relied on as an element in undue influence, it must appear not only that the representations were false and believed to be true by the testator, but that they were made the basis of importunity and mental pressure upon the testator and that the testamentary act was the product thereof. When this appears, such fraud is an element in undue influence, and, upon the proof of its employment to overcome the will of the testator, a finding of undue influence may be based. On the other hand, representations which are false, while they may exert an influence upon the testamentary disposition, unless they are made not only for that purpose, but are used as pressure upon the mind of the testator to affect the disposition of his property, constitute fraud purely. Such false representations need not be made to the testator by one who may be benefited by them. They may be made by a stranger. They may be made without any object of affecting the testamentary disposition and solely out of pure malice. If the testator, under a belief of the truth of such false statements, and influenced by them, makes a will disinheriting one who, but for a belief in the truth

of such false statements, would otherwise have been provided for in it, the will is the product of fraud on the testator and subject to be declared invalid for that reason. In order, however, that the fraudulent representations may be considered as an element in proof of undue influence, it must appear, not only that they were false and made for the purpose of influencing testamentary disposition, but that they were made the basis of importunity and pressure upon the testator, which he was unable to resist, and which controlled his mind when his will was made. Undue influence and fraud constitute two separate and distinct grounds, upon proof of either one of which a will may be declared invalid, and it is quite clear that, if proof simply of fraud or fraudulent representations may support equally an issue of undue influence or an issue of fraud, the distinction between those grounds of contest is obliterated.

In Page on Wills, § 122, it is said: "Fraud is in its nature closely allied to undue influence, and in many cases where the issue to be tried is *devisavit vel non* it is practically impossible to distinguish the two, as the same evidence often tends to support each charge. The confusion is increased by the theory sometimes expressed by the courts that undue influence is to be treated as a kind of constructive fraud. But, while allied to undue influence, fraud is not the same thing. Undue influence is essentially overpowering the will. Fraud is deceit. Such considerations have led courts, where the rules of pleading permit of a distinction between fraud and undue influence in making up the issues, to hold that fraud is not the same thing as undue influence, and that an allegation of the one does not include an allegation of the other." In *Davis v. Calvert*, 5 Gill & J. (Md.) 269, 25 Am. Dec. 282, the court says: "Fraud is a distinct head of objection from importunity and undue influence. Importunity and undue influence may be fraudulently exerted, but they are not inseparably connected with fraud." And in *Eckert v. Flowry*, 43 Pa. 46, the following language is used: "Now that is undue influence which amounts to constraint which substitutes the will of another for that of the testator. It may be either through threats or fraud, but, however exercised, it must, in order to avoid a will, destroy the free agency of the testator at the time when the instrument is made." See, also, *Herster v. Herster*, 122 Pa. 239, 16 Atl. 342, 9 Am. St. Rep. 95; *Gordon v. Burris*, 153 Mo. 239, 54 S. W. 546. In *Estate of Snowball*, 157 Cal. 301, 107 Pac. 598, the jury in a will contest had before them the issues of undue influence and fraud. They found affirmatively on the first, and made no response to the second. It was claimed on appeal here that the jury should have found on the second issue, and could not take into consideration to support the first evidence which was given in the case of fraudulent

statements made by one of the devisees under the will to the testatrix. It was held that they could. But in that case it appears that the unwarranted accusations made against contestant were used as the basis for and were followed by the persistent importunities on the testatrix to practically disinherit contestants, to which importunities she yielded. Clearly this was undue influence exercised by means of fraud.

Under the views announced, in the absence of any proof of the exercise of undue influence by Hiram L. Ricks under his confidential relations with his mother, or at all practiced by him, the jury was not warranted, assuming that they believed he had made a false and fraudulent statement to his mother of an agreement made by contestant to relinquish all interest in her estate, in basing their finding of undue influence thereon. The evidence on this subject of false representations, as it is detailed in the record, could only be considered on the issue of fraud, upon which issue the jury failed to find. It follows, therefore, that on the issue of undue influence the verdict of the jury is not supported by the evidence, and the order denying a new trial must be reversed for that reason. In view of a new trial, other points made on this appeal are to be considered.

[7] It is claimed that the declaration made by the testatrix at the time of the quarrel, namely, that appellant had told her at the time of the division that contestant had agreed to take no further part of the property, could not be considered by the jury to establish the fact that he had made such a statement or representation to her. This may be conceded as correct. The jury, however, had a right to take into consideration the conduct of the appellant in connection with the statement of the testatrix as an admission on his part of the facts stated by her. See *Estate of Snowball*, 157 Cal. 311, 107 Pac. 598.

[8] While the general rule is that declarations or admissions of one of several executors, devisees, or legatees are inadmissible in an attack on the validity of a will, because the interests of the parties are several and not joint (*Estate of Dolbeer*, 149 Cal. 245, 86 Pac. 695; *Id.*, 153 Cal. 662, 96 Pac. 266), this rule has no application where this condition of severalty of interests does not exist. This is the situation here. The appellant being the sole executor, devisee, and legatee, his interest alone could be affected by either his admissions or his declarations. Our Code (Code Civ. Proc. § 1870, subd. 3) provides that: "An act or declaration of another, in the presence or within the observation of a party, and his conduct in relation thereto," may be given in evidence. The statement of the testatrix at the time of the quarrel between the brothers, namely, that Hiram L. Ricks had told her of such an agreement at the time the division was made, was made in his presence. If it was not true, it called

for a denial by him. As it was not denied, it was only natural to consider it as an admission of the truth of the statement by the only one to be affected by it—an acquiescence in the truth of the fact stated, implied from his conduct in allowing it to go unquestioned. And if the jury believed the testimony of contestant as to what occurred at the quarrel they had a right to treat this admission of the appellant—sole beneficiary under the codicil—as proof of the fact itself that he had told his mother what she stated he had at the time she said he did, and to consider it as bearing directly on any issue before the jury to which it was relevant. As to the express declarations of Hiram L. Ricks, they were admissible for the same general reason. The same Code section referred to (subdivision 2 thereof) declares that evidence may be given of the "act, declaration or omission of a party as evidence against such party." Hiram L. Ricks was a party to the proceeding and the sole party in the attack on the validity of the codicil whose interests would be affected by the admission in evidence of his declaration, so that the general rule against the admission of the declarations of one of several executors, devisees, or legatees, where their interests are several, has no application.

[9] Nor was the appellant entitled to have the jury instructed that his declarations were admissible and could be considered only by the jury for the purpose of showing the feelings and relations existing between the parties. The admissions and declarations against interest of the sole beneficiary are admissible to establish any fact in issue upon the validity of a will which they have a tendency to establish, and are not subject to the limitation appellant claims for them.

[10] As to the declarations of testatrix, the court recognized and observed in instructing the jury the well-established rule that, when such declarations are not part of the *res gestæ*, they are not admissible to prove, nor may they be considered by the jury for the purpose of showing, the exercise of undue influence, although such declarations were entitled to be shown and considered for the purpose of illustrating the state of mind of the testatrix when that state of mind was material. In *re Calkins*, 112 Cal. 301, 44 Pac. 577; *Estate of Arnold*, 147 Cal. 593, 82 Pac. 252; *Estate of Thomas*, 155 Cal. 488, 101 Pac. 798; *Estate of Snowball*, 157 Cal. 301, 107 Pac. 598. The court instructed the jury that, "upon the question of undue influence, statements of the testatrix made either before the execution of the codicil or after, and which tend to throw light on her condition of mind, her feelings, and affections for her sons and her relations with them, are admissible for this purpose. But, as proof of undue influence, the evidence of such statements is hearsay and incompetent, and should not be considered by you. They afford no substantive proof of undue influence, and cannot be

admitted for such purpose, and, before contestant can recover on the ground of undue influence, it is necessary that he should prove that undue influence was in fact actually exerted upon the testatrix by other evidence than her own declarations." The declarations and statements of the testatrix had a tendency to illustrate her relations to her children, her feelings towards them, and her condition of mind or belief as to their respective claims or rights to participate in her estate, and the instructions properly and clearly limited the jury to a consideration of the statements or declarations of testatrix for this purpose alone.

The judgment and order appealed from are reversed.

We concur: HENSHAW, J.; SHAW, J.; ANGELLOTTI, J.; MELVIN, J.

On Rehearing.

PER CURIAM. Rehearing denied.

BEATTY, C. J. (dissenting). I dissent from the order denying a rehearing of this cause because in my opinion there was evidence in support of the contest of the codicil, which, if true, was sufficient to warrant the finding that its execution was procured by undue influence. Whether this evidence was true or not was a question for the jury. Evidently they believed it, and disregarded the conflicting evidence.

160 Cal. 486

BOLAND v. ALL PERSONS, ETC.

Appeal of STEPHENS.

(S. F. 5,230.)

(Supreme Court of California. Aug. 4, 1911.)

1. APPEAL AND ERROR (§ 1024*)—REVIEW—FINDINGS—OPENING DEFAULT JUDGMENT—AFFIDAVITS.

Where the affidavits on a motion to open a default judgment are conflicting, those in favor of the prevailing party must on appeal be taken as true.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4027; Dec. Dig. § 1024.*]

2. JUDGMENT (§ 142*)—OPENING DEFAULT—JUDGMENTS WHICH MAY BE OPENED.

Code Civ. Proc. § 473, provides that, when summons has not been personally served on defendant, the court may within one year allow such defendant or his legal representative to answer to the merits. The plaintiff and defendant in an action to establish title to land resided in the same house on the land in controversy. Upon action by plaintiff, notice was posted upon the front door and remained there for a considerable time. The defendant, though bedridden, was able to transact business, and was informed of the notice, and was asked if she wanted to oppose the action. She stated that she did not, and that she had conveyed the lot to plaintiff several years before, and that he had begun the action in accordance with her wishes. Defendant was never personally served with process. Held that, after the defendant's death, the court properly refused to set aside a default

judgment and allow defendant's personal representatives to defend.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 253; Dec. Dig. § 142.*]

3. JUDGMENT (§ 142*)—OPENING DEFAULT—MERITORIOUS CAUSE OF ACTION.

Under Code Civ. Proc. § 473, providing that, when a defendant has not been personally served, the court may allow such defendant or his legal representative after the rendition of any judgment to answer to the merits of the original action, to entitle a defendant seeking to set aside a default, he need only show that he has not been personally served and has a good cause of action which he could have presented had he been informed of the pendency of the action, for there is no presumption of negligence as in cases where there has been personal service.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 253; Dec. Dig. § 142.*]

4. JUDGMENT (§ 139*)—OPENING DEFAULT—DISCRETION OF COURT.

The determination whether a defendant in an action in which there was no personal service was guilty of laches in failing to appear, there being a showing, in opposition to the motion under Code Civ. Proc. § 473, to open the default, that he had actual notice of the action in time to have entered an appearance and presented his defense, rests in the discretion of the trial court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 265-268; Dec. Dig. § 139.*]

In Bank. Appeal from Superior Court of the City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by James B. Boland against all persons claiming title to certain land. After a judgment by default, Dolores V. Stephens, individually and as administratrix of Micaela A. de Morgan, wanted to set aside a default judgment and to open the cause, and from a denial thereof, she appeals. Affirmed.

W. M. Cannon (S. W. Molkenbuhr, of counsel), for appellant. Morrison, Cope & Brobeck (Edward Hohfeld, of counsel), for respondent.

SHAW, J. In a proceeding under the so-called McEnerney act (Stats. 1906 [Ex. Sess.] p. 78), the plaintiff obtained judgment declaring him to be the owner in fee of a certain lot in San Francisco. The judgment was rendered upon default on May 27, 1907. On December 2, 1907, Dolores V. Stephens, claiming as sole heir of Micaela A. de Morgan, deceased, served and filed a notice of motion to be made on December 13, 1907, to set aside the judgment and open the cause for further proceedings in defense. On May 26, 1908, she was duly appointed as the administratrix of the estate of Micaela A. de Morgan, and as such, on the same day, she served and filed a notice of motion to be made on May 27, 1908, to set aside the judgment and allow her to answer. Both motions were denied by the court. From the orders denying them, Dolores V. Stephens, for herself and as administratrix, appeals.

More than six months had elapsed after the rendition of the judgment before either

motion was made. They were therefore too late as applications for relief on the ground of mistake, inadvertence, surprise, or excusable neglect, under the first clause of section 473 of the Code of Civil Procedure. *Brownell v. Superior Court*, 157 Cal. 710, 109 Pac. 91; *Thomas v. Superior Court*, 6 Cal. App. 631, 92 Pac. 739.

Another clause of the section provides that, "when from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action." The appellant claims that the application was sufficient under this clause, and that upon the facts shown at the hearing of the respective motions each of them should have been granted. There was no personal service of the summons on Micaela A. de Morgan, nor was she named in the affidavit filed with the complaint as required by sections 5 and 6 of the act, as a person claiming a lien upon or interest in the lot. The motions were heard together and upon the same affidavits. It is unnecessary to consider any question except the proposition that Micaela A. de Morgan was barred during her lifetime by reason of her laches and acquiescence in the proceedings. Upon this ground we think the motions were properly denied.

The summons was duly issued in the action on January 24, 1907. The first publication thereof was made on January 29, 1907, and the last publication on April 2, 1907. The time fixed by section 8 of the act, within which Micaela A. de Morgan was required to make answer if she claimed any interest in the property, expired on April 29, 1907. She died on May 10, 1907, without having entered her appearance, or taking any steps to preserve any rights she may have had in the property. Seventeen days thereafter the judgment was rendered.

[1] The motion was heard upon affidavits. In such cases, where the affidavits are conflicting, "those in favor of the prevailing party must be taken as true, and the facts therein stated must be taken as established." *Doak v. Bruson*, 152 Cal. 19, 91 Pac. 1002, and cases there cited.

[2] The following facts were shown by the affidavits filed in opposition to the motion: For several years prior to the beginning of the action, and from thence until her death, she and Boland lived in the same dwelling; the same being situated on said lot. A copy of the summons was posted on a door in the front part of the house on January 31, 1907, and remained so posted for a considerable time thereafter. Micaela A. de Morgan was confined to her bed during the time between the beginning of said action and her death, but she was capable and able to transact business and she was a woman not easily in-

fluenced by others. She was informed of the notice posted on the door of the house, and of the action begun by the plaintiff to establish his title to the lot, and she was asked if she wanted to appear in the action to oppose it. She stated, in effect, that she did not, that she had conveyed the lot to the plaintiff several years before for considerations satisfactory to herself, that he had begun the action in accordance with her desire, in order to restore his title of record, and that she was satisfied that he should have the property. This notice and the pendency of said action was called to her attention several times by different persons during the time within which she might have appeared. There was not even an attempt on the part of the appellant to contradict these statements, or to show that Mrs. de Morgan had no notice of the pendency of the action, or that she was in any manner deceived in regard to the nature of the action. No excuse was offered in her behalf. It is entirely clear that, if she had lived and instituted these proceedings herself, she would have been precluded from obtaining any relief against the judgment thus rendered with her knowledge and at her request or desire. The provision in question was not designed for the relief of persons not served with summons, who permit a judgment to be taken against them with their full knowledge and consent. The affidavits also show that Dolores V. Stephens was informed of the pendency of the action soon after it was begun and that she endeavored to induce Mrs. de Morgan to make a defense thereto, but that Mrs. de Morgan refused to do so. She denied this, but she offered no excuse for the delay except her alleged ignorance of the pendency of the action until "long after" the judgment was rendered.

[3] In applications for relief under this clause of the section there is no presumption of neglect, as in cases where there has been personal service. The party is not required, in the first instance, to do more than show that he has not been personally served and that he has a good defense to the action on the merits which he could have presented had he been informed of its pendency. *Gray v. Lawlor*, 151 Cal. 354, 90 Pac. 691.

[4] But his opponent may show in opposition to the application that the applicant had actual notice of the action in time to have entered an appearance and present the defense, and that the failure to do so was owing to his neglect or to his consent to the judgment. In that event a case arises for the exercise of the discretion of the court, and it must determine whether or not the laches is of a character that should preclude the relief. *Bogart v. Kiene*, 85 Minn. 262, 88 N. W. 748; *Mueller v. McCulloch*, 59 Minn. 409, 61 N. W. 455; *Keenan v. Daniells*, 18 S. D. 102, 99 N. W. 853; *Blyth v. Swenson*, 15 Utah, 352, 49 Pac. 1027; *Jordan v. Hutchinson*, 39 Wash. 373, 81 Pac. 867. The court

below was justified in refusing the relief upon the facts shown in opposition thereto. They would support a finding that Mrs. de Morgan consented to the judgment and desired it.

The orders appealed from are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

160 Cal. 537

PEOPLE v. BABCOCK. (Cr. 1,653.)

(Supreme Court of California. Aug. 8, 1911.
Rehearing Denied Sept. 6, 1911.)

1. INDICTMENT AND INFORMATION (§ 189*)—OFFENSES INCLUDED—STATUTORY RAPE—ASSAULT WITH INTENT.

A charge of statutory rape includes the offense of assault with intent to commit rape without force.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 588; Dec. Dig. § 189.*]

2. RAPE (§ 53*)—STATUTORY RAPE—ASSAULT WITH INTENT—EVIDENCE.

Evidence on a prosecution for statutory rape held to show an assault with intent to commit rape, provided the female was under the age of consent.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 78-81; Dec. Dig. § 53.*]

3. RAPE (§ 52*)—STATUTORY RAPE—AGE OF CONSENT—EVIDENCE.

Evidence on a prosecution for statutory rape held to warrant a finding that the female was under the age of consent.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71-74, 76; Dec. Dig. § 52.*]

4. WITNESSES (§ 388*)—IMPEACHMENT—INCONSISTENT STATEMENTS—FOUNDATION.

No foundation having been laid for impeachment of the mother of prosecutrix in statutory rape who had testified to prosecutrix being under 16 years old, the mother of another girl, over that age, could not testify as to the relative ages of the two girls, it appearing her only knowledge thereon was from a statement of prosecutrix's mother, in a casual conversation, prior to the occurrence, about the two girls.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1233-1242; Dec. Dig. § 388.*]

5. CRIMINAL LAW (§ 670*)—TRIAL—ACQUAINTING COURT WITH OBJECT OF QUESTION.

The question asked by counsel for defendant in statutory rape at the end of a long examination, in no way touching the age of prosecutrix, as to how she appeared at the time of the trial as compared with her appearance at the time of the event, so far as age was concerned, and whether she was dressed differently, not indicating materiality of the evidence sought, defendant should have indicated the precise object of the question; so that, in the absence of any such action on his part, sustaining an objection of immateriality and incompetency was justified.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1593; Dec. Dig. § 670.*]

6. CRIMINAL LAW (§ 762*)—INSTRUCTIONS—INTIMATION AS TO JUDGE'S OPINION ON FACTS.

The court in a statutory rape case having by proper instructions left to the jury the question of the age of the female, with instructions to find for defendant in case they had any

reasonable doubt as to whether or not she was under the age of 16 years, the use of the words "child in question," in another instruction, the object of which was only to inform the jury that the offense of assault with intent to commit rape was included in the charge of rape and of the elements of the two offenses, could not have been understood by the jury as an intimation of an opinion of the judge that the girl was under that age.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 762.*]

7. CRIMINAL LAW (§ 1171*)—APPEAL—HARMLESS ERROR—PRESUMPTION.

Though at the time of the birth in S. county of prosecutrix in statutory rape, whose age was in issue, there was a law requiring physicians and professional midwives to keep a registry of the time of each birth at which they assisted, and to file it with the county recorder, the statement of the district attorney in his argument in reply to a claim that the prosecution had not shown the girl's age by producing the records of birth in S. county that the law requiring registration of births was not in force at that time will be considered harmless, as it must be assumed that if there was such a record of prosecutrix's birth favorable to defendant it would have been produced by him, and therefore none having been produced, that there was none.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

8. CRIMINAL LAW (§ 1037*)—APPEAL—IMPROPER REMARKS OF DISTRICT ATTORNEY—NECESSITY OF INVOKING ACTION BY COURT.

Defendant, having simply noted an exception to an improper remark of the district attorney in argument, and not having asked that the jury be instructed that it was improper and to disregard it, cannot complain thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645; Dec. Dig. § 1037.*]

9. CRIMINAL LAW (§ 929*)—NEW TRIAL—MISCONDUCT OF BAILIFF.

Defendant is not entitled to a new trial on a showing merely that a bailiff, who, on two occasions, had custody of the jury, expressed to various persons during the trial his opinion that defendant was guilty; it not being shown that any of these statements were made in the presence or hearing, or came to the knowledge, of any juror.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2272-2279; Dec. Dig. § 929.*]

Melvin, J., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

O. F. Babcock was convicted of assault with intent to commit rape, and from the judgment and from an order denying a motion for new trial appeals. Affirmed.

D. K. Trask and Edward A. Regan, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ANGELLOTTI, J. The defendant was informed against for the crime of rape, alleged to have been committed upon a female under the age of 16 years, and upon his trial under such information was convicted of the crime of "assault with intent to commit the

crime of rape." From the judgment of imprisonment pronounced on said conviction and from an order denying his motion for a new trial, he appealed to the District Court of Appeal, and such appeals have been regularly transferred to this court for hearing and determination.

[1] The particular kind of rape charged by the information was that defined by subdivision 1 of section 261, Penal Code, as follows: "Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, * * * (1) where the female is under the age of sixteen years." It is not disputed, of course, that in such a case neither force nor violence is essential to the commission of the crime of rape, or that it is immaterial that the act of sexual intercourse was with the full consent of the female. She is below the age of consent, and, as it has been put, "the law resists for her." *People v. Roach*, 129 Cal. 34, 61 Pac. 574. In view of this well-established rule, it is now so firmly settled in this state as to be no longer open to question that one who lays his hands upon such a female, with the intent and for the purpose, then and there, to accomplish an act of sexual intercourse with her, is by so doing guilty of an assault with intent to commit rape, even though he does not use or intend in any event to use any force or violence, and the female in fact offers no resistance whatever, or even expressly consents to all he does. The offense is complete when he has thus laid his hands upon her with the intention of then and there accomplishing such purpose, and it is entirely immaterial that he subsequently voluntarily desists, without accomplishing his purpose. As said in *People v. Courier*, 79 Mich. 366, 44 N. W. 571, quoted approvingly in *People v. Roach*, supra: "In cases of this kind it is not necessary that it shall be shown * * * that the accused intended to gratify his passion in all events. If he intended to have sexual intercourse with the child, and took steps looking toward such intercourse, and laid hands upon her for that purpose, although he did not mean to use any force, or to complete his attempt if it caused the child pain, and desisted from his attempt as soon as it hurt, he yet would be guilty of an assault with intent to commit the crime charged in the information." The following cases in this state support the conclusions we have stated: *People v. Johnson*, 131 Cal. 511, 63 Pac. 842; *People v. Vann*, 129 Cal. 118, 61 Pac. 776; *People v. Roach*, 129 Cal. 33, 61 Pac. 574; *People v. Gomez*, 118 Cal. 326, 50 Pac. 427; *People v. Lourintz*, 114 Cal. 628, 46 Pac. 613; *People v. Verdegren*, 106 Cal. 211, 39 Pac. 607, 46 Am. St. Rep. 234; *People v. Gordon*, 70 Cal. 467, 11 Pac. 762. The rule enunciated in such cases as *People v. Fleming*, 94 Cal. 308, 29 Pac. 647, is not applicable where the female is under the age of consent. It neces-

sarily follows that the offense of assault with intent to commit rape is included in such a charge of rape as was made by the information in this case. The case of *People v. Allen*, 144 Cal. 298, 77 Pac. 948, is in no way in conflict with what we have said. The affirmance of the refusal in that case to give an instruction that the jury might convict the defendant charged with rape of the lesser offense of assault with intent to commit rape was clearly based upon the assumption that the evidence in that particular case was of such a nature that the only possible conclusion was that he was either guilty of rape or not guilty of any offense, just as in certain cases a refusal to instruct as to manslaughter where the information charged murder has been upheld.

[2] It follows from what we have said that according to the defendant's own testimony, as given on his trial, he was guilty of an assault with intent to commit rape, provided the female was at the time of the occurrence under the age of 16 years. The testimony of the witnesses for the people tended to show that he fully accomplished an act of sexual intercourse with her. His own testimony was that the act was not accomplished. But he admitted that following a conversation between them a few hours before she came to his office on the day named in the information, ostensibly with the view of securing employment, and remained there several hours, during which each of them had four or five drinks of apricot brandy; that finally, with the intent to then and there have sexual intercourse with her and for that purpose alone, he laid his hands upon her, and was proceeding to accomplish the act, when, by reason of the apparent illness of the girl, due to the excessive drinking of the brandy, he voluntarily desisted. Thus, according to his own testimony, he was guilty of assault with intent to commit rape, if the girl was then under 16 years of age, and this is the offense of which he was convicted by the jury.

[3] It thus appears that the only material question of fact in the case as to which there was any dispute was whether the girl was under the age of 16 years at the time of the occurrence, which was November 20, 1909. The evidence introduced by the district attorney on this question was to the effect that she was born in San Diego county, Cal., on February 6, 1894. The evidence to this effect was given by the girl herself, her mother, her grandmother, and the nurse who attended her mother at her confinement. The testimony of the nurse was fortified by a written memorandum which she said she had made at the time. The evidence introduced by defendant on this point consisted of the testimony of three witnesses to the effect that in casual conversations had at times shortly preceding November 20, 1909, the girl's mother had said that the girl was 16 years old, and the testimony of

one witness to the effect that the girl had told her that she was five or six months younger than the witness, which would have made her 16 at the time of the occurrence. Whatever conflict in the evidence was created by this testimony was, of course, purely a question for the jury and the trial court, for it is clear that the evidence was amply sufficient to support the conclusion that the girl was under the age of 16 years on November 20, 1909.

[4] A careful examination of the record develops no prejudicial error in the rulings of the court in the matter of the admission or exclusion of evidence material to the issue of the age of the girl. Mrs. Spaulding, an acquaintance of the girl and her mother for a few months only preceding the occurrence, was asked how the age of the girl compared with that of her own daughter, who was 16 on March 15, 1909. It was apparent from her testimony that her only knowledge on that question was such as she may have acquired by reason of a statement of the girl's mother, as to the girl's age, made in a casual conversation about the two girls. No foundation for any impeachment of the mother by Mrs. Spaulding had been laid. The purposed evidence of Mrs. Spaulding was thus inadmissible for any purpose, and the trial court did not err in striking out what she had already said in attempting to answer the question. Whenever the proper foundation had been laid for the impeachment of the mother on the question of her daughter's age by showing inconsistent statements, the trial judge allowed proof of the statements claimed to be inconsistent.

[5] Another witness who knew the girl prior to and on November 20, 1909, was asked by defendant's attorney how the girl appeared at the trial as compared with her appearance on and before November 20, 1909, so far as age was concerned, and also whether she was dressed differently on the trial from the way she dressed on and before November 20, 1909. Objections to these questions were sustained. The object of the proposed evidence was not stated to the trial court, and no statement was made as to the nature of the answers expected. Defendant's counsel simply asked the questions at the end of a long examination in no way touching the question of age, made no statement, in the face of the objection of immateriality and incompetency, as to what he expected to prove, and accepted the rulings of the court without comment. It is clear that answers to these questions would not necessarily have shown a condition of affairs material to any issue in the case. It was not suggested to the court that any change had been made in the appearance of the girl for the purpose of making her appear younger to the jury than she really was, or that would have such effect. We think that it was incumbent on defendant, under

the circumstances, to acquaint the trial court with the precise object of the questions, and that, in the absence of such statement on his part the court was justified in sustaining the objections. See *Spinks v. Clark*, 147 Cal. 453, 82 Pac. 45. There is certainly nothing in the record to indicate that the proposed proof was of the slightest importance to the defendant. While the girl was on the witness stand, she testified that she was not wearing her hair exactly as she did on November 20, 1909, but that she was wearing it "very similar." She said that she had no objection to dressing it as it was on that day, but the trial court refused to instruct her to do so, although requested by defendant's counsel to make such direction. There was no intimation by anybody that the hair was dressed at the time of the trial in such a manner as to make the girl appear younger than she, in fact, was, or that any change had been made in the method of dressing her hair for the purpose of producing that effect. The mere fact that she was wearing it at the time of the trial in a slightly different way from that used by her on and before November 20, 1909, was of no importance.

[6] The trial court clearly and definitely instructed the jury that it was for them to determine the question of the age of the female upon whom the offense was alleged to have been committed, and that, if they had a reasonable doubt as to whether or not at the time of the alleged intercourse the female was under the age of 16 years, they must give the defendant the benefit of such doubt and find him not guilty, even though satisfied that he had sexual intercourse with her. It is claimed, however, that by the use of the words "child in question" in another instruction on the offense of assault with intent to commit rape the trial judge intimated to the jury that he believed that the girl was under 16 years of age at the time of the occurrence. The sole object of this instruction was to inform the jury that the offense of assault with intent to commit rape was included in the charge of rape and of the elements essential to constitute such offense. There is to our minds nothing in this instruction, especially when considered in connection with the other instructions given, indicating that the term "child in question" was used by the judge, or could have been understood by the jury to have been used by the judge, as an expression or intimation of his opinion as to whether the girl was under the age of 16 years. The charge clearly left that question of fact solely to the jury, unembarrassed by even the slightest intimation of opinion on the part of the trial judge.

[7] Complaint is made that the district attorney was guilty of prejudicial misconduct in his closing argument. He said, apparently in reply to a claim made by defendant's attorney in argument, that the prosecution had

not shown the age of the girl by producing a copy of the record of births in San Diego county: "How foolish for counsel to stand here and ask why we did not bring the records from San Diego county. Well, gentlemen, every man is supposed to know the law, and that the law requiring registration of births was not in force at the time this girl was born, and therefore there is no official record of anyone who was born 15 years ago, except it is in the churches and family Bibles." Counsel for defendant noted an exception to the remarks of the district attorney, saying: "There is no evidence of any such fact." The district attorney's statement was not correct. There was a law in force at the time of the girl's birth requiring physicians and professional midwives to keep a registry of the time of each birth at which they assist professionally, and to quarterly file with the county recorder a certified copy of their register. Sections 3075, 3077, Pol. Code, as they then stood. Whether this law had been followed in the case of this girl, and consequently whether there was any official record in her case, did not affirmatively appear, but it is reasonable to assume that if such a record existed in regard to this girl, showing anything in regard to her date of birth that would assist defendant, it being as available to defendant as it was to the people, such record would have been produced by defendant. There was no pretence on the trial, or on the motion for a new trial or on this appeal, that there was, in fact, any official record in San Diego county showing anything inconsistent with the testimony of the witnesses for the prosecution as to the date of the birth of the girl. Under the circumstances, an appellate court should assume that there was no such record, and, this being so, it is impossible to see how defendant could have been prejudiced by the statement of the district attorney.

[8] Furthermore, defendant is in no position to avail himself of the claim of misconduct of the district attorney in this matter. He in no way invoked any action on the part of the trial court to obviate the effect of the statement, and the statement was of such a nature that any improper effect could have been avoided. He simply noted an exception to the remarks of the district attorney, as was the case in *People v. Shears*, 133 Cal. 159, 65 Pac. 295, where the district attorney made an improper statement. This court said: "This was improper, but its effect would have been removed if the defendant had asked the court to instruct the jury that it was improper, and to disregard it. He did not invoke the action of the court, but contented himself with excepting to the remarks of the district attorney." And the judgment was affirmed. There is no other specification of misconduct on the part of the district attorney that in view of the circumstances of this case requires notice.

[9] On the motion for a new trial, defend-

ant presented several affidavits to the effect that during the progress of the trial, and before the case was given to the jury, the bailiff of the court had expressed to various persons his opinion that the defendant was guilty of the offense charged. The jury was not in the custody of an officer during the progress of the trial, except during a recess for dinner just prior to the closing argument of the district attorney, and again when it retired to deliberate upon the verdict. This bailiff was the officer who had charge of the jury at such times. It was not made to appear that any of these statements of the bailiff was made within the presence or hearing of any juror, or came to the knowledge of any juror, and the bailiff's affidavit negatived any such condition. The trial court was amply warranted in concluding that no juror heard or knew of any statement made by the bailiff in this behalf. It follows that, however much we may condemn the action of the bailiff, it must be assumed here in accord with the conclusion of the trial court that no juror had any knowledge of the opinion so expressed, and that consequently defendant could not have been injured thereby. Complaint is also made in this connection that the court erred in placing the jury in charge of this bailiff during the recess already referred to and when it retired to deliberate upon its verdict. A complete answer to this claim is that the record does not show that defendant on either occasion made any showing of fact tending to prove that the bailiff had expressed any opinion relative to his guilt, or that the fact of disqualification had in any way been brought to the attention of the trial court. There was a mere charge that he had expressed such opinion, and no evidence whatever was offered in support thereof. The trial court did not err in refusing to sustain the charge in the absence of some showing to support it. The case of *People v. Fellows*, 122 Cal. 238, 54 Pac. 830, is, therefore, not in point.

There was no such showing of newly discovered evidence as to compel the granting of a new trial on that ground. In fact, the showing was of such a nature that we do not see how the trial court could well have held that there should be a new trial on account thereof.

What we have said disposes of all the points we deem it necessary to discuss. It is apparent from the record that defendant has had a fair and impartial trial upon the merits, and we can perceive no ground upon which an appellate court may properly reverse the judgment of the trial court or its order denying a new trial.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

MELVIN, J. I dissent. I think that the flagrant misconduct of the district attorney

deprived the defendant of a fair trial. Counsel for defendant in his argument asked why the prosecution had not produced the record of births from San Diego county, and invoked the presumption that "higher evidence would be adverse from inferior being produced." Section 1963, subd. 6, Code Civ. Proc. This he had the right to do, and the argument was most appropriate, for I regard record evidence of a birth higher than the mere recollection of a witness. In answer to this argument, the district attorney was permitted by the court to declare that at the alleged date of the birth of the prosecutrix there was no law requiring the registration of births. In this the district attorney was mistaken, but the court ratified the mistake by failing to notice the objection of defendant's counsel. Therefore the defendant was deprived of the benefit of the presumption, which very probably would have turned the scales in his favor. That the jurors did not believe the girl's testimony is evident from the fact that they did not find in accordance with her story that an act of sexual intercourse had been committed. They did believe defendant's account of the happenings in his office. The only question left for them to determine was the age of the girl. There was evidence strongly tending to contradict the girl's mother, and the prosecutrix herself, in that it showed, if believed, statements by them made prior to the trial that the girl was more than 16 years of age. The production of the record would have been, therefore, very illuminating to the jury, and the failure to produce it would have probably convinced the jurors that it would fail to corroborate the witnesses for the prosecution. The jurors would have been justified in such a conclusion as a result of the presumption above stated. In this condition of the case the district attorney threw the weight of his official dignity into an erroneous explanation of his failure to produce the record. That the incident deprived the defendant of a clear right to the benefit of the presumption can scarcely be doubted, and that the error was most harmful to him seems to me to be absolutely certain.

I think the judgment should be reversed.

160 Cal. 530

SIMPSON v. POLICE COURT OF CITY OF RIVERSIDE et al. (L. A. 2,670.)

(Supreme Court of California, Aug. 8, 1911.)

1. PROHIBITION (§ 3*)—COURTS—EXISTENCE OF ADEQUATE REMEDY BY APPEAL—"PLAIN, SPEEDY AND ADEQUATE REMEDY IN THE ORDINARY COURSE OF LAW."

Riverside City Charter (St. 1907, p. 1330) § 193, creates a police court, and gives it jurisdiction, concurrent with the justices' court, of all civil actions and proceedings arising within the city limits. Defendant in an action in that court to recover on a note, after his demurrer for want of jurisdiction had been overruled, applied for a writ of prohibition against

the police court and the judge thereof. Code Civ. Proc. § 1102, defines the writ of prohibition and its effect. Section 1103 provides that the writ may be issued to an inferior tribunal in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law, and section 974 gives an appeal from the judgment of a justice's or police court. *Held*, that the prohibition was properly denied, because under section 974 the applicant had a plain and adequate remedy at law by appeal.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4-19; Dec. Dig. § 3.*]

2. PROHIBITION (§ 34*)—RIGHT OF REVIEW—PARTIES AGGRIEVED.

Where a writ of prohibition has been granted by the superior court against the police court on the ground of want of jurisdiction after relator's demurrer to the complaint in a suit in that court on the same ground had been overruled, and the grant of the writ was erroneous because of the existence of a remedy by appeal, the police court is aggrieved so as to warrant an appeal, even though it lacked jurisdiction of the suit before it which it was prohibited from acting on.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 83; Dec. Dig. § 34.*]

Beatty, C. J., and Angellotti, J., dissenting.

In Bank. Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Application by A. Simpson for a writ of prohibition to be directed against the Police Court of the City of Riverside and G. A. French, judge thereof. From a judgment of the superior court granting a peremptory writ of prohibition, the defendants appeal. Judgment reversed, with directions to the superior court to dismiss the proceeding.

Miguel Estudillo, for appellants. Chas. R. Gray, for respondent.

SLOSS, J. This is an appeal from a judgment of the superior court awarding a peremptory writ of prohibition. An action was commenced in the police court of the city of Riverside by E. Carlin against A. Simpson (respondent herein) to recover \$125 alleged to be due upon a promissory note. Simpson appeared and demurred to the complaint, upon the ground that the police court had no jurisdiction of the subject-matter of the action. The demurrer being overruled, this proceeding was instituted in the superior court to prohibit the police court and the judge thereof from proceeding further in the cause.

[1] The charter of the city of Riverside provides for the creation of a police court, and undertakes to vest in that court jurisdiction, concurrent with that of the justices' court, "of all civil actions and proceedings arising within the corporate limits of the city and which might be tried in said justices' court." Section 193, Stats. 1907, p. 1330. The contention of the respondent is that this provision is ineffectual as a grant of jurisdiction in cases of the kind here involved. Regardless of the merits of this contention, we think the writ of prohibition should have been denied in the court below,

for the reason that the petitioner, Simpson, had a plain, speedy, and adequate remedy in the ordinary course of law for any act to be done in excess of the jurisdiction of the police court. Code Civ. Proc. §§ 1102, 1103. An appeal may be taken to the superior court on questions of law or fact, or both, from a judgment rendered in a civil action in the police court. Code Civ. Proc. § 974. That such appeal is a plain and speedy remedy is not questioned. We think it clear, too, that the remedy is entirely adequate.

In support of this conclusion it will not be necessary to do more than to refer to the recent decision of the District Court of Appeal for the First Appellate District in *Hamberger v. Police Court of the City of Fresno*, 12 Cal. App. 153, 106 Pac. 894, 107 Pac. 614. In that case, which was in its facts precisely similar to the one at bar, the court held that the writ of prohibition was properly denied for the reason above stated, and cited authorities to support its ruling. An application for a hearing in this court was denied. The chief justice filed an elaborate opinion in support of his dissent from the order refusing to transfer the cause, and in that opinion expressed his view that an appeal which could not be carried beyond the superior court is not such an adequate remedy as to bar the petitioner's right to resort to a writ of prohibition, in which proceeding he might have the question at issue ultimately determined by the highest court in the state. But, notwithstanding the forceful presentation of this position, a majority of the court took the other view and agreed with the District Court of Appeal that prohibition would not lie. The court below therefore erred in granting the writ, for the reason that the plaintiff had a plain, speedy, and adequate remedy in the ordinary course of law.

[2] This being so, we will not enter into any examination of the question of the jurisdiction of the police court of the city of Riverside. Even if we should upon such an examination conclude that that court was without jurisdiction, it could not be said that the error of the superior court in granting a writ of prohibition was without prejudice to the appellant. The appellant is the police court. It is not a party to the action of Carlin against Simpson, and has no direct interest in the outcome of that action. It has, however, a right to appeal from any judgment against it prohibiting it from proceeding in that action, and has a right to be relieved from any writ improperly issued so prohibiting it. Whether acting within or without its jurisdiction, it is subject to prohibition only in cases where, under the statute, prohibition will properly lie. It is as much injured by a writ of prohibition granted at the suit of one having a plain, speedy, and adequate remedy in the ordinary course of law as by a writ granted in a case where it is acting within its jurisdiction.

The judgment is reversed, with directions to the superior court to dismiss the proceeding.

We concur: SHAW, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

ANGELLOTTI, J. I dissent. I am in entire accord with the views expressed by the District Court of Appeal in deciding this case, to the effect that the police court of the city of Riverside is without jurisdiction of the civil case, action in which by said police court it was sought to restrain by this proceeding in prohibition. Under such circumstances, I quite agree with the District Court of Appeal that a reversal of the judgment of the superior court granting a writ of prohibition should not be had, even if we assume, in accord with some of the decisions, that the writ might have been denied upon the ground that the parties seeking it had a plain, speedy, and adequate remedy by appeal. No good purpose can be subserved by permitting the police court to hear and determine the case on its merits, with the consequent expense and inconvenience to both parties, if the decision of that court ought to be set aside on an appeal to the superior court, on the ground of want of jurisdiction. See *Campbell v. Durand* (Utah) 115 Pac. 986, 990. Further, the question whether a plain, speedy, and adequate remedy by appeal exists in any particular case is, to my mind, one largely within the discretion of the court to which the application for prohibition is made. The mere fact that there is an appeal given by the law is not necessarily sufficient to bar the remedy by prohibition. The remedy by appeal must always be plain, speedy, and adequate, and whether it is of such a nature must depend on the facts of each particular case. We have nothing in the record of this case that compels the conclusion that there was an abuse of discretion on the part of the court in determining that the remedy by appeal was not a plain, speedy, and adequate remedy.

BEATTY, C. J. I dissent. No effort is here made to refute the proposition which I attempted to sustain by my opinion in *Hamberger v. Police Court* (reported in 12 Cal. App. 153, 106 Pac. 894, 107 Pac. 614), and I may assume it to be conceded that the doctrine of that case necessarily results in denying to the citizens of California a right of appeal to this court secured to them by the Constitution. By the Constitution the superior court is given original jurisdiction, and this court and the District Court of Appeal also are given appellate jurisdiction in prohibition—that is to say, in all original proceedings properly instituted for the purpose of preventing a threatened usurpation of judicial authority. But a police court, having no jurisdiction of the subject-matter,

requires a citizen to answer a suit upon a pecuniary obligation. Objection is properly made by demurrer to the jurisdiction. The objection is overruled and the defendant required to answer. He petitions for a writ of prohibition, but it is denied by the superior court upon the sole ground that an appeal to that court from "the judgment sought" is a plain, speedy, and adequate remedy for his grievance. In answer to this the petitioner urges that such an appeal would make the superior court his last resort in case the jurisdiction of the police court should there be sustained, whereas it is his desire and intention to avail himself of his constitutional right of appeal to the higher courts for a final determination of the authority of the police court to compel him to answer. To this there is no reply except that his deprivation of a constitutional right is too small a matter to be worth discussion. I am still unreconciled to this method of disposing of the question. But, conceding that my scruples on this point may be overnice, it is clear, as pointed out by Justice ANGELLOTTI, that there is a material difference between this case and the Fresno Case. The objection to prohibition upon the ground of other plain, speedy, and adequate remedy addresses itself to the discretion of the tribunal whose restraining power is invoked, it is not jurisdictional, and, whether it has granted or denied the writ, its order will not be reversed except for abuse of discretion. That the allowance of the remedy is discretionary is a doctrine thoroughly established by the cases decided in this court. The cases of *Lindley v. Superior Court*, 141 Cal. 220, 74 Pac. 765, and *Ophir Company v. Superior Court*, 147 Cal. 467, 82 Pac. 70, were precisely the same except in the matter of convenience to the courts and expense to the parties, yet in one the writ was granted and in the other denied. It does not follow, therefore, that, because the denial of the writ was affirmed in the Fresno Case, the allowance of the writ must be reversed in this case. If Judge Densmore had reason to conclude that a trial in the police court, followed by an appeal to his court, would involve costs and trouble out of all proportion to the amount in controversy, and if he could see that the question of jurisdiction, which sooner or later he must decide, could be solved in the original proceeding as conveniently and more expeditiously and with less expense than after a trial and appeal, how can it be said that he abused his discretion in allowing the writ? The question to be decided was purely a question of law. The allegations of the petition brought it within his jurisdiction, and the course he pursued in deciding it in advance of a trial and appeal was recommended by the same considerations which justify the ordinary practice in civil and criminal actions of determining the

issues of law before proceeding to try the issues of fact. His course, in short, if sustained, would have resulted in a saving of time and money to the parties, and would have made a useful precedent in like cases. It would also have settled the important question as to the jurisdiction of the police court before the statute of limitations became a bar to a new action by Carlin in a justice's court if that became necessary. In view of the fact that the superior court, the District Court of Appeal, and Justice ANGELLOTTI (the only member of this court who has considered the question) are all of the opinion that the police court of Riverside has no jurisdiction of civil actions, it seems inevitable that any judgment against the defendant in the action commenced there must be reversed on appeal, after it is too late for the plaintiff to commence a new action for the same cause in a court of competent jurisdiction. It would seem, therefore, that the plaintiff in that action was even more deeply interested than the defendant (petitioner here) in the speedy determination of a question so vitally affecting his interests, and this fact lends additional support to the action of the superior court.

Finally, I am obliged to say that the reason assigned for setting aside the judgment of the District Court of Appeal in this case appears to me to be scarcely adequate. The appeal from the superior court was properly taken to that court. There the question as to the jurisdiction of the police court was carefully considered and the conclusion reached, in accordance with that of the superior court, that it had no jurisdiction of civil actions—and, although they agreed with the appellant that prohibition was not the appropriate remedy, they nevertheless affirmed the judgment of the superior court upon the ground that the error in issuing the writ was without prejudice. I quote the last paragraph of their opinion: "While we concur with appellant in his contention that the court below erred in granting a writ of prohibition where the right of appeal afforded a complete and adequate remedy, nevertheless, under section 475 of the Code of Civil Procedure, it is made our duty to disregard any error which does not affect the substantial rights of the parties, and no judgment shall be reversed by reason of any error unless it shall appear from the record that such error was prejudicial and that the party complaining and appealing sustained and suffered substantial injury. In our opinion, then, the police court of the city of Riverside having no jurisdiction, and any judgment rendered by such court being void upon its face, the appellant cannot be said to have suffered any substantial injury by the action of the court in prohibiting further proceedings in relation to such matter."

This reason for refusing to reverse the judgment of the superior court is deemed in-

sufficient by this court because, however just and sound that judgment may be upon the substantial merits of the controversy, it stands in the form of a writ "improperly" issued, and the police court's right of appeal is infringed unless it is relieved from it. It cannot, of course, be denied that the police court has the right of appeal from an adverse judgment in prohibition. The Constitution secures it in that right by the same clause that secures the right to one who invokes the remedy to protect him against judicial usurpation—the right pertains to the remedy, and is not secured to one party to the exclusion of the other. This solicitude for the right of a tribunal asserting a questionable jurisdiction to prosecute its appeal to this court from a judgment which rightfully restricts it to its proper functions seems somewhat excessive when compared with our indifference to the practical nullification of the right of appeal accorded by the same provision of the Constitution to one who justly complains that he is threatened by the process of a judicial usurper. He, it is held, in cases similar to this, can never get to this court on that question. His only remedy is an appeal to the superior court—an appeal which can be carried no farther.

And this scrupulous regard for the defendant's right of appeal from an adverse judgment in prohibition—in which I cordially sympathize—suggests a further consideration. Suppose the respondent had appealed to the superior court from the judgment of the police court, Judge Densmore would have reversed the judgment for the same reason that led him to issue the writ of prohibition, and the result would have been that the police court would have found itself practically divested of its jurisdiction in civil cases by a judgment in a collateral proceeding from which it would have had no appeal. If, therefore, it has a **rightful** claim to the disputed jurisdiction, the **remedy** elected by the respondent has preserved to the police court a right of appeal which otherwise it would have lost. Where, then, is the prejudice resulting from the improper issuance of the writ? The idea seems to be that strict regularity of procedure must be adhered to at all hazards, and that a court whose claims to civil jurisdiction can only be drawn in question *secundum artem* in a proceeding which it cannot defend has a real grievance if attacked in a proceeding which it can defend to the last ditch.

(160 Cal. 491)

HAUB v. LEGGETT et al. (S. F. 5,726.)
(Supreme Court of California. Aug. 4, 1911.)

1. EXECUTORS AND ADMINISTRATORS (§ 451*)—ACTIONS—FINDINGS—NEW TRIAL.

Where, in an action against an estate to recover \$1,500 for services to decedent, the an-

swer averred that the allowance of the claim by the executors and the judge of the superior court to whom it was presented for only \$500 was a bar to the recovery of more than that sum, but further denied the debt in excess of \$500, the court's failure to find as to the amount actually due was error, requiring a new trial if the allowance by the executors and court was not a bar to the action; the issue as to the amount being material requiring a finding thereon.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 451.*]

2. EXECUTORS AND ADMINISTRATORS (§ 241*)—ALLOWANCE OF CLAIM—EFFECT.

Code Civ. Proc. § 1497, provides that every claim, when allowed by the executors and judge of the superior court, must, within 30 days, be filed and ranked among the acknowledged debts of the estate to be paid in due course of administration. Section 1498, as amended by St. 1909, p. 147, permits the holder of a matured claim rejected by the executor or judge to sue thereon within three months after service of notice of rejection. Section 1503 provides that, if a claim be rejected in part, the creditor cannot recover costs in a suit to enforce it unless he recovers more than that offered to be allowed. Section 1504 provides that a judgment in an action upon a money demand against the estate only establishes the claim as if it had been allowed by the executor and a judge. Sections 1628 and 1622 require the executor to exhibit in his accounts all debts presented and allowed. Section 1636 permits any allowed claim exhibited to be contested by the heirs. Section 1647 requires the court to make an order for the payment of debts upon the settlement of the executor's accounts, and section 1649 makes the executor personally liable to creditors upon the making of an order for payment of debts. *Held* that, while a creditor of the estate may treat a partial allowance of his claim by the executors as a rejection of the entire claim and sue without presenting the claim to the judge of the superior court, he may, after having his claim partially allowed by the executors and such partial allowance approved by the judge, sue for the whole claim; an allowed claim not amounting to an absolute judgment so as to merge the whole claim into an order of allowance, and bar an action against the estate for the entire claim.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 849; Dec. Dig. § 241.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; **J. M. Seawell**, Judge.

Action by **Anna R. Haub** against **Joseph Leggett** and another, as executors of the estate of **Amanda M. Scales**, deceased. From an order denying a motion for a new trial after judgment for defendants, plaintiff appeals. Judgment and order reversed.

Fabius T. Finch, for appellant. **James G. Maguire**, for respondents.

SHAW, J. Appeal by plaintiff from an order denying her motion for a new trial.

The action is to recover \$1,500, alleged to be due plaintiff for services rendered and food supplied to the decedent in her lifetime. The evidence showed the following facts: Plaintiff presented to the defendants, as executors of the estate of said decedent, a claim for said sum for allowance as a claim

against said estate. The executors allowed it for only \$500, and indorsed thereon and signed a statement to that effect. Thereupon the plaintiff presented the claim, so indorsed, to the judge of the superior court, and requested him to act upon it. The judge allowed and approved it for \$500, and thereupon, at the request of the plaintiff's attorney, it was filed in the office of the clerk of the court. Thereafter, within the time allowed by law, this action was begun. Evidence was also given at the trial tending to prove the indebtedness.

The answer set up the allowance of the claim by the executors and the judge for \$500 only, as a judgment, or adjudication, of the controversy, and in bar of the right to recover more than that sum. It also denied the alleged debt as to the excess over \$500. The court made findings showing the presentation of the claim, the refusal to allow it for more than \$500 and the filing of the claim after such partial allowance, but made no finding upon the issues as to the merits of the claim. It was of the opinion that the allowance so made constituted a judgment for the amount allowed and a bar to any action upon the claim, and that therefore no further findings were necessary.

[1] One ground of the motion for new trial was that the decision is against law, in that the court failed therein to find upon material issues. If the aforesaid allowance of the claim is not a bar to a subsequent action upon the claim as a whole, then the other issues were material, and the new trial should have been granted upon that ground. *Swift v. Occidental, etc., Co.*, 141 Cal. 166, 74 Pac. 700; *Black v. Harrison H. Co.*, 155 Cal. 131, 99 Pac. 494; *Lyden v. Spohn Co.*, 155 Cal. 183, 100 Pac. 236.

[2] The executors, in support of the order appealed from, contend that the allowance of a claim by the executors and the judge, and the filing of it thereafter with the clerk, constitute a judgment upon the whole claim for the amount allowed, which has the effect of merging the claim in the order of allowance, so that under the familiar rule in regard to the merger of causes of action in judgments the claim ceases to exist except in its transformed state and is reduced to \$500. It is conceded that, if the claim as partially allowed had not been approved by the judge and filed, the plaintiff would have been at liberty to sue for the whole claim. The contention is that such approval by the judge and subsequent filing with the clerk is a complete estoppel preventing the plaintiff from claiming more than the part allowed.

The Code provides that every claim when allowed by the executor and judge must within 30 days thereafter "be filed in the court and be ranked among the acknowledged debts of the estate, to be paid in due course of administration." Code Civ. Proc. § 1497.

If a matured claim is rejected by the executor or judge, the holder is at liberty to bring suit thereon within three months after the date of its rejection, as the law was when these proceedings were taken. Code Civ. Proc. § 1498. As it is now, it is three months after service of notice of rejection. Stats. 1909, p. 147. If it is rejected by the executor or judge in part only and "the creditor refuse to accept the amount allowed in satisfaction of his claim," he cannot recover costs in such suit unless he recovers on the claim more than "that offered to be allowed." Code Civ. Proc. § 1503. A judgment in an action against the executor upon a money demand against the estate "only establishes the claim in the same manner as if it had been allowed by the executor or administrator and a judge." Code Civ. Proc. § 1504. The executor must in his accounts "exhibit all debts which have been presented and allowed." Sections 1628, 1622. Any allowed claim, so exhibited, may be contested by the heirs, and a trial by jury may be demanded thereon. Section 1636. Upon the settlement of such account the court must make an order for the payment of the debts (section 1647), and the executor thereupon becomes personally liable to each creditor therefor, and execution may issue against him (section 1469).

These provisions show that an allowed claim against an estate does not attain to the dignity and force of an absolute judgment until, upon the settlement of an account, an order is made directing the executor to pay it. Prior to that time it ranks as an acknowledged debt, but it is still subject to contest by the heirs. It has not become conclusive in favor of the claimant. The decisions of this court have always recognized the inconclusive effect of an allowed claim. In *Deck's Estate v. Gherke*, 6 Cal. 669, it was held that such allowance was conclusive upon the settlement of an account, in favor of an administrator who had paid the claim before filing such account. The decision was made in 1856. The aforesaid provision of section 1636 allowing the heirs to contest was not then in the statute. It originated in 1861. Stats. 1861, p. 647, § 80. This provision expressly changes the rule of *Deck's Estate v. Gherke*, supra, on this point. See *Estate of Fernandez*, 119 Cal. 579, 51 Pac. 851. Other decisions have repeatedly recognized the rule that the allowance of a claim is not the equivalent of an ordinary judgment. In *Beckett v. Selover*, 7 Cal. 228, 68 Am. Dec. 237, *Estate of Crosby*, 55 Cal. 582, *Estate of Hill*, 62 Cal. 186, *Weihe v. Statham*, 67 Cal. 84, 7 Pac. 143, and *Wingerter v. Wingerter*, 71 Cal. 111, 11 Pac. 853, it was held that such allowance does not bind the heir in a proceeding for the sale of land. In *Estate of Hadden*, 23 Cal. 363, it was doubted whether it was binding on a creditor upon a contest of an

account. In *Magraw v. McGlynn*, 26 Cal. 431, the court says such allowed claim is a judgment "of a qualified character only," and that the subsequent order for payment upon settlement of an account is the final judgment. In *Selna v. Selna*, 125 Cal. 357, 58 Pac. 16, 73 Am. St. Rep. 47, it was said that, even if it were conceded that the taking of an ordinary judgment for the price of land was a waiver of a vendor's lien therefor, nevertheless the allowance of a claim therefor would not waive the lien, although the statement of the claim did not mention the lien. In *Richardson v. Diss*, 127 Cal. 58, 59 Pac. 197, the court held that, after the allowance of a claim on a note bearing 15 per cent. interest, the claim would continue to bear that rate. In *Morton v. Adams*, 124 Cal. 229, 56 Pac. 1038, 71 Am. St. Rep. 53, the plaintiff had bought land which was subject to the lien of a judgment taken against the vendor in her lifetime. The judgment was presented as a claim against the vendor's estate and duly allowed. It was held that this allowance did not merge the former judgment as in the case of an ordinary judgment, the court saying that "the allowance of a claim is not in any true sense a judgment," and that the lien was not destroyed.

From these decisions it is seen that an allowed claim is held to be not technically a judgment, and that all that has ever been decided concerning it is that, for some purposes, it has the effect of a judgment. Practically the same question here involved was decided in *Walkerly v. Bacon*, 85 Cal. 137, 24 Pac. 638. William Walkerly, the decedent, had acquired property which was subject to a parol trust in favor of John Walkerly, the plaintiff, for money amounting to \$10,000. John filed a claim, as for a debt, against said estate for the whole sum, and it was duly allowed for \$5,000. He then brought suit in equity to enforce the trust as to the remaining \$5,000. This court decided that the allowance of the \$5,000 upon the claim did not estop plaintiff from suing to establish a trust as to the balance. It said that the allowance of a part of the claim had no greater effect than would the payment of such part when the plaintiff made the necessary demand before suit, and that, if such part was not accepted in full satisfaction of the demand, the plaintiff was at liberty to proceed to enforce any legal or equitable remedy for the balance. The court added this remark: "We know of no statute which estops even a simple creditor from bringing his action for that which was disallowed him simply because he has performed a duty required of him by law in filing with the records of the estate the allowance which was made in his favor." This remark, although perhaps obiter so far as it refers to a creditor having no lien or charge against the estate, appears to us to state a

correct principle of law, in view of the character which the statute and the decisions give to an order of the judge allowing a claim.

Such an order is made *ex parte*. There is neither a trial or hearing required. If the claim is allowed in full, it must be filed. If allowed in part only, it may properly be filed among the papers of the estate, for preservation as evidence in case the claimant should thereafter sue for the whole. We see no good reason for holding that such filing after a partial allowance by both executor and judge should constitute conclusive evidence of acceptance by the creditor of the part allowed in full satisfaction of his debt, or operate as a bar to a suit to recover the whole claim. It is not necessary to decide whether the suit in such a case should be for the whole claim, or only for the balance. If the creditor sues for the entire demand, giving no credit for the part allowed, as was done here, the executor or administrator can set up the allowance in the answer, as in this case was done, and the record will then necessarily show whether the judgment given is for the whole claim, or for the balance only. If it is for the whole, the allowance formerly made will be merged in such judgment. If for the balance only, the former allowance will stand. No injustice will be done in either case.

It is true the creditor may treat a partial allowance by the executor as a rejection of the entire claim, and may bring his suit at once without presenting it to the judge at all. But there is nothing in the statute which makes this the only mode of procedure or which declares that he cannot sue for the whole, if he first presents it to the judge and files it with the papers after the judge has approved the partial allowance of the executor. Nothing said in *Zirker v. Hughes*, 77 Cal. 235, 19 Pac. 423, is applicable here. It involved different statutes and proceedings. A claim against a county for \$952.77 was allowed for only \$640.77 by the board of supervisors, leaving a balance of \$312. The claimant then sued in a justice's court on the claim, asking judgment for \$299, and recovered judgment therefor, which was paid. He then sued Hughes, the county auditor, in mandamus to compel him to draw a warrant for the amount previously allowed. The judgment in the justice's court was pleaded in bar in the mandamus suit. It was held, in effect, that the statute required one claiming a debt against a county, if dissatisfied with a partial allowance thereof, to sue for his whole claim, and that, if he divided it into parts and sued for a part only, the judgment would merge the entire claim and bar the other part. This might be so if a similar course was pursued in the case of a claim against an estate. But here the suit was for the whole claim. Logically the rule stated in the *Zirker Case*, that the suit must be for the entire claim, would support

the mode here adopted and authorize a judgment for the whole claim, thus merging the partial allowance.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; MELVIN, J.; SLOSS, J.; LORIGAN, J.

16 Cal. App. 512

STEPHENS v. PACIFIC ELECTRIC RY. CO. (Civ. 984.)

(District Court of Appeal, Second District, California. June 26, 1911.)

1. MASTER AND SERVANT (§ 119*)—NEGLIGENCE—FURNISHING DANGEROUS APPLIANCES.

Defendant electric railway company by providing an electric grinder without a fuse attached to it between the motor and the power wire, which would have broken the current and prevented injury to plaintiff from the grinder flashing fire, even if the motor had been defective, was negligent in failing to furnish reasonably safe appliances to protect employes from danger; fuses being usually furnished on such appliances and adequately protecting employes from danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 210; Dec. Dig. § 119.*]

2. MASTER AND SERVANT (§ 103*)—MASTER'S DUTY—DELEGATION FOR APPLIANCES.

A master could not delegate the duty of furnishing a reasonably safe appliance, so that the fact that its foreman was ignorant of the necessity of an appliance to make the operation of an electric motor safe to an employé would not excuse the master from furnishing such appliance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.*]

3. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS.

Defendant cannot complain of the refusal to give a requested charge where the same matter was given in another instruction requested by him; it not being necessary to repeat instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Harry C. Stephens against the Pacific Electric Railway Company. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Affirmed.

Gibson, Trask, Dunn & Crutcher, J. W. McKinley, and Robert C. Gortner (Norman S. Sterry, of counsel), for appellant. Drew Pruitt and W. O. Morton, for respondent.

ALLEN, P. J. The action was one by an employé against his employer on account of alleged personal injuries. Plaintiff was employed by defendant and engaged in operating an electric grinder, the motor of which was fed from the trolley wires of defendant. The appliance provided by defendant for the work comprised a grinder, a motor, and wires feeding such motor, together with ground wires. This appliance had been in successful operation for some time and had

been used the preceding day by plaintiff. Before the accident, neither the foreman of defendant, under whom plaintiff was performing his duties, nor the plaintiff, knew of any defect in either the motor or the grinder. The morning of the accident, for some cause, the apparatus proved to be out of order. This the foreman attributed to a broken ground wire, the condition of which had been noticed before leaving the shop in the morning. The foreman directed plaintiff to repair this wire where broken, which was done, and, when plaintiff undertook to operate the machine, it developed that the defect was not cured. The foreman then, assisted by plaintiff, cleaned the commutator, and, believing that this would relieve the difficulty, the foreman directed plaintiff to try the machine and see if it would work, neither the foreman nor plaintiff at the time apprehending any danger in so doing. Plaintiff took the grinder in his hand and turned on the electric current, when the grinder "flashed fire," thus injuring plaintiff.

There is evidence warranting the finding of the jury that the appliance provided for the work, or that part thereof which connected the motor with the trolley wire, was not provided with a fuse. Had such fuse been provided, no injury of the character sustained by plaintiff would have resulted, even with a defective motor. Practically all of the other grinding appliances in use by defendant were controlled by a fuse, the purpose and office of which is to break the current through melting of the fuse, thus to obviate the danger of flashing or of other injury which might result to one operating the grinder. Neither the plaintiff nor the foreman were electricians. The foreman had had no experience in repairing electric apparatus, and plaintiff, when he turned on the circuit or undertook the use of the appliance furnished, had no appreciation of the danger incident to the use of the appliance in its then condition.

Under these facts, appellant contends that no negligence is shown, chiefly because of defendant's want of knowledge that the motor was out of order, and that both plaintiff and defendant had equal knowledge of the condition of such motor; it being claimed that under such circumstances plaintiff assumed the risk in undertaking its use in the condition shown. When it is considered that the appliance furnished plaintiff for his work embraced not only the motor, but the wire necessary to convey the current, as well as the grinder (Korander v. Penn Bridge Co., 116 Pac. 384), and that the injury resulted on account of a failure to properly equip the wire, the knowledge of defects in the motor alone does not necessarily affect the question of negligence. The injury resulted from the unsafe appliance provided by the master, the

danger in the use of which was not fully comprehended by the plaintiff.

[1] The defendant by providing an appliance which, in the absence of a fuse, was unsafe and dangerous to use, failed to discharge the duty of furnishing appliances reasonably safe and secure and to make such provision for the safety of employés as will reasonably protect them against the dangers incident to their employment. *Higgins v. Williams*, 114 Cal. 184, 45 Pac. 1041; *Starr v. Kreuzberger*, 129 Cal. 128, 61 Pac. 787, 79 Am. St. Rep. 92.

[2] This duty of furnishing a reasonably safe appliance the master could not delegate, and it is not excused if its foreman was ignorant of the necessity for a fuse or of the actual condition of the motor, if, in fact, as found by the jury, the unsafe condition of the appliance furnished is shown. That plaintiff knew, as did all parties, that no fuse was attached, does not of itself bar plaintiff of his right of recovery. It must also appear that plaintiff fully understood and comprehended the danger incident to the use of such appliance in its defective condition. Section 1970, Civ. Code. This want of comprehension on plaintiff's part is clearly shown and properly shown by his evidence in that regard.

We observe no inconsistency between the answers to the special interrogatories and the general verdict, all of which have support by competent evidence. Neither do we see merit in the various questions presented as to the action of the trial court in its rulings upon the admissibility of evidence; nor any error in the giving or refusing of instructions.

[3] The criticism on account of the refusal to give instruction No. 16 is answered by reading instruction No. 7, given by the court at defendant's request, which latter instruction embodies all that is contained in the one refused. The other instructions refused, in so far as they were correct expressions of the law, were given in substance and effect in other instructions. It is an established rule that courts are not expected to nor required, after having given an instruction upon a question of law, to repeat the same thereafter.

A careful examination of the record satisfies us that no prejudicial error intervened, and the judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

16 Cal. App. 480

MORCOM et al. v. BAIIERSKY et al.
(Civ. 969.)

(District Court of Appeal, Second District,
California. June 22, 1911.)

1. APPEAL AND ERROR (§ 502*)—RECORD—MOTION FOR NEW TRIAL—REVIEW.

Where the record nowhere shows upon what ground a motion for new trial was made,

and the transcript shows that, in the order denying the motion, it was stated that the motion was presented upon the grounds set forth in the notice of intention on file, which notice is not made a part of the record, and where the order does not show that the motion was presented on the bill of exceptions, the order denying the motion cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2305-2309; Dec. Dig. § 502.*]

2. EVIDENCE (§ 379*)—DOCUMENTARY EVIDENCE—PRELIMINARY EVIDENCE FOR AUTHENTICATION—MAP.

A witness in an action to quiet title, where the location of a boundary line was involved, stated that he was a civil engineer, and produced a map, which he stated was made about 1870, and was the original map of the survey of the locality as made by two surveyors, that he had checked up this map while running lines upon the tract, though not on the lots involved in this suit, and had found it to be correct. *Held*, that the testimony of the witness was sufficient to show prima facie that the map was correct, and that it was properly admitted in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1656; Dec. Dig. § 379.*]

3. BOUNDARIES (§ 36*)—EVIDENCE—HEARSAY—MAP MADE BY PERSON SINCE DECEASED.

A map showing the boundary lines of a tract of land in which the public or many persons are interested may be admitted in evidence, though the surveyor and the draughtsman who made it are dead; it being evidence of the character of hearsay.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 36.*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by G. Frean Morcom and another against Mary E. Baiersky and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Haas, Garrett & Dunnigan, for appellants. William M. Hiatt and Edward M. Selby, for respondents.

JAMES, J. Action to quiet title to and for possession of a certain lot of land in the city of Los Angeles. Judgment was in favor of defendants. The appeal is from the judgment and from an order denying a motion for a new trial, presented on a bill of exceptions. Insufficiency of the evidence to justify the decision and the ruling of the trial judge in admitting in evidence a certain map are urged as grounds for reversal.

The appeal from the judgment was taken more than 60 days after entry thereof. This appeal, therefore, was taken too late to authorize this court to consider the question of the sufficiency of the evidence to sustain the decision. Code Civ. Proc. § 939, subd. 1.

[1] Nor can the evidence be reviewed to determine the question as to whether or not it is sufficient to sustain the judgment on the appeal from the order denying the motion for a new trial. It is nowhere shown in the record upon what grounds that motion was made. For aught that appears, the ground of insufficiency of the evidence may not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

have been urged in the court below at the hearing of the motion. The transcript shows the order of the court denying the motion for a new trial, wherein it is stated that the motion was presented upon the grounds set forth in the notice of intention on file, but this notice of intention is not made a part of the record; nor does the order of the court show that the motion was presented on the bill of exceptions. Therefore the decision in the case of *Williams v. Hawley*, 144 Cal. 99, 77 Pac. 762, is in point, to the effect that in a case where the record is in the state of that which is here presented the order made on the motion for a new trial cannot be reviewed.

[2] There is left to be considered, therefore, only as to whether or not the trial court committed error in admitting in evidence a certain map which was produced by the witness Solano. The determination of the controversy between plaintiffs and defendants involved in part the question as to whether or not the northerly boundary line of the city of Los Angeles as now located is identical with that line as formerly established. Defendants for a number of years had owned and occupied lot 1 of what are called the "Canal and Reservoir Lands." The plaintiffs are the owners of lot 8 immediately adjoining and south of lot 1. For nearly 14 years a hedge of trees has stood along the south boundary line of lot 1 as it was claimed by defendants to be located. Plaintiffs made the claim that this hedge was located too far south, and that it included a portion of lot 8 owned by them. The point to be established, therefore, in the case was as to the true location of the boundary line between lots 1 and 8. As lot 1 shown upon the original plat was bounded on the north by the north boundary line of Los Angeles city, as to whether or not any change had been made in this north city boundary line became an important matter of evidence in the case. Some of the surveyors who testified at the trial located this boundary line further north than it is at present established, and other surveyors testified that the line as at present established was located practically at the same place as it previously had been. Some of the latter witnesses testified to finding rocks which appeared to have been placed by surveyors in different situations at the north of the tract, and which rocks indicated points at and near the north city boundary line as it is at present located. The witness Alfred Solano was then called to identify a map which the court afterwards admitted in evidence. The witness was a civil engineer, and he stated that the map produced was a map made in about the year 1870 in the office of William Moore, a surveyor, by one Siebolt under the direction and from field notes made by Mr. Moore; that Siebolt was

also a surveyor. The witness further stated that he in pursuance of his occupation as a surveyor had afterwards checked up this map while running lines upon the ground and that he had found it to be correct, and that it had been used as a reference map in the office for a good many years. This map was the original map of the survey of the canal and reservoir lands as made by William Moore. The witness testified that the recorded map was a copy taken from that original, and that the copy did not show all of the data that appeared upon the original: for instance, the original map showed rock monuments placed at corners of lots where the same abutted upon the street or intersected the north boundary line of the city. The witness had not resurveyed the particular lots the boundary line of which was involved in this action, but he had checked over many of the remaining lots and blocks in the tract, and testified that he was quite positive that the map was correctly made from the field notes of William Moore. The value of this map as evidence in favor of the defendants was largely by way of showing the fact that rocks were placed in the original survey of the tract, as monuments along the north city boundary line. This evidence tended to corroborate the testimony of those surveyors who located the present north city boundary line at the same place it had been located at the time of the original survey of the canal and reservoir lands. We think the court committed no error in admitting this evidence. The evidence of the witness Solano was sufficient in our opinion to show *prima facie* that the map correctly delineated the lines and points marked thereon. The matter of the weight to be given to the evidence, of course, was a question for the trial court.

[3] It is not shown by the record as to whether or not William Moore and Siebolt the draughtsman were dead at the time of the trial of the action, but, if it was a fact that these men who prepared the map were then dead, there would have been ample ground to justify the admission of the evidence under the authority of the decision in *Morton v. Folger et al.*, 15 Cal. 275. However, the witness Solano was a civil engineer, had seen the map made, had checked over a large part of it by actual surveys on the ground, and the map had been used as a reference map by surveyors for a good many years. Moreover, the witness testified that he was quite positive that it was correctly made, and this, we think, as before stated, established *prima facie* a sufficient foundation to authorize the admission of the map in evidence.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

16 Cal. App. 441

HOLLAND v. EASTERN OUTFITTING CO.
(Civ. 814.)

(District Court of Appeal, First District, California. June 16, 1911.)

1. ACTION (§ 38*)—SINGLE CAUSE OF ACTION—RECOVERY OF PREMISES—UNLAWFUL DETAINER.

A complaint which sets up in its first count a cause of action in unlawful detainer after default in the payment of rent and a notice in writing served March 6, 1909, demanding payment of rent due February 15, 1909, or possession of the premises, and in which the second count by reference repeats the allegations of the first count, and, in addition, alleges the demand for and nonpayment of rent due March 15, 1909, and in which the third count is similar to the second count except that it alleges the demand for and nonpayment of rent due April 15, 1909, is not bad for joining to the action for unlawful detainer an action in debt for rent due and unpaid, since the complaint sets out only a single cause of action for unlawful detainer, the additional matters set forth in the second and third counts being simply statements of damages flowing from the unlawful detainer, and since it was proper for the plaintiff to plead the nonpayment of the rent accruing subsequent to the service of notice and before the commencement of the action, though rent accruing after the filing of the complaint may be recovered without being pleaded.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 38.*]

2. LANDLORD AND TENANT (§ 291*)—RECOVERY OF PREMISES—DAMAGES—RENT DUE AND SUBSEQUENTLY ACCRUING.

The plaintiff in an action for unlawful detainer after service of notice of default in payment of rent due is entitled on a further detention to a judgment for the restitution of the premises and the rent due at the time of the notice and demand, as well as all rent accruing and unpaid up to the time of the trial.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 291.*]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Mary A. Holland against the Eastern Outfitting Company. Judgment for plaintiff, and, the plaintiff having died after the taking of the appeal, her special administrator Patrick Holland was substituted as respondent. Affirmed.

Jas. P. Sweeney, for appellant. W. E. Cashman, for respondent.

HALL, J. This is an appeal by defendant from a judgment and an order denying its motion for a new trial, but the only matter urged for a reversal relates to the action of the court in overruling defendant's demurrer to the complaint for a misjoinder of causes of action. Since the appeal was taken to this court the plaintiff has died, and the special administrator of her estate, Patrick Holland, has been substituted as plaintiff. The complaint is in form in three counts, and was filed May 6, 1909. The first count sets up a cause of action in unlawful detainer, after default in the payment of rent and three days' notice in writing requiring

its payment or possession of the premises. The notice was served March 6, 1909, and demanded the payment of the month's rental falling due February 15, 1909, amounting to \$250. The second count, by reference and adoption, repeated the allegations of the first count, and in addition alleged the demand for and nonpayment of the month's rental, in the sum of \$250, falling due March 15, 1909. The third count was in all respects similar to the second count, except that it alleged the demand for and nonpayment of the month's rental \$250, falling due April 15, 1909. The action was not tried until September, 1909, when judgment was rendered in accordance with the verdict of the jury for \$1,000, but without any rents or damages being trebled, and without any judgment for restitution of premises, for (as was stated at the oral argument) the parties, since the commencement of the action, had entered into a new lease of the premises. The demurrer was upon the ground that there was a misjoinder of causes of action, in this: that a cause of action in unlawful detainer set forth in the first count was joined with a cause of action in debt for rent due and unpaid, set forth in the second and third counts of the complaint.

[1, 2] We do not regard the complaint as setting out more than one cause of action to wit, an action in unlawful detainer. When the three days' notice was served, there was but one month's rent due, to wit, the rent for the month beginning February 15, 1909. Upon the expiration of the three days without payment of the rent due and demanded, or the surrender of possession of the premises, the further detention thereof became unlawful, and for such an unlawful detention the plaintiff would be entitled to a judgment for the restitution of the premises and the rent due and unpaid at the time of the trial. *Mason v. Wolff*, 40 Cal. 246; *Keyes v. Moy Jin Mun*, 136 Cal. 129, 68 Pac. 476; *Nolan v. Hentig*, 138 Cal. 281, 71 Pac. 440.

The additional matters set forth in the so-called second and third counts were simply statements of damages flowing from the unlawful detention pleaded in the so-called first count, and could as well have been set forth in the first count. The entire complaint pleaded but one cause of action, to wit, an action in unlawful detainer after default in payment of rent, and a three days' notice to pay the rent then due or to surrender possession of the premises. In such an action the plaintiff is entitled to recover not only the rent due and demanded at the time of giving the notice, but all rent subsequently accruing and unpaid up to the time of the trial. (See cases cited above.) It was probably necessary, and certainly proper, for the plaintiff to plead the nonpayment of the rent accruing subsequently to the service of the notice and before the com-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

mencement of the action, though rent accruing after the filing of the complaint may be recovered without being pleaded (cases cited, supra).

The fact that the pleader set forth the nonpayment of the rentals accruing after the service of the notice in separate counts did not constitute such matters independent causes of action. The matters thus pleaded were simply damages resulting from the unlawful detention.

The judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

16 Cal. App. 424

SMITH v. ELDERTON. (Civ. 958.)

(District Court of Appeal, Second District, California. June 15, 1911.)

1. PRINCIPAL AND AGENT (§ 1*)—BREACH OF DUTY—FIDUCIARY RELATION.

Defendant represented to plaintiff that he knew where he could buy 1,000 shares of a corporation's stock at \$2 a share; and they agreed between them to jointly buy it, defendant being intrusted with the buying. *Held*, that a fiduciary relation between them thereby arose.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 1.*]

2. PRINCIPAL AND AGENT (§ 71*)—FRAUD.

Defendant intrusted with the making of a purchase of 1,000 shares of stock for himself and plaintiff, having bought it for \$1 a share, represented that he paid \$2 a share, kept half of the shares, and delivered the other half to plaintiff, receiving \$1,000 from him, was guilty of a fraud under Civ. Code, § 2234, in disregarding the obligations imposed on him as trustee, by seeking an advantage over plaintiff, a beneficiary of the trust.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 71.*]

3. PRINCIPAL AND AGENT (§ 76*)—ESTOPPEL—RELiance ON REPRESENTATIONS.

Defendant, intrusted by plaintiff with the purchase for both of them of shares of stock, having bought at \$1 per share, and represented the price to be \$2 a share, being sought to be held liable for fraud, is estopped to deny plaintiff's reliance on his representation.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 158-161; Dec. Dig. § 76.*]

4. TRUSTS (§ 262*)—FRAUD OF TRUSTEE—PRESUMPTION.

A trustee making money out of his cestui que trust is presumed guilty of fraud, unless he affirmatively shows the transaction was perfectly fair.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 262.*]

5. PRINCIPAL AND AGENT (§ 79*)—FRAUD—REMEDY.

Plaintiff, who intrusted defendant with the buying for the two of 1,000 shares of stock of a corporation, which defendant represented he could buy at \$2, but which he bought at \$1, keeping half the stock himself, and delivering the other half to plaintiff, from whom he received \$1,000, though entitled to elect a remedy which would give him the entire 1,000 shares, may rescind and recover the money paid; and this without regard to the market value of the stock.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 79.*]

6. PRINCIPAL AND AGENT (§ 71*)—FRAUD—INJURY—EVIDENCE.

That plaintiff, who intrusted defendant with buying for both of them 1,000 shares of stock of a corporation, the price of which defendant represented to be \$2 a share, but for which he paid only \$1 a share, half of which stock he kept himself, delivering the other half to plaintiff, from whom he received \$1,000, was injured by the fraudulent transaction, is shown by the fact that he paid twice the amount he should have paid.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 71.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by W. T. Smith against W. C. Elderton. Judgment for plaintiff. Defendant appeals. Affirmed.

T. P. Dyer and Chas. L. Chandler, for appellant. Chas. S. McKelvey, for respondent.

ALLEN, P. J. Action to recover money alleged to have been procured by fraudulent practices. The pleadings develop, without controversy, a contract between plaintiff and defendant for the joint purchase of 1,000 shares of corporate stock in a corporation of which defendant was president and plaintiff a stockholder; it being represented by defendant to plaintiff that the stock was for sale at \$2 per share and that defendant knew where 1,000 shares of such stock could be purchased at such price. The parties agreed to such purchase at the rate of \$2 per share, and defendant was delegated the authority to enter into negotiations for its acquirement. Pursuant to such authority, defendant procured the assignment of a subscriber's rights to acquire 1,000 shares at \$1 per share, the subscription price for which had not been paid, which assignment defendant procured without consideration. Defendant exercising the rights of such subscriber paid to the corporation \$1 per share and caused 2 certificates, each for 500 shares, to be issued 1 to plaintiff and 1 to himself. Defendant thereupon presented to plaintiff the certificate for 500 shares, and plaintiff paid to defendant \$1,000, or \$2 per share, defendant retaining the certificate for 500 shares without paying any consideration or assuming any liability for the purchase price thereof. Plaintiff upon discovery of the facts rescinded the contract of purchase and tendered to defendant the 500 shares of stock, and brought this action to recover the money.

It is averred in the complaint that plaintiff because of the trust and confidence he had in defendant, and because of the statement of defendant that he would take five hundred shares along with plaintiff, relied upon such statement and acted thereon. The answer of defendant denies that plaintiff relied upon such statement. Under such condition of the pleadings, the court rendered judgment upon the pleadings in plaintiff's

favor, from which judgment defendant appeals.

[1] The facts admitted establish an agreement and arrangement through which defendant, as agent of the joint enterprise, assumed the duty of negotiating for and acquiring the stock. A fiduciary relation as between the plaintiff and defendant thereby arose, and this aside from the relative positions occupied by the parties to the corporation.

[2] The defendant, disregarding the obligations imposed upon him, was guilty of a fraud under section 2234, Civil Code, in seeking an advantage over plaintiff who was one of the beneficiaries of a trust.

[3] The denial of the answer as to the reliance of plaintiff upon the truth of the representations is ineffectual as raising an issue. One occupying a relationship as disclosed by the record is estopped to deny the reliance.

[4] "If a trustee makes money out of his *cestui que trust*, he must show affirmatively that the transaction was perfectly fair; otherwise, the presumption of fraud is against him." *Woodroof v. Howes*, 88 Cal. 187, 26 Pac. 112.

[5] That the plaintiff possessed the right to elect a remedy which would have given him the entire 1,000 shares did not preclude him from the one sought in the recovery of the money paid through such fraudulent practices, and this without reference to the market value of the stock.

[6] Nor can it be said that plaintiff was not damaged in the transaction. If defendant had acted in good faith and discharged the duty assumed by him as such agent, plaintiff would have acquired his stock for one-half the amount actually paid. That he paid twice the amount which he should have paid, or would have paid if knowledge of the true facts had existed, establishes his injury through the fraudulent practices.

We are of opinion that the court committed no error in rendering a judgment against defendant upon the pleadings, and the same is affirmed.

We concur: JAMES, J.; SHAW, J.

16 Cal. App. 515

HARRISON v. COUSINS et al. (Civ. 800.)
(District Court of Appeal, First District, California. June 26, 1911.)

1. APPEAL AND ERROR (§ 520*)—BILL OF EXCEPTIONS—ORDER GRANTING CHANGE OF VENUE.

On appeal from an order granting a motion for a change of venue under Supreme Court rule 29 (78 Pac. xii), providing that on appeals from orders of the superior courts the papers and evidence used on the hearing of the motion must be incorporated in a bill of exceptions, unless another mode of authentication is provided by law, appellant must bring up the pa-

pers on which the motion was granted by a bill of exceptions, notwithstanding Code Civ. Proc. § 951, requiring appellant on appeal from an order, except one granting or refusing a new trial, to furnish a copy of the notice of appeal, order appealed from, and of the papers used on the hearing below; the statute not providing how such papers shall be authenticated.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2359-2366; Dec. Dig. § 520.*]

2. APPEAL AND ERROR (§ 671*)—BILL OF EXCEPTIONS—EFFECT OF ABSENCE.

Where the evidence on a motion to change the place of trial is not authenticated by a bill of exceptions as required by Supreme Court rule 29 (78 Pac. xii), or as otherwise provided by law, the record will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.*]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by H. C. Harrison against H. D. Cousins and another. From an order granting a motion for a change of venue, plaintiff appeals. Appeal dismissed.

F. R. Wall, for appellant. Curtis & McNe (Houghton & Houghton, of counsel), for respondent Cousins.

HALL, J. This is an appeal by the plaintiff from an order granting the motion of defendant H. D. Cousins for an order changing the place of trial of the action from the city and county of San Francisco to the county of San Bernardino. Respondent objects to the hearing of the appeal upon its merits, and asks that the appeal be dismissed for the reason that there is no proper record before this court, in that the papers used or claimed to have been used on the hearing of the motion are not authenticated by being incorporated into a bill of exceptions as required by rule 29 of the Supreme Court. The transcript on appeal filed in this court contains no bill of exceptions nor any record made up in accordance with the provisions of section 953a of the Code of Civil Procedure.

The transcript does contain what purport to be copies of various papers, including the complaint, affidavit of merits of H. D. Cousins, including certain exhibits, designated by the letters "A," "B," "C," and "D," attached thereto, notice of motion for change of venue, demand for change of venue, demurrer of H. W. Hutton (copy of), certificate of clerk of superior court of San Bernardino county as to correctness of foregoing papers, minute order of court granting the change of venue, notice of order, notice of appeal, a stipulation not signed, certificate of clerk of superior court of San Francisco to the correctness of the copy of the minute order granting the change of venue and of the notice of appeal, and to the giving of an undertaking on appeal. These papers are

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

followed by a certificate signed by the judge of the superior court of the city and county of San Francisco as follows: "I * * * do hereby certify that upon the hearing of the motion of H. D. Cousins, one of the defendants in the above-entitled action, for a change of venue to the superior court of the state of California, in and for the county of San Bernardino, the only papers considered were the complaint in said action, the affidavit of merits of H. D. Cousins, with four exhibits, A, B, C, and D; said Cousins' notice of motion for a change of venue, and the demurrer of H. W. Hutton, one of the defendants above named; that said motion was heard by me, and that I granted the order changing the venue in said action; that true and correct copies of the above-named papers which were considered by me upon the hearing of said motion are set out in the foregoing transcript."

This certificate does not purport to have been given in settlement of a bill of exceptions, but appears to have been given ex parte. It states that certain enumerated papers only were considered, and omits to make any mention of the demand for a change of venue. Rule 29 (78 Pac. xii) requires that "in all cases of appeal from the orders of the superior courts the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except when another mode of authentication is provided by law." In this case no attempt was made to comply with this rule or the procedure authorized by section 953a of the Code of Civil Procedure.

[1] The appellant's contention is that under section 951 of the Code of Civil Procedure he is only required on an appeal from an order, except an order granting or refusing a new trial, to furnish the appellate court with a copy of the notice of appeal, of the order appealed from, and of the papers used on the hearing in the court below. While said section does enumerate a list of papers, copies of which must be furnished the appellate court, it does not undertake to provide how such papers or the copies thereof shall be authenticated. That matter is provided for in the rule of court, which requires that the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions. The necessity of complying with this rule is made manifest by what has happened in this case, for by proceeding in this ex parte way appellant procured from the judge of the court a certificate as to what papers were considered (not what were used), which makes no mention of the "demand for change of venue." Neither does the transcript before us show whether or not the respondent had answered or demurred at the time he filed his affidavit of merits and demand for

a change of venue, or that he ever answered or demurred to the complaint. Section 396, Code Civ. Proc. If the method prescribed by the rule of court had been followed in this case, the respondent would have had an opportunity of having all the proper papers and evidence inserted in the record.

[2] The record before us not being authenticated either as required by the rule of court or any provision of the law, we cannot consider it. *Ramsbottom v. Fitzgerald*, 128 Cal. 75, 60 Pac. 522; *Melde v. Reynolds*, 120 Cal. 236, 52 Pac. 491; *Muzzy v. McEwen Lumber Co.*, 154 Cal. 686, 98 Pac. 1062. The appeal is dismissed.

We concur: LENNON, P. J.; KERRIGAN, J.

16 Cal. App. 472

WOODSON v. WINCHESTER. (Civ. 783.)

(District Court of Appeal, Third District, California. June 17, 1911.)

1. PLEADING (§ 364*)—FORM—STRIKING OUT REDUNDANT MATTERS.

Defendant in an action to foreclose his right to purchase certain lands under a contract, unless all sums found due from him were paid in such time as the court might allow, elected by his amended answer to affirm the contract, and set up the general defense of fraud collateral to the contract, for which he asked for judgment for damages and to retain the land, and alleged in support of his defense certain statements of the plaintiff relating to colony lands, but not to the specific lands in question, and that defendant read the representations deeply and carefully and that he became satisfied that they were really true, and that a designated paper was published to induce persons residing in the Eastern states to sell their properties and go to the colony and purchase lands therein from the plaintiff, that he was told that the land had never been offered for sale, and that unless he purchased quickly he might lose the opportunity, that it had plaintiff's personal attention, and that the part not in orchard was good grape land, that fruit grown on the land had ready sale at exceptionally high prices, and was sold in advance of delivery at large profit. *Held*, on motion to strike out, that under Code Civ. Proc. § 453, these averments of the answer were properly stricken out as redundant and irrelevant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1156–1162; Dec. Dig. § 364.*]

2. FRAUD (§ 11*)—FRAUDULENT REPRESENTATIONS—MATTERS OF FACT OR OF OPINION.

Where a purchaser has gone upon land and has had full opportunity to exercise his own judgment, the vendor's statements that the 10 acres of land contained Bartlett pears, almonds, and orange trees, that the orange trees were of the fine Washington navels, the lemon trees a fancy quality, and the olives of the mission variety, that the trees had been for a number of years yielding the vendor a net profit of 20 per cent. per annum on a valuation of \$5,500, these statements are not representations of facts, for the falsity of which the purchaser may recover damages, but come within the class of harmless expressions of opinion.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.*]

3. FRAUD (§ 25*)—INJURY—NECESSITY.

Fraud without damage furnishes no ground for action, nor is fraud without damage a defense.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. § 25.*]

4. PLEADING (§ 8*)—FACTS OR CONCLUSIONS—FRAUD.

In an action by a vendor to foreclose a purchaser's right to complete his purchase of land, the purchaser by his answer affirmed the contract and claimed damages for fraudulent representations by the vendor, and asked for judgment for money and that he retain the lands, and set out a narrative of the facts and statements which induced him to make the purchase, and averred that he did not know whether they were true, but had entire confidence in the vendor, and executed a contract with him at once; that after he had made payments he discovered that all the vendor's statements were wholly false and fraudulent, which was well known to the vendor; and that the statements were made to induce him to pay \$5,500 for the land in suit, when, in fact, it was not of the value of more than \$1,000, and later repeated these alleged fraudulent statements, and averred that they were false and untrue in every material respect, but did not show in what particular or to what extent the vendor's narrative statements or his statements that the orange trees on the land were Washington navels and that the land had yielded 20 per cent. profit were false. *Held*, that the answer was bad on demurrer for failing to allege particular false statements from which damage resulted in the sequence of cause and effect.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Warren N. Woodson against William W. Winchester. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Freeman, for appellant. W. P. Johnson, for respondent.

CHIPMAN, P. J. This is an action to foreclose defendant's right to purchase the lands described in the complaint.

A second amended answer was attacked by a motion to strike out many of its averments and by a general and special demurrer. The motion was granted as to a considerable portion of the answer, and, after it had been thus shorn, the demurrer was sustained. Defendant making no further attempt to answer, plaintiff submitted his proofs and had judgment as prayed for in the complaint. The appeal is from this judgment on bill of exceptions.

The contract bears date September 16, 1907, and relates to certain lots in Maywood Colony, near Corning, Tehama county, for which defendant agreed to pay the sum of \$5,500 in installments, \$500 upon the execution of the contract, \$1,000 on April 1, September 1, and December 1, 1908, and the balance, \$2,000, on September 1, 1910, with interest at 8 per cent. per annum. It was alleged in the complaint that on October 26, 1908, \$2,100 had been paid on ac-

count of the principal and \$400 on account of interest to that date, and that no further payments have been made. The complaint was filed April 14, 1909, and plaintiff prayed that defendant be foreclosed from all right to purchase said land unless all sums found to be due on said contract, including costs of suit, be paid within such reasonable time as the court may allow. No question is raised as to the terms of the contract or as to the payments made thereon. Defendant's defense rests alone on his averments of fraud.

Defendant is not seeking to rescind the contract. He states in his brief that he elects to retain what he has received under the contract and seeks to recover damages for the injury he has sustained from the alleged deceit; i. e., he affirms the contract and consents to be bound by its provisions, but does not waive his claim for damages arising from the alleged fraud collateral to the contract. His defense appears to be that he has been damaged \$4,500, of which he asks that \$2,500 be offset against plaintiff's demand and that he have judgment for \$2,000 and retain the land. Obviously the defense rests entirely on the alleged fraudulent conduct of plaintiff, and, before such a defense will be entertained by a court of equity, it must be shown with that fullness and particularity of facts and circumstances as is required by settled rules of pleading.

[1] That sham, redundant, and irrelevant matter in a pleading may be stricken out is a general rule and is established by the Code of Civil Procedure, § 453. Paragraph 2 of the answer cannot for a moment be said to fall within any class of fraudulent representations or as statements by way of inducement to purchase at all reprehensible. They relate to lands comprising a colony, and not to the specific lands in question. That defendant, as he says in paragraph 3, "read them (the representations) deeply and carefully and that he became satisfied therefrom that such statements were really true," adds no force to the pleading, nor do the statements referred to in paragraph 4. The "Maywood Colony Advocate" was published for the "purpose of inducing persons residing in the Eastern states to sell their properties there and come to Maywood Colony and purchase lands therein from plaintiff." This general purpose may have been and probably was a very laudable one. Paragraph 5 of the answer was not wholly emasculated. Looking at the clauses stricken out, we fail to see their necessary relevancy to the charge of fraud. What mattered it that the land had never before been offered for sale, or that unless defendant purchased quickly he might lose the opportunity; or that plaintiff had kept this particular land

as a "show place," or that it had his personal attention, or that the 10 acres not in orchard was ideal grape land, and plaintiff had kept it to go with the 10 acres of orchard, and that the two pieces must go together, or that fruit grown on the land had ready sale and commanded exceptionally high prices and was sold in advance of delivery at large profit? Defendant, according to his answer which stands, was taken to the land "in an automobile—plaintiff's automobile"—an unimportant fact, and he says "that plaintiff stopped his automobile on the land * * * pointing defendant's attention to said land. * * * and requested defendant to purchase that particular land," and it was then, as they rested in the automobile, that plaintiff made the statements set out in the answer, some of which the court allowed to stand and struck out the others. Paragraphs 6, 7 and 8 remained undisturbed by the motion. Paragraph 9 suffered badly at the hands of the court, but we cannot see that defendant's case suffered, for the matter stricken out had no necessary connection with the specific fraud on which alone defendant had any right to rely. The averments appear to be an attack upon the verity of the publications concerning the Maywood Colony lands, which publications are not alleged to have been directed to the particular land in question, but to lands generally of the colony. The representations are substantially the same as are set forth in paragraph 5. The paragraph closes with what apparently was intended to cover the entire catalogue of representations which are denounced as "wholly and entirely false and untrue in every material respect" and were known by plaintiff "to be false and untrue in every material respect." This latter averment remains, but something more was required of the pleader than this. He should have pointed out what was material.

Paragraph 10 remains, but 11 went out we suppose because the court thought it rather remote to make plaintiff pay defendant damages because the defendant gave credence to the "Maywood Colony Advocate" and sold out his business in New London and took a chance in Corning. We incline to agree with the trial court that the averments contributed nothing material to the answer.

Part of paragraph 12, to wit, marked "a," "b," and "c," went out probably because (a) there were no averments to support a claim for the difference between the actual value of the property and the amount for which it was sold; (b) and (c) because too remote. We think the demurrer was rightly sustained to the remaining portions of the answer. The recital of facts leading up to the alleged statements in paragraph 5, subd. "d," "e," and "h," is plainly a narrative of which fraud is not predicated. Of the representations stated in these subdivisions it

is averred that defendant did not know whether or not they were true, but had entire confidence in plaintiff and believed him and was thereby induced to agree to purchase the land, and this the pleader says is evidenced by the fact that the contract was "executed the day following"; that after he had made all the payments he discovered "that all said statements so made by plaintiff * * * were wholly false and fraudulent, and defendant alleges that they were and are in fact wholly false and fraudulent," which was well known to plaintiff and were made by him "to induce defendant to pay \$5,500 for the land herein involved when in fact it was not at higher value than \$1,000," and is not now of higher value than \$1,000. Later along the pleader repeats these alleged fraudulent statements in paragraph 9, and he then alleges that they were false and untrue "in every material respect."

The special demurrer for uncertainty in part raised the question whether defendant intended to charge that these statements were wholly and unqualifiedly false or only false "in every material respect," and it is claimed, if the latter, that the defendant should have pointed out the material from the immaterial statements and shown on which he relies. But, passing this by, there is no fiduciary relation shown between plaintiff and defendant, and there is no averment that plaintiff gave any warranty or guaranty in making the sale. He is alleged to have made certain statements which defendant avers turned out to be false and fraudulent, known so to be at the time by plaintiff and made as an inducement to defendant to make the purchase. But has defendant presented facts sufficient to justify the court in entertaining the defense attempted?

[2] Expressions of opinion are to be distinguished from statements of facts such as a purchaser who has gone upon the land and has had full opportunity to exercise his own judgment would be justified in relying upon. The statements complained of which may be said not to come within the class of harmless expressions of opinion may be briefly stated as follows: That 10 acres of the land contained Bartlett pears, almonds, and orange trees; that the orange trees were of the fine Washington navels, the lemon trees a fancy quality, and the olives of the mission variety; and that the trees on said 10 acres had been for a number of years yielding plaintiff a net profit of 20 per cent. per annum on a value of \$5,500, all of which was false and fraudulent and so known to be by plaintiff, and was stated to defendant to induce him to purchase said land.

[3, 4] "Fraud without damage furnishes no ground for action; nor is fraud without damage a defense." *Holton v. Noble*, 83 Cal. 7, 9, 23 Pac. 58. It must be shown in the

pleading that the damage claimed was sustained by reason of the fraud and should show the relation between the fraud and the damage alleged; that is, it must appear that the fraud and the damage sustain to each other the relation of cause and effect. 20 Cyc. 103, 107. In passing upon the demurrer the learned trial judge very clearly pointed out the shortcomings of the answer. He said: "Several representations are alleged to have been made by the plaintiff, and then it is alleged that all of said representations were false. In what particulars they were false or to what extent is not alleged. To illustrate, take the allegation that the plaintiff said the orange trees were Washington navels. The answer alleges that this statement was false. But false to what extent? Were none of the trees of that variety, or were only a few of them of some other variety? If only a few of them were of another variety, then plaintiff's statement was false, but it does not follow that defendant was injured thereby. The number of other varieties may have been so few as to be of no moment, and it might be true that none of them were Washington navels, and still defendant not be injured at all. They may have all been of a better and more profitable variety. The answer must state facts showing the false statements of such a kind and in such particulars as that damage resulted therefrom to the defendant in the sequence of cause and effect. I have examined a great many cases on this point, and find that in all of them the pleader has alleged the falsity of the statements and then proceeded to show wherein and to what extent they were false, and stated such facts as showed that damage must have resulted from such false statements. Many cases have been brought for damages alleged to have been caused by a party falsely representing the number of acres in the tract sold. In none of them did the pleader content himself with alleging that the vendor said there were a certain number of acres (say 100) and that such a statement was false, but he then alleged that there were instead of the number of acres represented only a smaller number, stating the shortage in acreage as compared with the number represented. It is alleged in the answer that the plaintiff represented that the place had been paying 20 per cent. on a valuation of \$5,500, and that such statement was false. If the pleader had specified he would have gone further and alleged that it was not producing that much or any profit (if such were the fact), or that it was only producing 10 per cent. on a valuation of \$2,000 (if such were the fact). Unless some such particulars are alleged, the answer does not allege or show any material damage resulting from the false statements."

These views seem to us to correctly state the law.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

16 Cal. App. 489

MACLAY CO. v. SUPERIOR COURT OF SONOMA COUNTY. (Civ. 858.)

(District Court of Appeal, Third District, California. June 22, 1911.)

PROHIBITION (§ 10*) — GROUNDS — SPECIFIC ACTS OF JUDGE—JURISDICTION.

The petitioner brought action in the defendant court against one M. and others, co-partners as the P. Transportation Company, and on November 27, 1909, a default judgment was entered against M. and another and also against the company. On November 29th all the defendants appeared and moved to set aside the default, and also filed a demurrer to the complaint, and, after their motion to set aside the default had been denied, their motion to vacate the judgment was granted on December 20th, and plaintiffs appealed from such order, which, in the bill of exceptions as certified by the trial judge, read, "The motion to set aside the judgment and default of the Petaluma Transportation Company is granted," and that order was affirmed by this court. In March, 1911, the defendants' demurrer was restored to the calendar for determination, after a hearing in which defendants' attorneys made affidavit that the order setting aside the judgment had been made against all the defendants, and not against the company alone, as appeared from the order affirmed by this court. Plaintiff sought a writ of prohibition to restrain the lower court from hearing and determining the demurrer on the grounds that the judgment of November 27, 1909, was a binding judgment as to all defendants except the company named in the order appealed from and affirmed, and that the court had no further jurisdiction. Held that, when the alleged order appealed from went back affirmed, the lower court had the power to treat it as meaning what it intended and to recognize the order which it had in fact made, and that, in view of the affidavits and of the lower court's return to the same effect and of an opinion filed by it in the proceedings, the order certified on appeal was not in fact the order made, and as to the other defendants the court had jurisdiction; and hence that the writ would be denied.

[Ed. Note.—For other cases, see Prohibition, Dec. Dig. § 10.*]

Petition by the Maclay Company for writ of prohibition against the Superior Court of Sonoma County. Writ denied.

Lippitt & Lippitt, for petitioner. W. H. Early, for respondent.

CHIPMAN, P. J. Prohibition. The history of the litigation out of which springs the cause for seeking the writ in this action will be found in the opinion of Justice Hart in the case of Maclay Company v. N. S. Meads, Charles P. Doe, H. G. Cox, and G. L. Ray, as Individuals and as Copartners Under the Firm Name and Style of Petaluma Transportation Co., 112 Pac. 195; and an opinion on rehearing at page 364 of 113 Pac. The narrative of facts brings the history down to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the judgment in favor of plaintiff against Meads, Ray, and the Petaluma Transportation Company, entered November 27, 1909. It also therein appears that on November 29, 1909, the defendants appeared, filed a motion to set aside the default entered against them in the action, and also filed a demurrer to the complaint; that on December 3, 1909, plaintiff caused a writ of restitution to be issued which was by the sheriff returned executed by putting the plaintiff in possession of the premises on December 6th; that on the same day, December 6, 1909, the motion of defendants to set aside the default was heard and denied, permission being given, however, to notice and file a motion to vacate and set aside the judgment, and such motion was made on the grounds: (1) That the court was without jurisdiction to enter the judgment; (2) that the judgment is not supported by the pleadings; (3) that the default of defendants was not entered. The motion was heard on December 13th, and on December 20, 1909, an order was made granting the same. The order from which the appeal to this court was taken read as follows: "The motion to set aside the judgment and default of Petaluma Transportation Company is granted." For the reasons very fully shown in the original opinion it was held that "the court made no error in granting the motion as to the Petaluma Transportation Company" and the order was affirmed. On rehearing plaintiff urged that the judgment of this court should have been "that the order appealed from, in so far as it affected the defendants who were served with summons as well as those not served but who made a general appearance on the motion to vacate the judgment, be reversed," although, as suggested by counsel, "the order vacating the judgment is rather ambiguous." After pointing out that the order of this court was as broad as the order it was asked to review, the court said (113 Pac. 364): "If the trial court failed to dispose of the motion, in so far as it applied to the defendants, Meads, Doe, Cox and Ray, it was no doubt an oversight, which should, of course, be rectified. The parties are entitled to have the motion as to all the defendants who participated therein directly and clearly acted upon by the court below. But, as stated, we cannot see our way clear to reverse or affirm or modify or in any way to interfere with an order where, as here, we are by its ambiguity led into a state of uncertainty as to its scope and effect, or whether, indeed, any order in this case as to Meads, Cox, Doe, and Ray was made at all." Speaking of a possible implication by the order that the motion might be deemed denied as to the other defendants, it was further said: "Still the court might not have acted at all on the motion in so far as it affected the defendants other than the Petaluma Transportation Company." The suggestion made at the close of the opinion on rehearing that the motion

as to the defendants other than the Petaluma Transportation Company should not have been granted had reference wholly to the question discussed in the original opinion where it is shown that by the general appearance these defendants submitted themselves to the jurisdiction of the court, but it was not intended to direct the trial court in the exercise of its discretion on grounds other than as such discretion might be affected by the decision that the appearance made by the defendants was general.

It is alleged in the petition for the writ that the trial court in granting defendants' motion to set aside and vacate the judgment made its order in the form as it appeared in the bill of exceptions on appeal, as shown above, and that the trial judge certified to the bill as correct on February 2, 1910; that thereafter the defendants filed their motion in the said superior court that they would, on February 14, 1911, move the court to restore to the calendar of said court their demurrer theretofore filed in the action, which was opposed on the ground that said defendants had by their demurrer submitted themselves to the jurisdiction of said court; and that said judgment rendered against them is valid and binding, and was so declared in the judgment on appeal to this court. It is then set forth that at the hearing of said motion there were considered by the court the affidavits of two attorneys in behalf of defendants in which, among other things, it was alleged that the order made by the trial court on December 20, 1909, vacating and setting aside said judgment, was as follows: "This cause having been heretofore submitted to the court for consideration and decision on motion to set aside default and judgment, the court now orders after having fully considered the same that the default and judgment herein be and the same is hereby set aside," and that "no appeal has ever been taken by the plaintiff or defendants from said order." It is then set forth in the petition that notwithstanding the objections of plaintiff to the consideration of said motion, "the said superior court on the 2d day of March, 1911, ordered that the demurrer of said defendants filed November 29, 1909, be restored to the calendar of said court for determination"; that, unless the said court is restrained, the said court "will proceed to hear and determine the said demurrer, and will proceed to take other and further steps in the said action"; that "the said superior court was on said 14th day of February, 1911, and ever since has been, and now is, without any jurisdiction whatever to make or enter any order restoring said demurrer to the calendar for hearing, or to proceed to the hearing of said demurrer for the reason that the judgment entered in said action of the 27th day of November, 1909, is a valid, binding, and subsisting judgment as against the defendants, * * * and the time for appeal therefrom has elapsed." In the return to the writ

to show cause respondent, Judge Seawell, alleges that the order of date December 20, 1909, appearing in the transcript on appeal, was not the order made by him, and that the only order the court in fact made was the order above set forth in the affidavits of counsel for defendants on motion to set aside the judgment, "and that said order did in fact set aside and vacate the judgment therefore made and entered in said matter entirely, and as to all of the said defendants, and that ever since said time and now the said order has remained unchanged." It is further averred in the return that plaintiff served notice of appeal on December 22, 1909, and that the bill of exceptions contained the order as therein set forth, but "that the said indorsement (the certificate made by the respondent) was not correct for the reason that said bill of exceptions did not contain the real order made by said superior court on said 20th day of December, 1909." It is further averred that "said judgment given and entered by said superior court on the 27th day of November, 1909, against said defendant was by said court on the 20th day of December, 1909, vacated and set aside, and that no appeal was ever taken from said order vacating said judgment, and that the time to appeal from said order has now expired."

It is further set forth in the return: "That on the 14th day of February, 1911, said superior court had jurisdiction to make its order restoring the demurrer of said defendants filed on November 29, 1909, to its calendar for determination"; that "on said 14th day of February, 1911, said petitioner did secure a writ of execution from the clerk of said superior court which said writ of execution was issued by the clerk of said court at the request of the petitioner herein; that the said writ of execution was issued aforesaid without right and was void, and same was levied upon property of the Petaluma Transportation Company and said defendants; that thereafter the defendants in said action moved said superior court for an order vacating and annulling said writ of execution upon the ground that said judgment entered on the 27th day of November, 1909, had been vacated and set aside by said superior court on the 20th day of December, 1909; that said motion was duly presented to said court by the attorneys for petitioner and said defendants, and thereafter, and on the 3d day of March, 1911, said superior court did make its order recalling and annulling said writ of execution for the reason that the judgment had been previously vacated and set aside, and said superior court did on said day make its order restoring defendants' demurrer to the calendar of said court for determination; * * * that the defaults of defendants Charles P. Doe, N. L. Meads, G. L. Ray, and H. G. Cox were never entered in said action; that the defendants Charles P. Doe and H. G. Cox were never served in said action with

summons; that Petaluma Transportation Company was not made a party defendant to said action; that the judgment entered in said action on November 27, 1909, was vacated and set aside by said superior court on the 20th day of December, 1909; that the superior court of Sonoma county has not exceeded its jurisdiction in said proceedings, and that at all times and now said superior court has jurisdiction; that no trial on the merits has ever been had in said action in the said superior court of Sonoma county; that petitioner herein has not been damaged by any action of said superior court, * * * and all acts of said superior court * * * are without prejudice to said petitioner as its rights may appear."

Out of all this more or less confusion of facts, the question is narrowed down to the effect of the judgment on the appeal to this court affirming the purported order of the lower court made December 20, 1909, which read: "The motion to set aside the judgment and default of Petaluma Transportation Company is granted." It is conceded that this order is ambiguous as leaving in doubt whether the court intended to set aside the judgment as to all the defendants and the default as to the Petaluma Transportation Company or intended it to apply only to the latter. The respondent declares in his return that this was not the order made by the court but that the order in fact made was as set forth by the trial judge in his return. It appears from the affidavits of defendants' attorneys that the order appealed from was a rough minute order made by the clerk of the court. How it came about that the judge certified to the correctness of the bill of exceptions containing the order as shown in the transcript on appeal without discovering the mistake does not appear. This order went back affirmed, and the contention now is that it was a final order and necessarily left the judgment in full force, and that the court lost jurisdiction to disturb that judgment or to restore the demurrer for hearing or to take any further steps in the case looking to a trial on the merits. In short, that the court was estopped by its own order which had been appealed from and affirmed.

If this order had clearly stated its purpose, admitting of no doubt as to its import, or as to the intention of the court, and if we were not confronted with the statement of the judge who made the alleged order that he did not make it, but did make another order which he states is the only order made by him, we would have a situation which would present the points now urged by the petitioner.

We think, however, that when the case went back, with this alleged order affirmed, the court had the power to treat it as meaning what the court intended, and the court had the power to recognize the order which it had in fact made. The certificate of the

judge to the correctness of the bill of exceptions might have been given inadvertently, through mistake or other cause. The judge, in hastily reading the bill, may have thought that the order was sufficiently explicit, or he may not have examined it at all. Whatever may have been the reason for certifying the bill as it appeared in the transcript, the order which was in fact made was not the order certified as correct. The court had jurisdiction to proceed on the assumption that the order in fact made left the court free to open the way to a trial on the merits, which is always to be desired. In taking its appeal plaintiff used in the transcript the rough minute order of the clerk instead of the real order which latter it appears was entered in his regular minute order book—"Minute Book 'U,' page 462, Minutes of Department No. 1, Superior Court of Sonoma County, California"—and which, as we have seen, was the only order made and entered in the case. Mr. High says: "The writ will not go when the very question of fact upon which it depends is denied and is the chief point in the litigation yet pending and undetermined in the court below." The author cites as illustration the case where the judgment of the court below depends upon the existence or nonexistence of a certain judgment, and the fact as to whether such judgment was ever obtained is the issue in the court below. In such case, the author says, the writ will not issue, unless want of jurisdiction is apparent upon the face of the application, for, he says, if granted, it would virtually be a trial of the case of the superior court upon its merits and before appeal. High's Ex. Rem. (3d Ed.) § 788, p. 745. Here the sole controversy arises out of the order we have been considering, and involves a question of fact as to what the order really was.

In making his order of March 3, 1911, the learned trial judge submitted his opinion in writing which casts light upon the questions. After reciting some of the facts leading up to defendants' motion to vacate and set aside the judgment, the opinion continues:

"The service on the Petaluma Transportation Company being fatally defective, because it was not properly made a party to the action, the default entered as to it was set aside and the judgment vacated. This much must be admitted by all parties to the action. As to the scope of the order made there is a disagreement. The blotter notes of the clerk show that the order opening the default went only to said company, while his minutes show that it was not so limited, but included all defendants. Inasmuch as no formal default has ever been entered against any of the defendants other than said company, the scope of the order may not be material. But, if the matter of default touching all defendants was before the court, it would be a strange psychologi-

cal condition that would impel a court to decide only a portion of an indivisible question presented to it and leave the balance undetermined. The only logical way, perhaps, of accounting for such a condition would be the theory that the default of only a portion of the parties was demanded and entered as the fact coincidentally, perhaps, is shown to be by the record in this case.

"From an examination of all the papers in the cause, the complaint is included, until the filing of the bond on appeal which was subsequent to the court's ruling holding the service defective so far as the defendant Petaluma Transportation Company is concerned, it is very apparent that the theory of the plaintiff was that he was proceeding against an entity known as the Petaluma Transportation Company and incidentally against Meads, its assignor. The fact that an attempt was made to serve said company as shown by affidavits on file and the further fact that only one other defendant besides said assignor was served with summons would seem strongly to indicate such to have been the case. Following this comes a demand for a default against said company alone and the actual entry of said company's default and none other. The judgment seems to be drawn on the theory above indicated, for phrases of the following character are to be found in said judgment: 'That plaintiff have judgment against the said defendants, composing said partnership under the firm name and style of Petaluma Transportation Company,' etc.—and 'that an execution be issued against the said defendants, under the name of the Petaluma Transportation Company,' etc.

"The court is of the opinion that the claim now made by plaintiff that the notes found in the clerk's blotter contain the complete order of the court in disposing of the motion to set aside the default is weakened by an inspection of the record made subsequent to the time that service of the summons was held not properly made on said company. For example, the notice of appeal, after setting out the name of all defendants, states the appeal is to be taken from an order setting aside and vacating the judgment given in favor of plaintiff and against the defendants. The bond on appeal uses precisely the same words. Perhaps other instances of the same character might be found, but this subject will not be pursued further.

"We now come to the main question at issue. On February 14, 1911, plaintiff caused an execution to be issued in the above-entitled action directed against all defendants, except said company, and has levied on the steamer *Resolute*, claiming the same to be the property of the said defendants or some of them, and threatens to sell the same as in such cases provided. The defendants have moved the court that an order be made recalling and annulling said execution for the reason that the judgment heretofore en-

tered in said cause has been vacated. Said motion to be made upon all the papers, records, files, etc., in said cause; and also for an order restoring the demurrer filed by them on the 29th day of November, 1909, to the calendar. The right to do both or either depends upon the state of the record in this case which has heretofore been partially set out. The court is of the opinion that the defendants as individuals appeared in the case before a default had been demanded or entered against them and therefore have at no time been in default. Indeed, Doe and Cox were never served with summons, and no dismissal was made as to said persons.

"Any judgment that may have been entered against defendants, unquestionably against Doe and Cox, if it can be said from an inspection of said judgment that the same includes them as individuals, or as members of said company, was improperly made and entered. So far as the appeal from the order setting aside the default and judgment is concerned, the court is of the opinion that in case of conflict, such as is here presented, the amplified order found in Minute Book 'U,' page 445, should control. In either event, there would be no legal subsisting default for the reason that in the first instance the default against said company is void and in the second the default has been set aside and no appeal was taken from it. Aside from anything above stated by the court, the policy of the law favors the trial of causes upon their merits. And for a greater reason should this policy prevail in cases such as this, where treble damages are demanded.

"It is the order of the court that the execution issued in the above-entitled cause on February 14, 1911, be, and the same is, recalled and annulled; also that defendants' demurrer, filed November 29, 1909, be and the same is hereby restored to the calendar for determination."

The writ is denied.

We concur: HART, J.; BURNETT, J.

16 Cal. App. 427

PEOPLE v. BARNNOVICH. (Cr. 309.)
(District Court of Appeal, First District, California. June 16, 1911.)

1. WITNESSES (§ 297*)—REFUSAL TO TESTIFY—CODEFENDANTS.

Persons jointly charged with accused could refuse to testify if their evidence would tend to make them guilty of a felony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1026-1037; Dec. Dig. § 297.*]

2. WITNESSES (§ 306*)—PRIVILEGE—TESTIMONY OF CODEFENDANTS—CONTROL BY ACCUSED.

Accused has no control over the right of one jointly charged with him to refuse to testify

in accused's trial on the ground of self-incrimination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1058-1060; Dec. Dig. § 306.*]

3. CRIMINAL LAW (§ 508*)—TESTIMONY OF ACCOMPLICES.

Pen. Code, § 1111, prohibiting a conviction upon the testimony of an accomplice unless corroborated by other evidence which in itself tends to connect accused with the commission of the offense, and providing that the corroboration is not sufficient if it merely shows the commission of the offense, does not go to the admissibility, but to the effect of the accomplice's evidence, so that, while a conviction cannot be had upon his uncorroborated testimony, the actual commission of the offense may be shown thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1099-1123; Dec. Dig. § 508;* Witnesses, Cent. Dig. §§ 244-248.]

4. CRIMINAL LAW (§ 680*)—APPEAL—HARMLESS ERROR—ORDER OF PROOF.

While ordinarily the corpus delicti should be established before the state introduces extrajudicial admissions, unless accused was actually prejudiced thereby, the admission of such admissions before the corpus delicti is established is not affirmative error where the corpus delicti is afterwards established by other evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1609-1613; Dec. Dig. § 680.*]

5. CRIMINAL LAW (§ 508*)—TESTIMONY OF ACCOMPLICES—SUFFICIENCY.

In a prosecution for placing explosives under a building in which a human being usually lived, the evidence, other than that of the alleged accomplices, showed that the shoes taken from accused fitted perfectly the footprints found near the premises where the explosion occurred, and that accused had dynamite in his possession shortly before and immediately after the explosion, and had repeatedly threatened to "fix" the person living in the house with dynamite because he would not give him a job. *Held*, that the evidence tended to connect accused with the commission of the offense so as to warrant a conviction when taken in connection with the accomplice's testimony, which was, with it, sufficient to sustain the verdict.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 508.*]

6. CRIMINAL LAW (§ 1159*)—APPEAL—VERDICT—CONFLICTING EVIDENCE.

A verdict of guilty will be sustained on appeal where the evidence of accused and the state violently conflicted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

7. CRIMINAL LAW (§ 448*)—EVIDENCE—OPINION EVIDENCE—STATEMENT OF FACT.

A statement as to the result of a comparison in witness' presence between footprints found at the place of the crime and shoes taken from accused was admissible as a statement of fact based upon witness' personal observation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1035-1051; Dec. Dig. § 448.*]

8. CRIMINAL LAW (§ 603*)—AFFIDAVITS FOR CONTINUANCE—ABSENT WITNESSES.

An affidavit to procure a continuance for the absence of a witness previously subpoenaed should have shown facts fairly authorizing the

inference that the witness' attendance could have been procured within a reasonable time.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1348-1361; Dec. Dig. § 603.*]

9. INDICTMENT AND INFORMATION (§ 125*)—CHARGING TWO OFFENSES.

Pen. Code, § 601, provides that one who maliciously deposits or explodes or attempts to explode under any structure which human beings usually inhabit any dynamite, etc., with intent to injure or destroy such structure, etc., or with intent to injure, intimidate, or terrify any human being, or by means of which a human being is injured, is guilty of a felony. *Held*, that an information under the statute did not charge two offenses because it alleged an intent to injure a person and an intended injury to property, since all of the acts taken separately or together may constitute only one offense, though each in itself may also constitute an offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.*]

10. CRIMINAL LAW (§ 881*)—GENERAL VERDICT.

Since proof of the commission of any of the acts enumerated in the statute and alleged in the information would support a general verdict of guilty as charged, the verdict need not specify the particular acts and intent of which the jury found accused guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2089, 2093; Dec. Dig. § 881.*]

11. CRIMINAL LAW (§ 995*)—JUDGMENT—DESIGNATION OF CRIME.

In a prosecution for "maliciously" exploding dynamite under a human habitation with intent to injure, intimidate, or terrify a human being, made a felony by Pen. Code, § 601, the judgment stated in general terms that accused was convicted of "the crime of using an explosive with intent to injure a dwelling house and with intent to injure, intimidate or terrify a human being" therein, and also stated that accused was found guilty of the offense set forth in the information, but did not use the word, "maliciously," in designating the offense. Pen. Code, § 1207, provides that, when a judgment of conviction is rendered, the clerk must enter it, "stating briefly the offense for which the conviction was had." *Held*, that the court adopted the verdict as a part of the judgment, which was the equivalent of a detailed description of the offense, and substantially complied with section 1207.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2518-2543; Dec. Dig. § 995.*]

12. CRIMINAL LAW (§ 995*)—JUDGMENT—CONSTRUCTION.

A judgment in a criminal case must be construed in its entirety.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2518-2543; Dec. Dig. § 995.*]

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

George Barnnovich was convicted of exploding explosives under a place in which a human being usually lived, and, from a judgment of conviction and order denying a new trial, he appeals. Affirmed.

J. E. Rodgers, for appellant. Attorney General Webb, for the People.

LENNON, P. J. The defendant, George Barnnovich, was jointly charged with George Maracich and Lawrence Maracich, in an information filed in the superior court of Contra Costa county, with the crime of felony as defined in section 601 of the Penal Code. The defendant Barnnovich elected to be tried separately, and upon his trial he was convicted and sentenced to the state prison for life. The appeal is from the judgment and the order denying defendant's motion for a new trial.

The codefendants, George and Lawrence Maracich, were competent witnesses for the people, and were rightfully called by the district attorney to testify to any material facts within their knowledge. Before giving their testimony both these codefendants were in turn by the court cautioned as to their rights, and then admonished that any testimony which they saw fit to give could and might subsequently be employed against them.

[1] They could not have been compelled to testify, and, when called as witnesses, it was their privilege under the law to refuse to testify if their testimony would have tended to subject them to punishment for a felony.

[2] This, however, did not concern the defendant at the bar, and it was a matter over which he had no control. *People v. Rodondo*, 44 Cal. 539. The objection made at the trial to the testimony of the codefendant Lawrence Maracich "upon the ground that he was an accomplice and that the corpus delicti had not been sufficiently established to permit a codefendant testifying" was properly overruled.

[3] The statutory rule that a conviction cannot be had upon the uncorroborated testimony of an accomplice does not go to the admissibility, but only to the effect of the evidence of the accomplice. Pen. Code, § 1111; *People v. Grundell*, 75 Cal. 305, 17 Pac. 214. Notwithstanding a conviction cannot be had upon the uncorroborated testimony of an accomplice, the actual commission of the offense may be established by such testimony (*People v. Leavens*, 12 Cal. App. 184, 106 Pac. 1103) and we are satisfied that the corpus delicti in the present case was clearly and fully established at the time the people sought to introduce in evidence, through the medium of the witnesses, George and Lawrence Maracich, the statements and admissions of the defendant made before and after the commission of the crime charged. Even if this were not so, the record does not disclose that the defendant was in any way prejudiced by the order in which the trial court permitted the presentation of the prosecution's proof.

[4] Ordinarily, where the people seek to introduce in evidence the extrajudicial statements and admissions of a defendant, the corpus delicti should be first established; but in the absence of a showing that the defend-

ant was prejudiced thereby irregularity in the order of proof is of no consequence if, as is disclosed by the record in the case at bar, the facts requisite to establish the commission of the crime, independently of the alleged admissions of the defendant, ultimately appear in evidence. *People v. White-man*, 114 Cal. 338, 46 Pac. 99; *People v. Ward*, 134 Cal. 306, 66 Pac. 372; *People v. Besold*, 154 Cal. 368, 97 Pac. 871.

The evidence in the case, other than that of George Maracich, an admitted accomplice, and Lawrence Maracich, a disputed accomplice, was to the effect that the shoes taken from the person of the defendant fitted perfectly in the footprints found near the premises where the explosion occurred, that the defendant had dynamite in his possession and on his person shortly before and immediately after the explosion, and that he had repeatedly threatened to "fix Mr. Hartman with dynamite because he would not give him a job."

[5] This evidence standing alone may have been entitled to but slight weight in determining the guilt or innocence of the defendant; but it did, apart from the testimony of the claimed accomplices, tend to connect the defendant with the commission of the offense charged against him, and was corroboration of the testimony given by the Maracich brothers sufficient to warrant the jury in finding the defendant guilty.

[6] The contention that the evidence upon the whole case does not support the verdict may be disposed of with the statement that the evidence offered respectively upon behalf of the people and the defendant is in violent conflict.

[7] The testimony of the witness Fox as to the result of a comparison which was made in his presence between the footprints found at the scene of the crime and certain shoes, shown to have been subsequently taken from the person of the defendant when he was arrested, was but the statement of a fact based upon the personal observation of the witness. The ruling of the trial court refusing to strike out this testimony was correct.

The trial court did not abuse its discretion in refusing the continuance asked for by the defendant (after a jury had been impaneled and the case for the jury closed) in order to obtain the attendance of a witness for whom several days previous to the commencement of the trial a subpoena had been issued and returned unserved.

[8] The application for a continuance under all of the circumstances shown by the record was not seasonably made (Pen. Code, §§ 1052, 1433; *People v. Beam*, 66 Cal. 396, 5 Pac. 677; *People v. Logan*, 123 Cal. 414, 56 Pac. 56), and the affidavit offered in support thereof failed to set forth, as it should have done, any fact or facts from which the trial court could have fairly inferred that the attendance of the alleged witness could have been procured within a reasonable time or at all

(*People v. Ah Yute*, 53 Cal. 614; *People v. Lewis*, 64 Cal. 403, 1 Pac. 490; *People v. Leyshon*, 108 Cal. 444, 41 Pac. 480; *People v. Wade*, 118 Cal. 672, 50 Pac. 841).

[9] The information alleges two intents—one an intended injury to a person and the other an intended injury to property. It does not follow from this that the information charges two offenses as claimed by counsel for the defendant. Section 601 of the Penal Code, which defines the offense of which the defendant was convicted, enumerates a series of acts any of which separately or all together may constitute the offense. "All such acts may be charged in a single count, for the reason that, notwithstanding each may by itself constitute the offense, all of them together do no more, and likewise constitute but one and the same offense." *People v. Frank*, 28 Cal. 507; *People v. Leyshon*, 108 Cal. 440, 41 Pac. 480; *People v. Swaile*, 12 Cal. App. 192, 107 Pac. 134.

[10] As but one offense arising out of a single transaction was charged in a single count by the information, proof of the commission by the defendant of any one of the acts enumerated in the statute and charged in the information was sufficient to support a general verdict of guilty as charged in the information, and it was not necessary, therefore, that the jury should have specified in their verdict the particular acts and intent of the defendant of which they believed and found him guilty.

[11] It is insisted upon behalf of the defendant that the judgment is defective, in this: That the crime of which the defendant was convicted was not technically and in detail designated in the judgment. This contention is based upon the failure of the trial judge, when pronouncing the judgment and sentence of the law, to use the word "maliciously" in its designation of the offense charged against the defendant, and of which he was found guilty. The judgment, however, as entered in the minutes of the court, does in general terms mention and describe the offense of which the defendant was convicted, viz., "the crime of using an explosive with intent to injure a dwelling house, and with intent to injure, intimidate and terrify a human being in said dwelling house." In addition to this general description of the offense, the judgment specifically refers to the fact that the defendant was "found guilty of the offense set forth in the information." The Penal Code does not in terms provide for either the form or the contents of a judgment in a criminal case, but section 1207 of that Code requires that "when a judgment upon a conviction is rendered the clerk must enter the same in the minutes of the court, stating briefly the offense for which the conviction was had. * * *"

[12] The judgment in the case at bar must be considered and construed in its entirety; and, so considered, it sufficiently appears that

the court adopted the verdict of the jury as a part of the judgment, and sentenced accordingly. This was the equivalent of a detailed designation of the offense for which the conviction was had (*People v. Sam Lung*, 70 Cal. 518, 11 Pac. 673), and in conjunction with the court's general designation of the offense was a substantial compliance with the provisions of section 1207 of the Penal Code, and afforded the defendant ample protection against a second prosecution for the same offense.

The judgment and order appealed from are affirmed.

We concur: HALL, J.; KERRIGAN, J.

16 Cal. App. 519

JUSTY et al. v. ERRO. (Civ. 831.)

(District Court of Appeal, Third District, California. June 27, 1911.)

1. BROKERS (§ 63*)—RIGHT TO COMMISSIONS—DEFENSES.

If the broker produces a purchaser ready, willing, and able to purchase upon the terms stipulated, the owner cannot prevent paying commissions by refusing or neglecting to consummate the sale as by selling to another or negligently dealing with the procuring purchaser so as to lose the sale, or by changing the terms of the proposed sale.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 79-96; Dec. Dig. § 63.*]

2. BROKERS (§ 56*)—COMMISSIONS—PROCURING SALE.

To entitle him to commissions, a broker need not personally conduct the negotiations leading to the sale, or be present when it is completed, nor need the principal know at the time that the purchaser was found by the broker; it only being essential that the broker's efforts be the procuring cause of the sale.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 85-89; Dec. Dig. § 56.*]

3. APPEAL AND ERROR (§ 1011*)—FINDINGS—CONFLICTING EVIDENCE.

The trial court's findings on substantially conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

4. BROKERS (§ 57*)—RIGHT TO COMMISSION.

Where the owner authorized a broker to sell property for a certain sum for a commission of "5% of the purchase price," the broker was entitled to 5 per cent. commissions on that sum upon a sale to a purchaser procured by him, though the owner, without the broker's knowledge, reduced the price to the purchaser, and hence, in an action for commissions, evidence that the owner sold for a less price than that fixed by the agreement with the broker was not admissible.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 66-72; Dec. Dig. § 57.*]

5. BROKERS (§ 85*)—ACTION FOR COMMISSIONS—ADMISSION OF EVIDENCE.

In a real estate broker's action for commissions for effecting a sale, a written agreement executed by plaintiff with another after plaintiff had been authorized to sell, authorizing such other to sell as subagent for plaintiff, was admissible; defendant claiming that such

other was not acting for plaintiff in making the sale.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 106-115; Dec. Dig. § 85.*]

6. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where, in a real estate broker's action for commissions, a written agreement executed by plaintiff with another after plaintiff had been authorized to sell, authorizing such other to sell as subagent, was properly admitted in evidence to rebut defendant's claim that such other was not acting for plaintiff when selling, any error in admitting an oral agreement by plaintiff appointing such other as subagent was not prejudicial to defendant.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

7. BROKERS (§ 55*)—RIGHT TO COMMISSIONS—SALE BY ANOTHER.

Under an agreement between the owner and a real estate agent giving the latter the exclusive right to sell the property for 90 days at a 5 per cent. commission, provided that the owner might himself sell it to any one to whom it had been submitted by the agent, in which case the agent should receive a 2½ per cent. commission, the agent had the exclusive right to sell the property within the period limited, and was entitled to a 5 per cent. commission if sold by himself or any one else without his consent within such period, unless sold by the owner to one to whom it had been previously offered by the agent, in which case he was entitled to a 2½ per cent. commission; so that in an action for commissions for a sale within the stipulated time evidence that the person effecting the sale acted for himself, and not for plaintiff, was inadmissible.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 82-84; Dec. Dig. § 55.*]

8. BROKERS (§ 69*)—ACTIONS FOR COMMISSIONS—DAMAGES—MEASURE.

In a real estate broker's action for breach of a contract to pay 5 per cent. commissions for selling realty by procuring its sale by another, the measure of damages was the maximum commissions which could be earned under his contract with the owner.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 69.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by N. P. Justy and others against Matias Erro. From a judgment for plaintiffs and an order denying a motion for a new trial, defendant appeals. Affirmed.

Sutherland & Barbour, for appellant. Raleigh E. Rhodes and W. D. Crichton, for respondents.

HART, J. The plaintiffs, doing a real estate brokerage business in the city of Fresno, brought this action for the purpose of recovering certain commissions alleged to be due and owing them from defendant for services rendered under a written contract in procuring a purchaser and consequently effecting the sale of certain land belonging to the defendant and situated in Madera county. The cause was tried by the court, a jury having been waived by both parties. Plaintiffs were given judgment, from which and the order denying him a new trial the

defendant prosecutes this appeal to this court.

The complaint is in two counts, viz.: The one declaring upon the contract and the other upon the debt alleged to be due plaintiffs for the services stated in *indebitatus assumpsit*. The answer specifically denies the averments of each count of the complaint.

The points urged against the judgment and order are generally that the evidence is insufficient to support certain of the vital findings and that the court committed errors prejudicial to the defendant in certain of its rulings allowing and excluding certain testimony.

As to the facts of the transactions giving rise to this action, the controversy seems to have been pivoted by both parties upon the sole question whether the sale of the land described in the agreement between the parties was brought about through the plaintiffs or entirely through one Charles De Roulet, the claim of defendant being that the latter, acting solely for himself and independently and not as an agent of or connected in any way with the plaintiffs in the transaction, effected a sale of the property, upon which proposition it is contended that the plaintiffs are not entitled, at the most, under their agreement with defendant, to more than the aggregate commissions computed at the rate of 2½ per cent. on the "purchase price," as to which price there is also some dispute. In the outset we may as well announce it to be our opinion that, according to the terms of the agreement between plaintiffs and defendant, the former are entitled to the maximum commissions provided for by said agreement even under the theory of the defense. In other words, even if it be true, as is the claim of the defendant, that De Roulet, through whom admittedly the land was sold during the term within which the plaintiffs had been given by the agreement the exclusive right (with a single exception of which we shall give special consideration hereafter) to sell the land was not acting for or connected in any manner or sense with plaintiffs in their agreement with defendant, the former would, nevertheless, be entitled to commissions of 5 per cent. on the purchase price. It is, however, deemed the more orderly, under the circumstances presented by the record, to postpone further consideration of this proposition until we have examined the facts as revealed by the record and some other questions which are raised by the appellant against the validity of the judgment and order. But it is conceived not to be improper to state in the beginning some of the well-settled general rules of law relating to contracts by which real estate brokers are authorized to sell property for others on commission.

[1] "If, within the time limited, the broker has produced a purchaser who is ready,

willing, and able to purchase upon the terms prescribed, the principal cannot evade the payment of the broker's commission by then refusing or neglecting to consummate the sale, or by changing the terms, or by selling the property to another, or by so negligently dealing with the proposed purchaser as to lose the benefit of the sale." *Mechem on Agency*, § 967. And, in consonance with the rule as thus stated, it has been held that, if the broker has fulfilled upon his part, "he will be entitled to his commissions, although the sale is not consummated because the principal's title proves defective (*Hamlin v. Schulte*, 34 Minn. 534, 27 N. W. 301; *Goodridge v. Holliday*, 18 Ill. App. 363; *Gonzales v. Broad*, 57 Cal. 224; *Knapp v. Wallace*, 41 N. Y. 477; *Doty v. Miller*, 43 Barb. [N. Y.] 529; *Sibbald v. Bethlehem Iron Works*, 83 N. Y. 378, 38 Am. Rep. 441), or because the principal's wife refuses to join in the conveyance (*Clapp v. Hughes*, 1 Phila. [Pa.] 382), or because the purchaser refuses to complete the sale on account of false representations made by the principal" (*Glentworth v. Luther*, 21 Barb. [N. Y.] 145).

[2] Nor is it necessary that the broker should personally have conducted the negotiations between his principal and the purchaser leading to the sale, nor that he should have been present when the bargain was completed, "or even that the principal should, at the time, have known that the purchaser was one found by the broker." *Section 966, Mechem on Agency*, and cases cited in the footnote thereof. And, while it is indispensable, yet it is sufficient that his efforts were the procuring cause of the sale; that, "through his agency, the purchaser was brought into communication with the seller, although the parties negotiated in person." *Id.*

With the foregoing statement of some of the principles governing contracts of the character of the one here, we will now proceed to review the facts, which as disclosed by the evidence from which the court made its findings, may thus be summarized:

On and prior to the 3d day of August, 1908, and until he sold the same, the defendant was the owner of a tract of land situated in the county of Madera and known as the "Borden and Freeland Ranch." On said 3d day of August, 1908, said De Roulet met defendant and asked the latter if he (defendant) would "sign a contract for his property for \$36,000 and he said he would, and he came to Mr. Justy for that purpose," having been accompanied to Justy's office by De Roulet. After reaching Justy's office, the defendant executed, in the presence of Justy, the latter's son, and Vise, Justy's partner, the following agreement: "I hereby appoint N. P. Justy Company, W. R. Vise, my agents with exclusive right to sell the following property and receive deposit in my name. To-wit: I sell

the ranch known as the Borden and Free-land ranch located in the county of Madera, state of California, as follows: for the sum of \$36,000.00; \$5,000.00 cash balance of \$31,000.00 in 5 — years as follows: \$5,000.00 thirty days or more and \$10,000.00 in ninety days after, balance to be paid in four years at amount arranged, with interest at 7 per cent. per annum, payable annually. And I agree to furnish deed, abstract and clear title, and pay five per cent. commission on purchase price out of said sale. Reasonable time allowed for making papers. This contract to remain in force for a period of ninety days from the date hereof and thereafter until written notice is given to cancel, and if sale is made by me or through me during the term of this contract, or after the expiration of the same, to any one to whom said property has been submitted by said N. P. Justy Company, I agree to pay them 2½ per cent. commission on said sale. Fresno, Cal. Aug. 3rd, 1908. [Signature] Matias Erro. Aug. 3rd. Witness: N. D. Justy at 3:20 P. M.] Indorsed on reverse side: "Recorded at the request of Madera Abstract Company Sept. 25, 1908, at 50 minutes past 9 o'clock A. M., in Vol. 3 of Covenants, page 71, Records of Madera County, Cal., Walter A. Smith, Recorder."

After the execution of said agreement, Justy and De Roulet entered into an agreement by which the latter engaged to act as subagent of plaintiffs in securing a purchaser of the property, and for his services in that capacity he was to share equally with plaintiffs in the commissions which they were to receive, on a sale of the land by them, under their agreement with defendant.

Within 90 days from the date of the execution of the agreement between plaintiffs and defendant, De Roulet found a purchaser in the person of a Mrs. Camy, a resident of Madera county. In De Roulet's own language may perhaps best be told the circumstances of the sale to Mrs. Camy: "After I had been requested to find a purchaser for this property, I tried to get a buyer. To my best knowledge it must have been about three weeks after the 3d of August before I found anybody. This person was Mrs. Camy, sometimes known or called Madam Camy. I went over to Mrs. Camy's and took her over to Mr. Erro in Madera, and I told her she could get that property for \$36,000, but when I brought Mrs. Camy over to Mr. Erro he raised it to \$43,000. After a certain agreement, they reduced it to \$42,000, and she agreed to pay that, in exchange for property or notes. This I think was about three weeks subsequent to the 3d day of August. We went to Mr. Erro two or three times. On each of these occasions Mr. Erro and Madam Camy were in conversation with reference to the barter or exchange of the property, purchase and sale of it. I think it was some time in October that they agreed upon terms. It was during the life of the contract."

Justy's testimony that De Roulet, in the procurement of Mrs. Camy as the purchaser of the property, was acting for and as the agent of the plaintiffs under the agreement between the former and the latter is corroborated by the testimony of Vise and that of De Roulet himself. Clearly the testimony of which we have given only a brief synopsis fully supports the finding of the court that "in pursuance of said agreement and thereunder, and prior to the expiration of said period of ninety days, in said agreement mentioned, said plaintiffs did find, provide and obtain a purchaser for said real property, for a sum over and in excess of the sum named in said agreement and asked by said defendant, to wit: for the sum of \$42,000, and upon terms suitable and satisfactory to said defendant, and that said purchaser was able to purchase, willing to purchase, ready to purchase, and who actually did purchase, said real property"; that, having performed all the terms, covenants, and conditions of their agreement with defendant, the plaintiffs "became and were entitled to the sum of 5 per cent. commission upon said purchase price of forty-two thousand dollars."

The theory of the defendant, as developed by the evidence introduced in support of his resistance to the claim of plaintiffs, was, as before stated, that De Roulet, in bringing Mrs. Camy and defendant together in the transaction culminating in the sale to her, was acting entirely for himself and independently of plaintiffs; that he was never authorized by plaintiffs to act for them in the matter of the sale of the property involved in their agreement with defendant; and that his claim that he was so acting for plaintiffs was the result of an understanding conceived by him and the plaintiffs after the sale to Mrs. Camy was effected and sought to be established by them with the design and hope of securing the maximum commissions provided for in the agreement between plaintiffs and defendant. To this end, defendant undertook to show that De Roulet, after bringing about the sale of the land to Mrs. Camy, was told by plaintiffs that, if he would join them in maintaining that he had acted as their agent in his dealings with the defendant and Mrs. Camy, they could secure the 5 per cent. commission to which defendant had bound himself, in case plaintiffs secured a buyer, and that they would then divide the total sum of the commissions, allowed on the basis of 5 per cent. of the purchase price, in equal shares between them; that it was then that the idea that De Roulet, in the transaction with Mrs. Camy, was not acting for himself alone, but as the regularly appointed agent of plaintiffs, was first conceived by him and plaintiffs.

[3] We need not review the evidence thus offered by the defendant and received by the court; for, while it may be conceded that some circumstances were thus developed which, upon their face, might tend to inspire

suspicion as to the good faith of the claim that De Roulet acted at all times, in his negotiations with Mrs. Camy, as the agent of plaintiffs, still the effect of that testimony, even if it were material, could only be to raise a substantial conflict in the evidence, and, as is well understood, the conclusion of the trial court as to the truth of the matter must therefore be accepted by this court.

The defendant did not deny making the agreement with plaintiffs. Indeed, his letter written three days after the expiration of the 90 days during which the contract by express language was to remain in force (it will be observed that the contract further provided that after the 90 days it should remain in force until it was canceled by written notice) notifying plaintiffs of the cancellation of the agreement is itself evidence of a conclusive character that he recognized the legality and binding force of its terms. Justy, Vise, and De Roulet, as we have seen, each testified that the last named was, immediately upon the execution of the agreement between plaintiffs and defendant, especially employed by plaintiffs to find a purchaser of the property described in said agreement, and that from that time until he did find a purchaser in the person of Mrs. Camy he continued in their employment for that specific purpose. Conceding, for the present, that the evidence produced by defendant upon this point would, if sufficient in probative power, have established a legal defense to the right of plaintiffs to recover the maximum commissions stipulated for by the agreement, it was then, of course, for the trial court to decide upon which side the evidence upon that issue preponderated, and, having found thereon with plaintiffs, it is not, as before stated, within the legal province of a reviewing court to declare that the court below thus reached an erroneous conclusion or abused the discretion with which it is invested in the matter of weighing evidence, and, to that end, judging of the credibility of the witnesses.

It is further urged by appellant that there is no evidence in the record disclosing the precise price at which the real estate described in the contract was sold. This point may appropriately be considered in connection with the rulings of the court by which the defendant was prevented from showing that the price for which the property was sold was less than the sum of \$36,000. This will necessitate a return to the facts from which the question arose in the court below and is presented here.

De Roulet, it will be recalled, testified that when he brought Mrs. Camy to Erro, after having told her that she could obtain the property for the sum of \$36,000, the latter refused to accept said sum, but raised the purchase price to \$43,000, finally, however, agreeing to take \$42,000. But the last-named price, it appears, included, in addition to the land itself, a large amount of personal prop-

erty of various kinds—some live stock and some consisting of farming implements, machinery, etc. The court by its judgment allowed plaintiffs commissions computed upon the basis of the price for which the farm and said personal property were sold, viz., \$42,000, a judgment having consequently been rendered and entered in favor of plaintiffs for the sum of \$2,100. But in passing upon the motion for a new trial the court, as a condition to a denial of said motion, ordered and required plaintiffs to remit the sum of \$300 of the judgment so rendered and entered. The plaintiffs within the time specified by the court in its order filed a written remission of the amount designated by the court, the effect of which was to reduce the judgment in favor of plaintiffs to the sum of \$1,800, which manifestly represents commissions at the rate of 5 per cent. on the purchase price of the land as set forth in the agreement between plaintiffs and defendant.

But it is now earnestly insisted that, notwithstanding such reduction of the amount for which judgment was originally awarded, the court's refusal to permit evidence to be received which, it is claimed, would or might have disclosed that the price Mrs. Camy agreed to pay for the land was less than the sum of \$36,000, was prejudicially erroneous. But we think the rulings so complained of were proper from every standpoint from which we have been led to view this record.

[4] As we have seen, the rule approved by all the authorities is that where, as here, the contract between the broker and the seller itself fixes and specifies the price for which the former is authorized to sell the property on specified commissions, the broker, in case he procures a purchaser ready, willing, and able to purchase at such price, is entitled to the stipulated commissions on the price so fixed and specified regardless of whether the owner has reduced the price in the final sale of the property to such purchaser or otherwise changed the terms of the contract. *Mechem on Agency*, § 967; *Stewart v. Mather*, 32 Wis. 349. This rule is, of course, subject to the qualification that the broker had no notice or knowledge of the reduction of price or had not acquiesced in or consented to such reduction or other modifications of the terms of the contract material to his rights thereunder.

The contract between the plaintiffs and the defendant in the case at bar authorized the former to sell the property for the sum of \$36,000 on which sum they were to receive, as compensation, if they brought to defendant a buyer within the time limited by said contract, commissions at the rate of "5 per cent. on the purchase price." And the words "purchase price" cannot justly or reasonably be construed to have reference to any other price than that definitely fixed and specified in the contract. There is no evidence, nor, indeed, any pretense, that plaintiffs consented to a reduction of the price so fixed. There-

fore they were entitled to be paid commissions on the basis of the price thus definitely fixed, and in accordance with which they undertook to sell the property, without regard to any change in such price to which the defendant himself, without their knowledge or consent, might have assented with the buyer. The part of the convention that plaintiffs obligated themselves to perform was completely fulfilled when, through their efforts there was brought to the defendant a buyer then ready, willing, and able to buy the property.

From the foregoing views, it manifestly follows that testimony which might have shown or tended to show that the defendant, in his negotiation with Mrs. Camy immediately culminating in the sale, agreed to and did in fact sell the property described in his agreement with the plaintiffs for a smaller sum than that fixed by said agreement would not have been material or relevant for any purpose.

Objections were also made by counsel for defendant to all questions propounded to the witnesses Justy, Vise, and De Roulet with regard to the conversation occurring between said witnesses immediately after the agreement between plaintiffs and defendant was executed. The conversation thus sought to be brought out, and, in fact, brought out, involved the agreement and the terms thereof between plaintiffs and De Roulet by which the latter was employed by plaintiffs to assist them, as their agent, to sell defendant's property. The rulings allowing testimony of said conversation were not erroneous. Assuming for the purpose only of considering said rulings, that the theory of the defense is tenable—that is, that proof that De Roulet, in his transaction with Mrs. Camy, acted for himself and not for plaintiffs, would, if it satisfactorily showed the fact, constitute a defense to the right of plaintiffs to recover at all—it was, in such case, of course, incumbent upon plaintiffs, in order to establish their title to the maximum commissions provided for in their contract with defendant, to show that De Roulet had been duly and regularly authorized by them to act for them and that he did act for them in the sale of the property. Indeed, declaring and relying, as they do, in one count of the complaint, upon the contract for a recovery, the plaintiffs had the undoubted right to show that they negotiated the sale, through whomsoever it might have been personally accomplished, if by some one employed by them for that purpose. But this agreement, as made orally immediately following the execution of the contract between plaintiffs and defendant, was subsequently (September 20, 1908), and prior to the time at which the contract between defendant and Mrs. Camy was executed (October 10, 1908), reduced to writing, and in that form offered and received in

evidence. The vital and only important covenant involved in said agreement was that by which De Roulet was authorized by plaintiffs to find for them a purchaser of defendant's property, to prove which fact was the sole purpose of the production of evidence of said agreement.

[5.6] Therefore, even if it be questionable whether the testimony of the oral agreement of the parties was proper, in view of the requirement of our statute of frauds that certain agreements authorizing or employing an agent or broker to sell real estate for compensation shall be in writing (section 1624, subd. 6, Civ. Code), a proposition we need not decide here, it cannot, of course, be said that the written evidence thereof was not competent and proper, or that the testimony of the oral negotiations and agreement authorizing De Roulet to act for plaintiffs could in any manner or measure have prejudiced defendant, since there is not, nor any claim that there is, any material variance between the agreement as orally made and the written evidence thereof. But, in any event, while, as before declared, the finding of the court that the efforts of plaintiffs were the procuring or proximate cause of the sale is amply supported by the evidence, which finding necessarily implies a finding that De Roulet acted for plaintiffs in causing the sale to be made to Mrs. Camy, yet we are of the opinion, as previously suggested, that, accepting the theory upon which the defendant seeks to defeat the right of plaintiffs to the recovery of the maximum commission computed upon the basis of \$36,000, the sum specified in the contract as the purchase price, it then becomes immaterial whether De Roulet did or did not act, in the transaction, as agent of plaintiffs, and that, therefore, the latter must still prevail.

This proposition calls for a construction of the agreement between plaintiffs and defendant and the rights of the former thereunder, and, if it be sound, then obviously error cannot be predicated of any of the rulings by which the court refused to allow testimony designed to show that De Roulet was not employed by plaintiffs to find a purchaser or to negotiate a sale of defendant's property for them, or that he was not acting for them when he brought Mrs. Camy to defendant as a purchaser of said property.

The agreement between plaintiffs and defendant, it will be noted, gives to plaintiffs the exclusive right to sell or negotiate the sale of the property therein described for the period of at least 90 days from the date of the execution thereof. The only qualification of said provision and the right so given is that the defendant himself may sell the property to any party to whom the same has been submitted by plaintiffs, in which event the latter were to receive com-

missions at the rate of 2½ per cent. or the minimum commissions stipulated for in the agreement. Thus it is to be observed that the only contingency which could arise under the contract, the happening of which during the life of the agreement would limit the right of plaintiffs to the minimum commissions provided for thereby, was the sale of the property by defendant to some party to whom the proposition of the sale had antecedently been submitted by the plaintiffs. In other words, there is only one thing that could have occurred, under the terms of the contract and within the time limited thereby, which would compel the plaintiffs to accept the smaller commissions provided for by said agreement, and that is where the sale was made by defendant himself to a party to whom the plaintiffs had prior to such sale submitted the proposition. Of this proposition there is, in our opinion, absolutely no ground for debate. This being true, the agreement, viewed and considered in its entirety, is rationally capable of but one construction, viz.: That, with the said exception that the owner of the property might himself have sold the same by his own personal efforts to some person to whom the proposition of the sale had previously been submitted by the plaintiffs—that is to say, to a party to whose attention the proposition had been brought by plaintiffs, but who has finally purchased the same through the personal efforts or negotiations of the defendant himself—the plaintiffs were vested with the sole and exclusive right to sell said property.

[7,8] But a sale of the property within the period limited by the contract by the defendant brought about by any other person than the plaintiffs, without their acquiescence or consent, could not operate to defeat the latter's right to the maximum commissions provided for by said agreement (see *Kimmel v. Shelley*, 130 Cal. 555, 62 Pac. 1067), and, where the sale had been so made, in an action to assert that right, whether said action was upon the contract itself or for a breach of its terms (the maximum commissions which could be earned by them under the terms of the contract would, in the latter action, constitute the measure of damages), they would be entitled to recover the commissions computed at 5 per cent. on the sum of \$36,000. See *Mechem on Agency*, § 967; *Lane v. Allbright*, 49 Ind. 275; *Reed's Ex'rs v. Reed*, 82 Pan. 420; *Fox v. Byrnes*, 52 N. Y. Super. Ct. 150. There is no evidence in the record, nor, indeed, any claim that the plaintiffs or either of them submitted the proposition of sale to Mrs. Camy, unless it was done through De Roulet as their agent. Vise testified that he "talked with Mrs. Camy with reference to this property after

the sale, but never before." The purpose of the evidence unsuccessfully sought to be brought out by the cross-examination of Justy, Vise, and De Roulet was to support the theory of the defense that De Roulet in bringing Erro and Mrs. Camy together on the proposition of the sale of the land, was in no sense connected with plaintiffs, was not acting as their agent, but was acting solely for himself; that the proposition had not been submitted to her by the plaintiffs. As proof of such fact would not, as is manifest, have released or absolved Erro from liability to pay plaintiffs the stipulated maximum commissions on the purchase price as specified in the agreement, it follows, of course, that the rulings of the court excluding evidence of such fact, if it was a fact, were proper. Such testimony, in other words, even if sufficient to satisfactorily prove the fact, could not have established a legal defense to the right of plaintiffs to recover the 5 per cent. commissions on the sum of \$36,000, fixed and specified by the contract as the purchase price of the property.

There are some other points presented which, in view of our theory of the meaning and scope of the agreement between the parties to this action, call for no special notice.

We have discovered no reason for interfering with the judgment and the order, and they are therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

16 Cal. App. 375

PIERCE v. PIERCE. (Civ. 805).

(District Court of Appeal, Third District, California. June 9, 1911. On rehearing, July 7, 1911.)

1. ACTION (§ 7*)—MOTIVE IN SUING.

Motive, though an important element of fraud, does not alone vitiate a conveyance nor preclude the assertion of a valid claim, and hence, when a mortgage given for valuable consideration is foreclosed by regular proceedings, the court will not inquire into the motives of the suit.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. § 8; Dec. Dig. § 7.*]

2. FRAUDULENT CONVEYANCES (§ 29*)—TRANSFER—SUBJECT—ATTACK—STATUTORY PROVISIONS.

Civ. Code, § 3439, which provides that every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands is void against all creditors of the debtor, is intended to prevent any fraudulent change in the situation of the property which would prejudice persons holding claims against the debtor, but does not prevent the enforcement of a valid existing lien upon specific property of the debtor, where every requirement of the statute is complied with, and no element of fraud appears in the proceeding to enforce the lien.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 29.*]

3. FRAUDULENT CONVEYANCES (§ 29*)—COLLUSIVE LEGAL PROCEDURE—TRANSFER ON FRAUDULENT CLAIM.

A debtor's attempt to cover up his property or to transfer it by means of legal proceedings, regular in form, will not be set aside as fraudulent against creditors, unless the proceeding is had on a fraudulent claim, one that has the form but not the substance of a valid charge on the property; and a sale in foreclosure of a mortgage either under a power therein or by legal proceedings will not be set aside at the suit of creditors of the mortgagor unless there be fraud in the foreclosure proceeding itself.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 72-82; Dec. Dig. § 29.*]

4. FRAUDULENT CONVEYANCES (§ 299*)—SUFFICIENCY OF EVIDENCE.

Evidence in an action by a wife against her husband's divorced wife to quiet title in a certain piece of property held insufficient to sustain a finding that the mortgage executed by the husband for a valuable consideration was foreclosed at his instigation for the fraudulent purpose on his part and on the part of the mortgagee of concealing the title of the property from his creditors, and particularly of concealing title to such property in anticipation of commencing an action of divorce against his former wife.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 299.*]

On Rehearing.

5. TRIAL (§ 395*)—FINDINGS—ULTIMATE AND EVIDENTIARY FACTS AND CONCLUSIONS.

In an action by a wife to quiet title in property formerly belonging to her husband, and in which the husband's divorced wife claimed a lien, a finding that it was not true that the claim of defendant was without any right whatever, and that she had no estate, title, or interest in or to the lands or any part thereof, but that the defendant and plaintiff were the owners of the land as tenants in common subject to certain liens, is the finding of an ultimate fact, and is not a mere conclusion, and as such necessarily precludes a judgment that plaintiff is the sole owner of the land.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 931; Dec. Dig. § 395.*]

6. TRIAL (§ 404*)—FINDINGS—CONSTRUCTION AND OPERATION—ULTIMATE FACTS TO PREVAIL OVER PROBATIVE FACTS.

An ultimate fact shown by the finding of certain probative facts to have been found against the evidence must still prevail where it does not appear that the findings of the probative facts dispose of all the facts involved in the pleadings.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 957-962; Dec. Dig. § 404.*]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action to quiet title by Ella B. Pierce against Frances P. Pierce, with cross-action in which Robert E. Pierce and others were made parties. From a judgment establishing a lien in favor of the defendant, plaintiff appeals. Reversed.

Power & McFadzean, E. M. Rea, and Horatio Alling, for appellant. Will M. Beggs, R. M. McCornish, and E. C. Farnsworth, for respondent.

BURNETT, J. For a statement of the facts and of the grounds of the decision as to the merits, we make the following quotation from the opinion filed in the cause by the learned trial judge:

"This is a suit between the present wife and the former wife of Dr. Robert E. Pierce to quiet title to an orange grove of about 30 acres near Lindsay, and now worth at least \$30,000. By a cross-complaint Dr. Pierce, his mother, Fannie L. Pierce, and his brother, Frederick B. Pierce, are made parties. Dr. Pierce became a practicing physician in 1879. One year later at his ancestral home in Melrose, Mass., he was married to defendant, and they lived together for nearly 20 years, most of the time at San Jose, where Dr. Pierce still resides. The land in controversy was purchased with community funds about the year 1894. Defendant was in Melrose from July, 1897, for nearly two years, visiting the doctor's mother, having gone there, as defendant says, 'at his very urgent consent and wish.' It appears from the testimony of the mother, Fannie L. Pierce, that her husband in 1884 loaned Dr. Pierce \$2,000 on his note. The father died about three years later, leaving this note with other property to Fannie L. Pierce. Nine years after his death, while the doctor was visiting at Melrose, in January, 1896, she loaned him an additional \$2,000, taking his note for \$4,000, and canceling the first note. Nearly two years later, November 29, 1897, Dr. Pierce executed a mortgage on the land in controversy to his mother to secure payment of a note for \$4,000 of even date, due one year after date. The mortgage and the new note were prepared either in the brother's office in San Francisco, or in the office of Jackson Hatch, at San Jose. On February 10, 1899, suit in the name of the mother was brought against Dr. Pierce to foreclose this mortgage. The brother appeared as attorney for his mother. Summons was issued and received by the sheriff and served on Dr. Pierce the same day in Tulare county, there being mileage charged for only one mile, which shows that the doctor was at or conveniently near Visalia on that day. On February 21st, the doctor not having appeared, his default was entered and the mother obtained a judgment against him for \$4,603.30, including \$250 attorney's fee. A decree of foreclosure was entered, and on March 14, 1899, the land was sold to the mother for the amount of the judgment and cost of sale. Under the law the doctor had six months within which to redeem the property, but four days after the foreclosure sale he conveyed the land and his equity of redemption to his mother, Fannie L. Pierce.

"Dr. Pierce testified that shortly after the foreclosure sale he received a lease of the land from his mother through his brother for a term of from three to five years. This

lease was not recorded or produced at the trial. In June, 1900, Dr. Pierce sued his wife for divorce, she resisted, filed a cross-complaint, and was awarded the decree of divorce and alimony in the sum of \$100 a month, and the alimony was made a lien upon this property. The records of this suit were burned in the fire following the earthquake in San Francisco, where the case was tried. From the decree, a copy of which was recorded in this county, it is evident that the property rights of the parties were put in issue and tried and the doctor must have admitted the ownership as claimed, or permitted the ownership to be proved without objection. After the divorce was granted, down to 1902, the divorced wife saw Dr. Pierce very often at her home, where he would call upon her. He was friendly and affectionate in his greetings. Whenever she was ill, which was often, he prescribed for her as a physician. She frequently consulted with him about her business affairs. He appeared much interested in her welfare, and she still had great trust and confidence in him. Alimony was paid for a time. The last payment of \$200 was advanced by defendant's father, he taking Dr. Pierce's note, which has not been repaid. Alimony was in arrears for about four years at the time of the trial. Early in 1902 Dr. Pierce told his former wife that he had a paper which he wished her to sign, and that he would send it to her by his brother Fred. Soon afterwards, on February 8, 1902, while she was ill in bed and preparing for a surgical operation, which Dr. Pierce had advised, the brother, Fred Pierce, took the paper to her and she signed and acknowledged it. She says she was told that it was a lien, but did not know what a lien was. Neither the doctor nor the brother told her it was a release of her lien on the property, and she did not discover that it was until the fall of 1906. She did not read it, but signed it because the doctor asked her to sign it. She knew nothing of the mortgage on the property nor of the foreclosure and sale nor of the deed from Dr. Pierce to his mother, nor of any lease from the mother to Dr. Pierce until in October, 1906.

"In January, 1906, Dr. Pierce and plaintiff, Ella B. Pierce, were married. Then, without consulting his mother, Fred B. Pierce prepared and sent to her a deed, which she executed on February 8, 1906, conveying this property to Ella B. Pierce whom she had never seen and with whom she had never corresponded. This deed was recorded. No consideration was received for it. The mother said it was a present. The mother never saw the property, never asked for the payment of the note, nor for any security, nor ever authorized the foreclosure suit. Everything seems to have been done by Fred Pierce, and she but passively responded to his suggestions."

Attention is then directed to the fact that

by various acts after the foreclosure Dr. Pierce treated the property as his own, and it is said to be "a reasonable inference from the circumstances that Dr. Pierce urged his wife to go East in July, 1897, with a view of putting the community property in a condition so that she would ultimately be deprived of any interest in it and then to separate from her and cause a divorce to be granted." The opinion proceeds: "The remarkable facts in this case have culminated in a condition by which the community property of Dr. Pierce and his former wife, now worth many thousand dollars, has without any act or omission of hers, and without her prior knowledge, become by gift apparently the separate and exclusive property of the new wife, while she, the first wife, is destitute and working as a stenographer for \$40 a month to support herself and her 85 year old father. The court concludes that it is not right, and that a just disposition of the cause is to set aside and annul the foreclosure proceedings, the deed from Dr. Pierce to his mother, the release of the lien for alimony, and the deed from the mother to Ella B. Pierce, so far as it grants more than an undivided half interest in the lands and affects the lien for alimony, and to decree that plaintiff and defendant are owners as tenants in common of the orange grove and the profits heretofore made from it, that the land is subject to two liens—the mortgage lien which may be considered the property of the plaintiff, and the lien for overdue alimony, the property of the defendant, and that an accounting be had and the property sold and out of the proceeds the amount found due upon the accounting be paid, and, after the payment of costs, the balance be divided equally between the plaintiff and defendant."

It is due Dr. Pierce to say that his brother, Frederick B. Pierce, who acted as his attorney, testified that he explained to defendant fully the said release of lien, and that it was read to her at the time she executed it. The court, though, accepted her account of it rather than his. This, of course, the court had a right to do. No doubt the court below took a humane view of the situation, and, from a generous impulse, sought to relieve the distress of a woman that was believed to have been wronged and oppressed. It seems impossible, though, as we view it, to reconcile the decision with certain well-established legal principles.

The whole cause turns upon the finding of the court: "That the said mortgage was made, executed, and delivered for a valuable consideration paid to the said Robert E. Pierce, but that the foreclosure thereof was instigated and suffered, and the commissioner's deed thereunder permitted by the said Robert E. Pierce for the fraudulent purpose on the part of the said Robert E. Pierce and the said Fannie L. Pierce of concealing the title of the said property from the creditors

of the said Robert E. Pierce and particularly of concealing the title of the said Robert E. Pierce to said property in anticipation of commencing an action for divorce against the defendant and cross-plaintiff." That this is the gravamen of the controversy must be apparent. If the mortgage and the foreclosure proceedings were legal and regular, the complete title became vested in Fannie L. Pierce. This would be so without regard to Dr. Pierce's deed of his equity of redemption. It would necessarily follow that plaintiff succeeded to the entire estate in the property, as the deed to her is unassailable.

Assuming, therefore, that there was no infirmity in the steps culminating in the commissioner's deed to her, the deed from the said Fannie L. Pierce to Ella B. Pierce vested the title absolutely in plaintiff, and the judgment of the court below was, of course, an unwarranted interference with her right. On the other hand, it may be said that in connection with other findings of the court the judgment can be upheld if the annulment of the said foreclosure proceedings can be justified. This vital finding, therefore, requires attention.

It is to be observed that there is no taint as to the mortgage itself. It was for a valuable consideration, and the purpose of the parties in executing it is not impugned. Indeed, it is expressly found that "said mortgage was in all respects a valid lien on said land," but the foreclosure is set aside for the reason that the parties were moved thereto by fraudulent and improper motives. We must assume—and, indeed, the evidence shows it—that the money borrowed and secured by said lien was due and unpaid, that no legal step in the action of foreclosure was omitted, that the judgment decreeing the sale was according to the forms of law, that the sale was regular, that no one was prevented from bidding for the property, and that it was sold for its full market value. As a matter of fact, it appears to have been sold to the mortgagee for the amount of the judgment, which was in excess of the value of the land. Moreover, there was nothing to show that either party to the foreclosure had any reason to believe or did believe that the property would increase in value, the returns from it and the condition of the trees on the land indicating, to the contrary, that it would depreciate. If the judgment of foreclosure under these circumstances should be set aside, of course, it would follow that the mortgagee should not have attempted to foreclose her lien. The situation would then be this: For the reason that A. desires to prevent C. from realizing anything from a contingent interest in the property, he is forbidden by equity to assert a perfectly valid claim against B. in a perfectly legal manner, although, by forbearing to press his suit, it is probable that his security will be jeopardized, and no benefit will accrue to C. This

may be the refinement of morality, but it is not the principle upon which business is conducted, nor can it be enforced unless we are by law to attempt to control the motives of men in their dealings with one another.

[1] Motive, though an important element of fraud, does not alone vitiate a conveyance nor preclude the assertion of a valid claim. In *Morris v. Tuthill*, 72 N. Y. 575, which was a suit to foreclose a mortgage, the court said: "The facts that the assignor of a mortgage and his assignee acted in concert with the view unnecessarily to harass and oppress the mortgagor and with intent to prevent payment, to the end that the equity of redemption might be foreclosed, and they become purchasers for less than the value, do not constitute a defense to an action to foreclose a mortgage. So, also, the facts that the assignee took title from motives of malice, and solely with a view to bring an action, and that the assignor assigned from a like motive and without consideration, furnish no defense, and do not impeach plaintiff's title. It is sufficient to sustain the action that the mortgage debt is due, has been transferred to, and is owned by, plaintiff." In *Dickerman v. Northern Trust Co.*, 176 U. S. 190, 20 Sup. Ct. 314, 44 L. Ed. 423, it is said: "If the law concerned itself with the motives of parties, new complications would be introduced into suits which might seriously obscure their real merits. If the debt secured by a mortgage be justly due, it is no defense to a foreclosure that the mortgagee was animated by hostility, or other bad motive." Therein reference is made to many analogous decisions by the Supreme Court of the United States holding in a variety of cases that the courts will not inquire into the motives of the parties. To the same effect are *Davis v. Flagg*, 35 N. J. Eq. 491; *McMullen v. Ritchie* (C. C.) 64 Fed. 253; *Toler v. E. Tenn. Ry.* (C. C.) 67 Fed. 168.

[2] But the claim is made that the case is brought within the inhibition of section 3439 of the Civil Code against "every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands." The purpose of this statute is manifestly to prevent any fraudulent change in the situation of the property that would prejudice the rights of persons holding claims against the debtor. It would be rather a strained construction to hold that it includes the enforcement in the regular manner of a lien that had previously attached to the property. If there were any deceit practiced, or any advantage taken, or any substantial irregularity in the judicial proceeding, a different question would be presented, but it seems unreasonable to hold that the section applies to the enforcement of a valid existing lien upon specific property where every requirement of the statute is complied with, and no element of fraud appears in the proceeding to enforce the lien.

[3] The cases relied upon by respondent involve different circumstances, as will be seen upon an examination. They are cited in 20 Cyc. 397-401, as authority for the text: "Debtors frequently attempt to cover up their property or transfer it in fraud of creditors by means of collusive and fraudulent legal proceedings; but it is well settled that such proceedings, however legal they may be in form, are void as against creditors, and the property so disposed of, real or personal, may be reached and subjected to the satisfaction of their claims;" and "a collusive and fraudulent sale under foreclosure of a mortgage or deed of trust on real or personal property, either under a power therein or by legal proceedings, will be set aside at the suit of creditors of the mortgagor or grantor." The former, though, refers, we think, to a fraudulent and not a bona fide claim, one that has the form but not the substance and merit of a valid charge against the property; and the latter contemplates fraud in the proceedings themselves whereby the security is sought to be enforced. This is shown in the cases cited, as far as they are in point at all. In *Laffin v. Cent. Pub. House*, 52 Ill. 432, the trial judge had answered in the negative the following two legal propositions: (1) "Whether the act entitled 'An act to amend chapter 9 of the Revised Statutes, entitled attachments in circuit courts,' warrants an attachment on the ground of fraud in a sale under a chattel mortgage without fraud in the making of the mortgage?" (2) "Whether a sale under a chattel mortgage, which, in matter of fact, hinders and delays creditors, warrants an attachment under said act, on the ground that such sale is fraudulent in law, without a corrupt intent in the making of the sale." The Supreme Court, however, declined to pass upon the questions for the reason that the record was too incomplete, and therefore the judgment was affirmed. In *Milliman v. Eddie*, 115 Iowa, 530, 88 N. W. 964, the judgment on which the defendants relied was supported by no consideration. The Supreme Court of Iowa said: "It was, in effect, a voluntary confession of judgment, and on an indebtedness which did not in fact exist, made for the sole and only purpose of hindering and delaying the creditors of the senior Goodmans, among whom were the plaintiffs' grantors. * * * The transaction from the beginning to the end was fraudulent in fact and void." The character of *James v. M. & M. R. R. Co.*, 73 U. S. 752, 18 L. Ed. 885, is seen in this statement from the syllabus: "In a sale under a railroad mortgage, where the amount of bonds in the hands of bona fide holders was less than \$200,000, and the notice of sale set forth that the mortgage debt was \$2,000,000, and that \$70,000 interest was due, the sale could not be upheld without sanctioning the grossest fraud and injustice." "This deceptive notice," as stated in the opinion, "was calculated to destroy all competition among

the bidders, and, indeed, to exclude from the purchase everyone, except those engaged in the perpetration of the fraud." *Drury v. Cross*, 74 U. S. 299, 19 L. Ed. 40, was a similar case. There the directors of a railroad company procured a mortgage to be foreclosed on the railroad for a much larger sum than was actually due, by fraudulent combination with the purchaser. It was therefore held that the purchaser must be held liable as trustee to creditors for the value of the property he purchased on the sale of the road, after deducting the amount due him at the day of sale. The court declared that "The scheme to acquire the property of this corporation was in its inception fraudulent, and every step in the progress of its execution was necessarily stamped with the same character." In *Livesay's Ex'r v. Beard*, 22 W. Va. 585, a deed of trust on lands and personal property with no definite fixed period at which a sale could be required and which put it in the power of the grantor by collusion or otherwise to indefinitely postpone a sale thereunder and put all the live stock conveyed by the deed and the increase thereof and all future crops to be raised from the land in the quiet enjoyment of the grantor, from which to support his family and pay the debts secured thereon as he might deem most advantageous, was held to be fraudulent on its face and void. *Woodard v. Mastin*, 106 Mo. 324, 17 S. W. 308, was the case of a fraudulent and collusive sale for \$300 of property belonging to an insolvent debtor and worth about \$40,000. It is hard to see how the transaction could have been held otherwise than fraudulent and void. In *Wright v. Mack*, 95 Ind. 332, a debtor in failing circumstances executed chattel mortgages upon all his property and stock in trade, of the value of \$5,700, to secure sums in the aggregate of \$1,400. It was held that the debtor had the right to secure the debts "to the exclusion or in preference of his other creditors, and the mortgagees might lawfully accept such securities." But it was held that on account of the irregularity and fraud in the subsequent proceedings participated in by the mortgagees, whereby there was a wrongful conversion of the property, the parties were liable to the general creditors for their damages resulting from such conversion. *Hudgkins v. Kemp*, 61 U. S. 45, 15 L. Ed. 853, involved a fraudulent conveyance by a bankrupt. Among the indicia of fraud it appeared that the land was worth double the amount of the purchase price, and the possession and occupancy of the same remained unchanged. The evidence is reviewed in the opinion and held to impeach strongly the bona fides of the transaction between the grantor and grantee. In all these cases the element of guile or subtlety or imposition attached to some overt act of vital importance to the parties. In none of them was there a lawful assertion in a lawful manner of a

valid claim that had its origin in good faith for an adequate consideration.

[4] But, if we consider the evidence, we find it insufficient to support the finding in reference to the concealment of the property and in anticipation of the action for divorce. There is no proof whatever that the mother had any knowledge of the doctor's domestic relations or any intimation of his intentions in that respect when the suit for foreclosure was brought, or at any time within the sixteen months that followed before the action for divorce was begun. There is nothing to show that she was influenced in the matter at all by any other motive than a desire to realize on her mortgage debt, which was past due. We can only surmise that the doctor had in mind the dissolution of the marital ties, as there does not seem to be any evidence of it. As appellant states it: "If there was anything in their relations prior to the divorce which would indicate the approaching final breach between them, the record is silent concerning it. So far as the record discloses, the barque of their domestic felicity sank suddenly in a windless, waveless sea. There was no warning note of the disaster for the ear of either friends or relatives, so far as the record shows." It may be remarked that the circumstance that the property was incumbered for more than its value is persuasive evidence that there was no intention of "concealing" it by means of the foreclosure. There was no apparent reason for even an opinion that the property would more than satisfy the valid claims that had already become a charge against it, and it seems scarcely credible, under these circumstances, that the motive was otherwise than to subject the property to the payment of the debt. The law certainly did not require the parties to anticipate that the property might become more valuable, that there might be other claimants and to forbear the enforcement of a valid lien until such time as the property might be valuable enough to satisfy all future demands. As to this point the only reply of respondent is that "the record shows conclusively that the foreclosure and subsequent proceedings were taken for the express purpose of defeating the rights of some one who was about to sue Dr. Pierce for malpractice." The only evidence in that connection is the testimony of Frederick B. Pierce, who said: "The mortgage was foreclosed because a short time before that the doctor was threatened with a suit for damages for malpractice in San Jose, and he wanted to have this property in such shape to protect my mother. He was willing to give me a deed rather than have the mortgage foreclosed, but at that time I wanted to keep the

records straight, and as long as this mortgage was in existence and it was a bona fide transaction, that it would appear much better if there was any question of consideration raised thereafter. I was the moving spirit in the foreclosure proceedings." But, granting that this was one of the motive considerations of the foreclosure, the answer would seem to be that it does not appear that this unknown person was a creditor of Dr. Pierce or that he had a demand in any legal sense against the doctor.

As we view the matter, the judgment on the findings should have been in favor of plaintiff.

The judgment and order are reversed, with directions to enter judgment for plaintiff.

We concur: CHIPMAN, P. J.; HART, J.

On Rehearing.

BURNETT, J. [5] Respondent has called our attention to certain findings of the court below, which, it is claimed, would render a judgment for plaintiff unsupported. Among them is: "That it is not true that the claim of the defendant, Frances P. Pierce, is without any right whatever, or that she has no estate, right, title, or interest in or to said land, or any part thereof; but on the contrary, defendant Frances P. Pierce and plaintiff Ella B. Pierce are the owners of said property as tenants in common, subject to certain liens against the said property, as hereinafter more particularly set forth." We should treat this as the finding of an ultimate fact and not as a mere conclusion. It necessarily follows that it would preclude a judgment that plaintiff is the sole owner of the property.

[6] Notwithstanding the finding of certain probative facts shows that the foregoing ultimate fact was found against the evidence, the ultimate fact must prevail, since it does not appear that the findings of the probative facts dispose of all the facts involved in the pleadings. *Forsythe v. Los Angeles Ry. Co.*, 149 Cal. 575, 87 Pac. 24.

We think, therefore, that our judgment rendered herein should be modified so as to simply reverse the judgment and the order of the court below. It is therefore ordered that the following words be stricken from the opinion filed: "As we view the matter, the judgment on the findings should have been in favor of plaintiff," and also that the following words be stricken from the judgment, to wit: "With directions to enter judgment for plaintiff." The petition for a rehearing is denied.

We concur: CHIPMAN, P. J.; HART, J.

15 Cal. App. 188

Ex parte LA DUE. (Cr. 186.)

(District Court of Appeal, Second District, California. Jan. 14, 1911.)

COURTS (§ 102*)—NUMBER OF JUDGES AGREEING IN ADJUDICATION.

Where the justices of the District Court of Appeal are unable to agree upon a judgment, an application to that court for a writ of habeas corpus must be denied, and the prisoner remanded.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 102.*]

In the matter of the application of Stanley S. La Due for a writ of habeas corpus. Writ denied because of the justices' inability to agree upon a judgment.

Hugh J. Crawford, for petitioner. Paul W. Schenck and F. E. Davis, for respondent.

PER CURIAM. The justices of this court being unable to agree upon a judgment, the writ must be denied and petitioner remanded to the custody of the sheriff of Los Angeles county; and it is so ordered.

16 Cal. App. 388

KAUFMAN v. ALL PERSONS, ETC.

Appeal of YOUNG et ux.
(Civ. 824.)

(District Court of Appeal, Third District, California. June 13, 1911.)

1. QUIETING TITLE (§ 44*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence in an action to establish title and determine adverse claims held to show that plaintiff exercised her option to purchase the property in controversy.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 44.*]

2. VENDOR AND PURCHASER (§ 77*)—PERFORMANCE OF CONTRACT—TIME OF PAYMENT.

Where an agreement for the purchase of realty gave the vendee the right to pay the installments of the price "on or before" the date on which they were due, she could pay all of the installments before the first installment was due.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 120; Dec. Dig. § 77.*]

3. VENDOR AND PURCHASER (§ 18*)—OPTION AGREEMENT—RIGHTS OF VENDEE.

Defendant executed a note to a loan society payable in installments at stated times, all of the principal being due February 1, 1906, and, the principal not having been then paid, defendant executed a trust deed to secure the note, the insurance upon the property being payable upon loss to the society. On January 16, 1906, defendant executed an agreement giving plaintiff in consideration of \$1,000 an option to purchase the property, a part of the remaining \$5,000 of the price to be paid to a bank for defendant in installments, and the balance of the price to be paid to the loan society according to the terms of the trust deed executed to it, and further providing that defendant should execute a deed, subject to the trust deed, and place it in escrow with the bank to be delivered to plaintiff upon payment of the installments to the bank, and that plaintiff should, after exercising the option, pay the installments to the loan society which defendant was bound to pay to it under the trust deed. In April, 1906, the

improvements were destroyed by fire and the insurance applied on the mortgage debt to the loan society, and defendant on September 26, 1906, paid the balance due on the debt to it without plaintiff's knowledge, and received from it a reconveyance of the trust deed title. Plaintiff afterwards tendered to the society the amount due on the installments pursuant to the agreement of defendant, which tenders were refused, and defendant also refused any further tenders on the ground that they were insufficient because they credited plaintiff with the insurance money paid to the society. Held, that defendant's payment of the debt to the loan society could not affect plaintiff's rights under the option agreement, nor prevent her from paying to the bank the money upon payment of which she was to receive the escrow deed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.*]

4. VENDOR AND PURCHASER (§ 57*)—CONSTRUCTION OF CONTRACT—ASSUMPTION OF INDEBTEDNESS.

Under the option agreement, construed in view of the escrow deed, which expressly conveyed the premises to plaintiff subject to the deed of trust from defendant to the loan society, plaintiff assumed defendant's indebtedness to the society as a part of her purchase price.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 57.*]

5. VENDOR AND PURCHASER (§ 199*)—RIGHTS OF PURCHASER—APPLICATION OF INSURANCE.

Plaintiff acquired an equitable interest in the proceeds of the insurance policy as an incident to her equitable title under the agreement of sale, so that she was entitled to have the proceeds of the policy applied upon the mortgage indebtedness assumed by her.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 199; Insurance, Cent. Dig. § 1440.]

6. VENDOR AND PURCHASER (§ 266*)—VENDOR'S LIEN—WAIVER.

Where a vendor refused the purchaser's offer to pay the installments due on a mortgage indebtedness which the purchaser assumed, and refused the purchaser's offer to make a full and final settlement of all amounts due the vendor under the contract, after deducting proper credits, he thereby waived his vendor's lien for an amount due on the indebtedness which the purchaser assumed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 687, 713-750; Dec. Dig. § 266.*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Elizabeth Kaufman against John Crosby Young and others. From a judgment for plaintiff, and an order denying a motion for a new trial, defendants Young appeal. Affirmed.

Norman H. Hurd, for appellants. E. E. Hull (Guy Shoup, of counsel), for respondent.

HART, J. This is an appeal by the defendants Young from the judgment and the order denying them a new trial.

The action was brought in the month of February, 1908, under the provisions of the act of June 16, 1906, popularly known as the "McEnerney Act" (Laws 1906 [Ex. Sess.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

p. 78), for the purpose of establishing plaintiff's title to certain real estate situated in the city of San Francisco and to determine the status of all adverse claims to said property. The defendant John C. Young claimed some interest in said real estate, and he was therefore served with summons and a copy of the complaint. Said Young, joined by his wife, Josephine M. Young, answered the complaint, and therein, after asking that they be adjudged to be the owners in fee or at least to have some interest in the property described in plaintiff's pleading, prayed that "in the event that said court shall not adjudge and declare said John Crosby Young to be the owner of said property and of said moneys aforesaid, by reason of said default and forfeiture, then and in that case that said defendants, John Crosby Young and Josephine M. Young, be adjudged and decreed * * * to be entitled to a vendor's lien covering all said property for the entire balance of the purchase price of said property." We have carefully examined the evidence as presented by defendants' statement on motion for a new trial, which is a part of the record on this appeal, and have found the statement of the facts, as set forth in respondent's brief, of the several transactions out of which this controversy has arisen, to be full and accurate, and we shall therefore adopt the greater part of such statement as the recital of said facts in this opinion. The defendant John C. Young was on the 1st day of February, 1904, the owner of the property in dispute, and on that day, in conjunction with his wife, made and executed to the Savings & Loan Society, a corporation, a promissory note in the sum of \$4,000.

"This note provided for the payment of the indebtedness evidenced by it in monthly installments of \$20 and accrued interest, until the 1st day of February, 1906, at which time the full amount of the principal should become due and payable. The note further provided that at any time during a default in the payment of any sum to be paid under the note, the entire balance of the indebtedness evidenced by said note should, 'at the option of the holder of this note, but not otherwise, become immediately due and payable.' The entire unpaid balance of this indebtedness was not paid on the date mentioned in the note at the time at which it was due, but the monthly payments of \$20 and accrued interest were thereafter continued, with the consent of the Savings & Loan Society. For the purpose of securing the payment of the indebtedness evidenced by this promissory note, defendants Young executed to certain trustees for the benefit of the Savings & Loan Society a deed of trust, conveying to said trustees the real property described in the complaint. One of the conditions of this deed of trust was that the buildings located upon the property should be kept insured in a company to be

designated by the Savings & Loan Society, in the sum of \$3,000, 'loss, if any, to be made payable to said Savings & Loan Society.' Pursuant to this agreement contained in the deed of trust, the policy of insurance introduced in evidence, and set out upon pages 89 et seq. of the transcript, was procured. This policy of insurance contained the following clause: 'Loss, if any, payable to Savings & Loan Society.' For some time prior to January 16, 1906, plaintiff had occupied the premises in suit as the tenant of defendant Young, maintaining there 'a home for unfortunate girls and their babies,' known as the 'Peniel Home of Peace.' This was the condition of the title to the property in suit up to the last-mentioned date, at which time the agreement with plaintiff herein-after referred to was executed by defendant Young.

"On January 16, 1906, plaintiff and defendant John Crosby Young entered into an agreement for the sale of the property to plaintiff, by the terms of which plaintiff paid to said John Crosby Young the sum of \$1,000 for an option to purchase the property in suit, this \$1,000 to constitute a part of the purchase price of the property if plaintiff exercised her option to purchase. The remaining \$5,000 of the purchase price was to be paid as follows: \$1,476.52 to be paid to the Crocker-Woolworth National Bank for defendant Young in three payments, the first of which was payable 'on or before' the 1st day of the January following the date of the contract, and the two remaining installments were to be paid 'on or before' later dates. The balance of the purchase price, amounting to \$3,523.48, was 'to be paid to the Savings & Loan Society of San Francisco * * * at the rate of twenty dollars per month and interest, according to the terms of' the deed of trust hereinbefore referred to. The agreement further provided that 'a good and sufficient deed of said premises * * * subject to said deed of trust,' bearing same date as the agreement, should be at once executed by defendant Young and placed in escrow with the Crocker-Woolworth National Bank, to be delivered to plaintiff upon payment by her of the \$1,472.52 and interest which was to be paid to said defendant through this bank. The agreement provided that plaintiff should have until the first payment to be made to the Crocker-Woolworth National Bank was due in which to exercise her option, and it also provided that in the exercise of her option she must pay the \$20 per month and interest to the Savings & Loan Society 'according to the terms of' the deed of trust. As hereinbefore shown, the balance of the mortgage debt secured by the deed of trust was due within 15 days after the option agreement was entered into, but the Savings & Loan Society consented to a continuance of the monthly payments thereunder, and

did not demand payment in any other way. Early in February, 1906, plaintiff made her first payment to the Savings & Loan Society under the terms of her option agreement, and thereafter continued to make her monthly payment of \$20 and accrued interest to the Savings & Loan Society upon the mortgage debt, until prevented from doing so by the refusal of the Savings & Loan Society to receive further payments from her, under the claim that the mortgage debt had been satisfied.

"Prior to the date of the option agreement, and while plaintiff was occupying the premises in suit as tenant of defendant Young, she paid her rent of \$40 per month to the Savings & Loan Society for account of her landlord, and the receipts given to her for such rent ran to her landlord, but after the execution of the agreement plaintiff was recognized by the Savings & Loan Society as the principal debtor under the mortgage debt, and the receipts were made to her direct, without mention of her former landlord's name in the transaction. In the agreement for an option no rent was reserved, nor was any mention made of payment of rent in any form. The only payments mentioned in the agreement were payments to be made upon the purchase price of the property.

"During the great San Francisco conflagration of April, 1906, the improvements upon the premises in suit were destroyed by fire, and thereafter the insurance effected under the terms of the deed of trust hereinbefore referred to was collected by the Savings & Loan Society and applied upon the mortgage debt. In the collection of this insurance the Savings & Loan Society further recognized plaintiff as the principal debtor under the mortgage debt by charging her with the attorney's fee expended in collecting the insurance, and by writing to her to call upon them in reference to her insurance. After applying the insurance money collected, there remained due to the Savings & Loan Society upon the mortgage debt the sum of \$1,110. This sum, without the knowledge or consent of plaintiff, defendant John Crosby Young paid to the Savings & Loan Society on September 29, 1906, and took to himself a reconveyance of the title conveyed by the deed of trust. This reconveyance was never recorded. About one month after the date of this reconveyance, plaintiff paid to the Crocker-Woolworth National Bank the full amount which she was to pay that bank for defendant John C. Young under the terms of the escrow agreement, and received from the bank the deed of defendants which had been placed there in escrow at the time of the execution of the option agreement. This deed was then duly recorded. No part of this sum paid to the Crocker-Woolworth Bank was due at the time of such payment, but by the terms of the agreement it might be paid 'on or before' the dates mentioned in

the agreement as the times it was due and payable. Each month, for several months subsequent to the time the Savings & Loan Society delivered the 'reconveyance' to defendant Young, plaintiff made tenders to the Savings & Loan Society and to defendant John C. Young of the actual amount due each month after deducting the amount of insurance money collected by the Savings & Loan Society from the amount of the mortgage debt. These tenders were made both in writing and by tendering the actual amount due in money. The amount tendered each month included the amount previously tendered, which had been refused. The Savings & Loan Society refused to accept these tenders, basing its refusal upon the ground that the mortgage debt had been fully paid, and defendant Young refused to accept the tenders, basing his refusal upon the ground that plaintiff was not entitled to credit for the amount of the insurance money which had been applied upon the mortgage debt by the Savings & Loan Society, and therefore the amounts which she tendered were not enough. He was willing to accept any money which she was willing to pay to him, but refused to give a receipt for the same. After the tender of January 2, 1907, which tender included the amount due at that time, together with all previous amounts which she had tendered and which had been refused, plaintiff desisted from making further tenders until April 9, 1907, at which time she tendered, in writing, the full amount of the balance of the mortgage debt which remained after application of the insurance money. Acceptance of this tender was refused. On May 9, 1907, the trustees named in the deed of trust executed and delivered to plaintiff a satisfaction of the mortgage debt and a quitclaim to any title which they had in the property. On May 24, 1907, this satisfaction and quitclaim was duly recorded in the office of the county recorder of the city and county of San Francisco, and thereupon plaintiff's record title to the property became clear of the mortgage lien."

Upon the foregoing statement of the facts, as established by the evidence, the main contentions urged by the appellants are: (1) That the plaintiff never exercised her right to purchase the property in question under the agreement of option between her and the defendant, John C. Young; (2) that the money due and paid as and for insurance on the building on the land did not and could not inure to her benefit, since the policy of insurance was not transferred or assigned to her by said Young; (3) that defendants are entitled to have a lien declared in the judgment upon the property in dispute as indemnity for the said sum of \$1,110, which, as seen, they paid, under the circumstances as recited in the above statement of the facts, to the Savings & Loan Society.

There are also some assignments of er-

ror involving the rulings of the court in allowing to be answered certain questions propounded by counsel for plaintiff.

[1] 1. The evidence very clearly discloses in our opinion that plaintiff exercised her right of option to purchase the property described in the complaint. As we have seen, the plaintiff occupied the premises as a tenant of defendant John C. Young for a number of months prior to the date of the execution of the agreement of option. She paid the rent, by the express instructions of said Young, to the Savings & Loan Society, to which he was indebted in the sum of \$4,000, the rent so paid being credited on the note evidencing said indebtedness. On the 16th day of January, 1906, the agreement of option was executed, said agreement containing the covenants heretofore mentioned. At the time of the execution of said agreement and as the consideration for its support, the plaintiff paid to the defendant John C. Young the sum of \$1,000. On the same day the defendants, in consideration of the sum of \$15, executed the deed in escrow, conveying to plaintiff the property in dispute, subject to the deed of trust of said property previously executed by defendants to the Savings & Loan Society. This deed, with a letter of instruction, dated January 18, 1906, was delivered to the Crocker-Woolworth National Bank, to be held in escrow by said bank and delivered to the grantee upon the performance of the conditions set out in said letter of instruction.

The agreement of option provided that, in the event plaintiff accepted the same or elected to exercise her right thereunder to purchase the property, she should pay to the Savings & Loan Society the balance of the indebtedness due it from the defendants (\$3,523.48) in monthly installments of \$20, together with the interest accruing on the unpaid balance of the principal sum. These payments, it is now claimed by defendants, merely constituted payments of the rent for the premises, but it was admitted by John C. Young that the plaintiff paid no rent after the agreement of option was executed, but that the payments to said society were made "under this agreement," referring to the said written option. Besides, while the receipts for rent paid to said society were always made out in the name of John C. Young, the payments by plaintiff to said society, after the execution of the deed in escrow, were receipted for in writing in plaintiff's name, thus showing that both John C. Young and the Savings & Loan Society recognized the transaction then subsisting between plaintiffs and defendants to be a contract of sale and not a mere option. Obviously there is nothing in the fact that plaintiff did not make a payment to the Crocker-Woolworth National Bank until after the defendant John C. Young had taken up the note held by the Savings & Loan Society, which militates in

the slightest measure against the proposition that she exercised her right to buy the property within the time within which under the terms of the agreement she was at liberty to exercise that right.

[2] The agreement, it will be borne in mind, gave her the right to pay the installments to be paid at said bank "on or before" the dates on which such installments were, respectively, to be paid, and when she paid the full amount which she was required to pay at the bank, including, of course, all the installments, before the date on which the first installment became due, she thus acted clearly within her right under the option agreement.

[3] The defendants had no legal right to prevent her from so paying the money to be paid as the condition on which the bank was to deliver to her the deed in escrow, nor to refuse to accept said money at the time it was paid, and the act of defendants in paying the note to the Savings Society, under the circumstances, could not have the effect of impairing her rights under the agreement of option in the least. She paid an enormous sum (\$1,000) for the mere right to accept or reject the offer by defendant to sell the property to her, and we cannot conceive how, under the circumstances, a court of equity could be expected to sustain the defendants in the claim, if, indeed, they seriously make it here, that, because of an unnecessary act of their own, and unbeknown to plaintiff and evidently prompted by some reason which, though not made clearly to appear, we feel free to conjecture is not in harmony with the principles of equity, the plaintiff forfeited her right to purchase the property in dispute. The moment she paid the money to the bank she thus exercised her right to purchase the property, and, as stated, no prior act or acts of the defendant, particularly any act done clandestinely, so far as she was concerned, could affect her right to buy the property in any degree whatsoever.

But even if the evidence to which we have particularly referred still leaves shrouded in some doubt whether the transaction, as finally consummated, involved a contract of sale, the admissions of defendant J. C. Young and his counsel will readily dispel such doubt.

In one of his letters to Miss Kaufman, J. C. Young not only called her attention to payments that were due on the purchase price, but referred to her default in the payment of a certain installment to the Savings Society, saying, among other things, that he would excuse said default, but would expect a prompt payment on a certain near day in the future. Furthermore, counsel for appellants, in the concluding paragraph of his opening brief, uses the following language: "In closing, appellants desire to say only this: That the evidence is undisputed that plaintiff purchased the property for the sum

of \$6,000," etc. As declared in the outset of this discussion, there can be no doubt that from the entire evidence, of which we have presented herein a comprehensive synopsis, the court was justified in concluding (there are no findings) that plaintiff accepted and exercised the right given her by the agreement of option to buy the property, and that the contract thus evolved from the original transaction is one that could have been specifically enforced at the suit of either party.

2. We know of no just principle by which appellants can sustain their contention that the money due from and paid by the insurance company upon the policy underwritten on the building on the premises involved in this controversy should inure wholly to their benefit and not to that of plaintiff. Said building, it will be recalled, was destroyed by fire after the plaintiff and defendants had entered into the contract of option, and subsequently to the execution and delivery to the Crocker-Woolworth Bank of the deed in escrow. The argument advanced in support of this proposition is that, the policy not having been transferred or assigned to the plaintiff, the money due thereunder, upon the destruction of the building, cannot be claimed by her, but was the property of the defendants. In order to vest her with any interest in or right to said money, or to have it credited for her benefit on the note held by the Savings Society, so the argument goes, the policy must necessarily have previously been assigned to her by the defendants. It may first be said in reply to this proposition that the defendants, having, previously to the fire, assigned the policy of insurance to the Savings & Loan Society as additional (to the deed of trust) security for the loan by said society to defendants, were without any legal power to assign said policy to plaintiff. The habendum clause of the deed in escrow, it will be remembered, reads: "To have and to hold, all and singular, the said premises, together with the appurtenances, unto the said party of the second part, her heirs and assigns forever, *subject to a certain deed of trust* from John Crosby Young and Josephine M. Young to Arthur A. Smith and Wm. B. Dunning, trustees Savings and Loan Society, dated Feb'y 1, 1904." Said clause in said deed and the agreement of option must be construed together, and, so construing them, it is idle to argue that the intention and understanding of the parties was not that plaintiff was to assume, and that she did not, by virtue of such understanding, assume the extinguishment of the obligation of the defendants to the Savings & Loan Society. The agreement of option specifically points out all the payments by installments, including the payment of the note held by the Savings Society, that were required to be made by plaintiff until the full purchase price should have been paid.

The clause quoted from the deed in escrow, viewed by the light of said option, simply and plainly means that the plaintiff bought the property from the defendants subject to the right of the Savings & Loan Society to enforce the collection of its note executed to it by the defendants by the sale of the property, if necessary, and, if the insured portion of the property was destroyed by fire before the payment of the note, by the application of the money derived from the insurance company on said policy to the indebtedness. There must be, of course, some competent evidence clearly showing that plaintiff assumed the indebtedness of defendants to the Savings Society, and it may be that, had the contract of sale been evidenced only by the deed in escrow, no other writing as to the terms of the sale having been made by the parties, the mere language of the clause of said deed, "subject to a certain deed of trust," etc., might be held to be insufficient to bind the plaintiff to the payment of the debt secured by the deed of trust.

[4] But such is not the case here. As seen, the writings constituting the transaction by which the sale of the property was consummated very clearly and unequivocally show that the plaintiff, as a part of the consideration or purchase price, assumed the indebtedness of defendants to the Savings Society.

[5] By the agreement of sale plaintiff acquired an equitable title to the property and with such title she necessarily acquired an equitable interest in the insurance policy—that is to say, the policy having been assigned or made payable to the Savings Society as security for the obligation which she had agreed to assume and extinguish, she, upon purchasing the property, thus acquired the right to have the money derived from said policy, in case of the destruction by fire of the building upon which it was underwritten, applied, for her benefit, upon the obligation so assumed. The rule as thus stated is expressly recognized by the very case cited by appellants (Gilbert and Ives v. Port, 28 Ohio St. 296 et seq.), wherein the following statement of the rule by Sugden on Vendors (8 Am. Ed.) 291, c. 7, § 2, is approved: "*A vendee, being the equitable owner of the estate from the time of the contract of sale, must pay the consideration for it, although the estate itself be destroyed between the agreement and the conveyance; and, on the other hand, he will be entitled to any benefit which may accrue to the estate in the interim, although this was not always the rule. But, now, if after the contract, and before the conveyance, the houses were burned down, the loss will fall upon the purchaser, although the houses were insured at the time of the agreement for sale, and the vendor permitted the insurance to expire without giving the notice to the vendee.*" And the Ohio court, in the case mentioned, concludes

from all the authorities and upon principle that "the vendee, because he is the equitable owner, and, as such, is compelled to sustain the loss, occurring after the sale and before the conveyance, is entitled to any benefit that may accrue to the estate."

We are not unmindful of the cases that hold that, where property upon which insurance has been placed to indemnify the owner or other interested person against loss by fire has been transferred by the owner to another party, and the policy of insurance has not been assigned by the grantor or person for whose sole indemnity it has been issued, to the grantee, or has been assigned to the latter without the consent of the insurer, in violation of a covenant in the contract against the assignment thereof without the permission or assent of the insurer, such policy is void, and, in case of loss, cannot be enforced against the insurance company. The principle underlying those decisions is obviously that a contract of insurance is a personal one between the insurer and the insured, or, as it is stated in *Wilson v. Hill*, 3 Metc. (Mass.) 68, cited here by appellants, "an insurance of buildings against loss by fire, although in popular language it may be called an insurance of an estate is, in effect, a contract of indemnity, with an owner, or other person having an interest in the preservation of the buildings, as mortgagee, tenant, or otherwise, to indemnify him against any loss which he may sustain, in case they are destroyed or damaged by fire." But manifestly this case does not come within that class of cases. The policy here, as has been seen, was by its own terms and under the agreement between said society and the defendants, made payable, in case of the destruction of the building by fire, to the Savings Society, for the sole purpose of extinguishing or reducing a debt which the plaintiff, under her agreement with defendants and with the knowledge and consent of the creditor, had assumed and agreed to pay. She was, as declared, the equitable owner of the property and in possession thereof. Had the building, uninsured, or insured and the policy assigned neither to her nor to one acting, in effect, so far as the policy was concerned, as her trustee, or assigned without the consent of the insurer, been destroyed by fire, the loss, as is true under the present circumstances would have fallen on her, and the defendants could have specifically enforced the contract of sale just as they could have done had the building not been destroyed. In brief, it was her property until her equitable title was defeated by the non-performance of the conditions upon which she purchased it.

3. We think the court was right in disallowing defendants a vendor's lien on the property concerned here to secure the payment of the \$1,110, which was the balance due the Savings Society on the purchase

price and which the defendant John C. Young paid to the Savings Society after the collection of the money on the insurance policy. The claim of defendant is based on section 3046 of the Civil Code which provides that "one who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer."

The evidence discloses that the payment by the defendant John C. Young of the balance due the Savings & Loan Society after the money derived from the insurance policy had been received by said society and credited on the note held by it against the defendants was purely the voluntary act of said John C. Young. There is no evidence which shows, or even tends to show, that the Savings Society had made a demand either on the plaintiff or the defendants for the payment of said balance. Indeed, the defendant John C. Young himself testified that the Savings Society had made no call for a settlement of the balance remaining unpaid on said note. The mortgage (trust deed), having been given to secure the payment on a sum largely in excess of the balance due on the note (the note was then past due), was presumably sufficient to secure the payment of such balance, and, while we are not to be understood as holding that the defendants had no legal right to redeem the property, the note having passed the date of its maturity (section 2903, Civ. Code), nor as holding that the Savings Society could not have demanded its payment at and before the time it was fully paid by defendants, assuming that the time for its payment had not been extended by the agreement of the society, still it is plainly manifest from the evidence that there was no actual necessity for the payment of the unpaid balance of said note at the time said balance was paid by the defendants. But, as a matter of fact, it appears that the Savings Society had agreed to allow the note to remain in their hands and the payments thereon to be made according to the terms and conditions of the original agreement. There is, however, no showing by the pleadings—either the complaint or the answer—that a deficiency judgment might or would probably follow a sale of the property to satisfy the note (*Lake v. Tebbitts*, 56 Cal. 481), and all that the defendant accomplished by the payment of the balance remaining unpaid on the note was to remove a lien amply sufficient to secure its payment. We have little doubt that the motive which inspired the defendant John C. Young to take up the note after the insurance money had been credited thereon and the debt evidenced thereby greatly reduced was a belief entertained by him that such action on his part might by some nicely drawn refinement have the effect of strengthening his position that the insurance policy would be made to inure solely to his bene-

fit. But, whatever the motive, having by their own voluntary and unnecessary act brought about the untoward situation in which they now find themselves as to the balance due on said note, the defendants ought not in our opinion be aided by a court of equity in relieving them of such situation or be permitted to avail themselves of the provisions of section 3046 of the Civil Code.

[6] But, without deciding whether, under such circumstances, said section of the Civil Code is applicable, we think defendants were properly and justly disallowed a vendor's lien by the court because of their unqualified refusal to accept, after they had taken up the note held by the Savings Society, the tender and offer by plaintiff to pay the installments, and, finally, to make a full and complete settlement with defendants of the amount due on the whole transaction after deducting the sum represented by the money received on the insurance policy and credited on said note. The defendant John C. Young admitted that the plaintiff offered to pay to him the installments that came due on said note after he had taken it up, and that at last she offered to pay and tendered to him the full sum of \$1,110 which he had paid to extinguish the obligation arising thereunder to the Savings Society. As stated, he refused these tenders, and, we think, ought to be held to have thereby waived any right, if any he might otherwise have had or could have claimed to a vendor's lien. "While a valid tender of the amount of a debt and a refusal of the money by the creditor do not have the effect of discharging the indebtedness, it is well settled that the tender is equivalent to payment as to all things which are incidental and accessorial to the debt. The creditor by refusing to accept does not forfeit his right to the thing

tendered, but he does lose all collateral benefits and securities." 28 Am. & Eng. Ency. of Law, p. 12, and cases cited in the footnote thereof; *Tiffany v. St. John*, 65 N. Y. 314, 22 Am. Rep. 612.

If it may transpire, although we have no occasion to so declare here, that the defendants have lost any legal remedy to which they might have resorted for the recovery of any just claim they may have against plaintiff, by reason of the payment by them of the balance remaining unpaid on the note which she promised to pay, the fault lies with defendants themselves. They forfeited their chance or opportunity to be reimbursed for said payment by their refusal to accept reimbursement tendered to them by plaintiff before this action was instituted. Neither law nor equity can have much, if any, patience with a litigant, appealing for the assistance of either, who has deliberately refused an amicable tender of the right to which he subsequently asks the courts to restore him; and particularly should this view prevail where the refusal was, as was evidently the fact in the case at bar, prompted by no other motive than to secure more, manifestly, than was justly, equitably and in good conscience such litigant's due.

4. We find nothing in the court's rulings admitting certain evidence, to which exceptions were taken at the trial and of which complaint is made here, which could have prejudiced the rights of the defendants in any degree, even if it may be assumed that some of them were not, strictly viewing them, correct.

We think the judgment and order should be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

16 Cal. App. 473

PEOPLE v. JACOBS. (Cr. 195.)

(District Court of Appeal, Second District,
California. June 20, 1911.)

1. CRIMINAL LAW (§ 1159*)—APPEAL—REVIEW—QUESTIONS FOR JURY.

The questions of fact are for the jury, so that its determinations are not reviewable, notwithstanding certain statements of the prosecuting witness are contradictory and others recount matters highly improbable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

2. CRIMINAL LAW (§ 829*)—INSTRUCTIONS.

An instruction embodying statements with reference to the testimony of a particular witness, being covered by a general instruction, previously given, as to the right of the jury to disregard the whole uncorroborated testimony of any witness whom they believed had testified falsely, is properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

3. RAPE (§ 49*)—STATUTORY RAPE—EVIDENCE—FAILURE TO MAKE COMPLAINT.

That prosecutrix in statutory rape made no complaint is not a circumstance defendant is entitled to have considered as showing improbability of the commission of the offense.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 70; Dec. Dig. § 49.*]

4. RAPE (§ 44*)—STATUTORY RAPE—EVIDENCE—PRIOR ACTS.

Evidence of prior acts of intercourse between the parties is admissible on a prosecution for statutory rape.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 63; Dec. Dig. § 44.*]

Appeal from Superior Court, Los Angeles County; George R. Davis, Judge.

W. H. Jacobs was convicted of rape, and appeals. Affirmed.

J. B. Holley, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. Defendant was convicted of rape, the prosecuting witness being under the age of consent. From the judgment defendant appeals.

[1] There is no merit in appellant's contention that the crime and defendant's connection therewith was not established. The evidence of the prosecuting witness, read in connection with that of a physician, warranted the jury in its verdict. While certain statements of the prosecuting witness were contradictory and others recounted matters highly improbable, nevertheless the questions of fact were for the jury, and with its determination we must remain content.

[2] The court properly refused an instruction embodying statements with reference to the evidence of a particular witness. It had already given a general instruction as to

the right of the jury to disregard the whole uncorroborated testimony of any witness whom they believed had testified falsely. This covered the ground and embraced all that defendant was entitled to in the premises.

[3] The court did not err in refusing an instruction to the effect that opportunity to make complaint to the mother and failure to do so for an unreasonable time, where no threat was shown by defendant, was a circumstance to be considered as tending to show the improbability of the commission of the offense. The admission of evidence tending to show statements concerning the outrage made at the first opportunity, where the victim was of consent age, has always been permitted as tending to show that she was an unwilling victim, and has been regarded as original evidence; and the fact that no outcry was made when other parties were known to be near, or no complaint made, has been received in evidence and regarded as a circumstance proper to be shown as affecting the question of willingness or unwillingness upon the part of the victim. In cases, however, where the willingness of the prosecuting witness is immaterial by reason of inability to consent, the matters involved in outcry or complaint have no significance. Neither was there error in refusing the fourth instruction offered by defendant; there being no evidence presented warranting the same.

[4] Evidence of other acts of sexual intercourse between the parties prior to the date set out in the information was admissible as tending to prove the main allegation. *People v. Castro*, 133 Cal. 12, 65 Pac. 13; *People v. Koller*, 142 Cal. 625, 76 Pac. 500.

We see no prejudicial error in the record, and the judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

16 Cal. App. 437

SHEEHY v. MINAKER et al. (Civ. 811.)
(District Court of Appeal, First District, California. June 16, 1911.)

1. APPEAL AND ERROR (§ 956*)—DISCRETION OF TRIAL COURT—BILL OF EXCEPTIONS—TIME TO SERVE.

The appellate court cannot interfere with the trial court's action in denying a motion for relief from failure to serve a bill of exceptions within the required time on the ground of excusable neglect, unless an abuse of discretion clearly appears.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3810; Dec. Dig. § 956.*]

2. APPEAL AND ERROR (§ 931*)—PRESUMPTIONS.

In support of the trial court's action in denying a motion, on which the evidence was conflicting, the appellate court must assume that it took the view of the facts most favorable to respondent.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3723, 3762-3771; Dec. Dig. § 931.*]

3. EXCEPTIONS, BILL OF (§ 53*)—SERVICE—TIME—DISCRETION OF TRIAL COURT.

Where appellant's time for serving a bill of exceptions was extended to September 1st by stipulation filed August 10th, and the bill was not prepared and served by appellant's attorney during that time because he was on his vacation, and it appeared that no further promise was made by appellee's counsel to extend the time, there was no abuse of discretion in overruling a motion for relief from failure to serve the bill within the stipulated time on the ground of excusable neglect.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Cent. Dig. §§ 100-105; Dec. Dig. § 53.*]

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Action by P. G. Sheehy against W. E. Minaker and another. From an order denying a motion for relief from failure to serve a bill of exceptions, one of defendants appeals. Affirmed.

Jordan, Rowe & Brann and P. E. Zabala, for appellant. Sheehy & Hudson, for respondent.

HALL, J. This is an appeal from an order denying appellant's motion, made under section 473, Code of Civil Procedure, to be relieved from plaintiff's objection that appellant's proposed bill of exceptions was not served in due time. The particular ground for relief relied on is that the bill was not served in due time because of excusable neglect on the part of appellant's attorneys.

The record before us shows that after the expiration of the time allowed by law, and the full extension thereof allowed by the judge of the court, the time for serving the bill of exceptions was extended by stipulation to the 1st day of September, 1909. This stipulation was filed August 10, 1909. The reporter's transcript of the proceedings upon the trial was placed in the hands of Mr. Zabala, one of the attorneys for the appellant, on August 4th, but the preparation of the bill was not commenced until September 4, 1909. It was completed on September 6th, and was on September 20th placed in the hands of Mr. Hudson, one of the attorneys for respondent. Its settlement was promptly objected to for the reason that it was not served in due time. A motion was made by appellant to be relieved from the objection. Affidavits were presented and read upon the motion, and the motion denied.

[1] Appellant very candidly and correctly concedes at the outset that this court cannot interfere with the action of the trial court unless it clearly appear that the denial of the motion was an abuse of discretion. *Ingrin v. Epperson*, 137 Cal. 370, 70 Pac. 165. After a careful examination of the record before us, we are unable to say that it clearly appears that the trial court in its

action denying the motion abused its discretion. Appellant's attorneys in the action were Jordan, Rowe & Brann, of San Francisco, and P. E. Zabala, of Salinas. The attorneys for respondent were Sheehy and Hudson, the first of Watsonville, and the second of Monterey. Sheehy is also the plaintiff. It appears without dispute that at the trial appellant was represented by Mr. Zabala and Mr. Brann, while respondent, P. G. Sheehy, appeared in his own behalf.

It was agreed between Mr. Zabala and Mr. Brann that Mr. Brann should prepare the bill of exceptions. Mr. Brann, however, left the city and county of San Francisco, where his offices were situated, on the 4th day of August, 1909, for a vacation, and did not return from his vacation until the evening of August 30th, and did not reach his offices until the morning of August 31st. From that time until September 4th he was engaged in the trial of another action. The reporter's transcript of the testimony had been forwarded from Salinas to Messrs. Jordan, Rowe & Brann August 4th, with a note from Mr. Zabala addressed to the firm, informing them that "Mr. Sheehy has kindly consented to give us until the 1st of September. He privately assured me that he might extend the time if necessary." Mr. Brann states in his affidavit "that the reason why he did not prepare it [the bill of exceptions] during the month of August, 1909, was that affiant was absent from the city and county of San Francisco on his said vacation." Mr. Zabala states in his affidavit that he arranged for the stipulation extending the time to September 1st with Mr. Sheehy, who at that time assured him that he would give additional time, and that he, Mr. Zabala, told Mr. Sheehy that Mr. Brann was going to be absent during the month of August on his vacation, and that said Sheehy then promised affiant additional time. On the 27th day of August, upon request from Messrs. Jordan, Rowe & Brann, Mr. Zabala attempted to telephone to Mr. Sheehy at Watsonville to request further time, but could not get him on the telephone; that he again, before the 1st day of September, tried to communicate with Mr. Sheehy over the telephone with the same result. During all of this time and until the 20th day of September Mr. Zabala was engaged in a trial for murder at Salinas. The affidavit of Mr. Zabala further states "that affiant, after his second attempt to get Mr. Sheehy over the telephone, and remembering that Mr. Sheehy had verbally promised him that he would extend said time further, and relying upon the same, and because of his engagements in said murder trial as aforesaid, made no further effort to get said time extended until

the 3d day of September, 1909." On the other hand, Mr. Sheehy, in his affidavit states that when Mr. Zabala, early in August, applied to him for an extension of time in which to serve appellant's proposed bill of exceptions, he, Zabala, wished the time extended to October 1, 1909, but that he, Sheehy, refused to extend the time any further than September 1, 1909, and accordingly signed the stipulation extending the time to September 1st. The conversation was over the telephone, and the stipulation subsequently sent by mail.

Other matters are stated both in the affidavit of Mr. Sheehy and Mr. Hudson, tending to show that no promise to give additional time was ever made. The determination of the facts upon this conflict of evidence was entirely for the trial court.

[2] In support of the action of the trial court, we must assume that it took the view of the facts most favorable to the contention of respondent; in other words, that it believed that no such promise was made to extend the time beyond September 1, 1909. The reason why the bill was not prepared during August was that Mr. Brann, one of the four attorneys for appellant, was absent on his vacation.

[3] Under these circumstances, it cannot be said that it clearly appears that the trial court abused its discretion in denying appellant's motion.

The order is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

16 Cal. App. 548

NORTHERN ASSUR. CO. OF LONDON v. STOUT et al. (Civ. 770.)

(District Court of Appeal, Third District, California. June 28, 1911.)

1. VENDOR AND PURCHASER (§ 185*) — PAYMENT—DEFAULT.

Findings of the trial court in an interpleader by an insurance company to compel claimants to an amount due from it under a policy of insurance to interplead that the defendant, to whom the policy was issued, and another person, had previously entered into an executory contract for the purchase of the premises insured, to be held by cotenancy, and that, after certain payments were made, the other cotenant abandoned the contract and the premises in so far as he could, and that, after default in payments, the vendor with knowledge of all these facts accepted payments to a full amount from the remaining cotenant with knowledge of her intention to acquire the land as her individual property, justified conclusions that the default in payment operated ipso facto as a forfeiture of the vendee's rights under the contract, and that thereafter the acts and conduct of the vendor and the remaining party making the payments were such as to establish an implied agreement to sell and to purchase the land on the same terms as those of the contract of sale.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 185.*]

2. APPEAL AND ERROR (§ 907*)—REVIEW—PRESUMPTION—FINDINGS OF COURT.

In the absence of a bill of exceptions or a statement of the case or other authorized method of bringing up the evidence, this court will presume that the findings are sufficiently supported, and this is equally so where the trial court files a written opinion in which it presents and discusses some of the facts which the evidence has established.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3673; Dec. Dig. § 907.*]

3. APPEAL AND ERROR (§ 717*)—RECORD—BILL OF EXCEPTIONS—OPINION OF TRIAL COURT AS SUBSTITUTE.

The opinion of the trial court cannot supplant or be made to serve the purpose of a bill of exceptions or a statement of the case or any other recognized form of certifying the testimony to a court of appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2967; Dec. Dig. § 717.*]

4. HOMESTEAD (§ 81*)—PROPERTY CONSTITUTING HOMESTEAD—CONTRACT OF PURCHASE.

One who holds possession of land under an executory contract of purchase may declare a valid homestead therein.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 116; Dec. Dig. § 81.*]

5. HOMESTEAD (§ 84*)—INTEREST OF COTENANT.

A valid homestead cannot be created in lands held in cotenancy.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 121, 122; Dec. Dig. § 84.*]

6. ABANDONMENT (§ 2*)—TITLE BY POSSESSION.

Title in fee cannot be divested by mere abandonment, but it is otherwise as to title by naked possession.

[Ed. Note.—For other cases, see Abandonment, Cent. Dig. § 1; Dec. Dig. § 2.*]

7. VENDOR AND PURCHASER (§ 101*)—TENANCY IN COMMON (§ 6*)—FAILURE IN PAYMENTS—EFFECT OF DEFAULT.

Where the terms of an executory contract for the purchase of land by two as cotenants makes the time of payment of the essence of the contract, the failure to make payment at a time provided works a forfeiture without the necessity of the vendor's indication of an election to claim the forfeiture, and the effect of such forfeiture is to nullify the agreement and to sever the cotenancy.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 170-174; Dec. Dig. § 101; * Tenancy in Common, Cent. Dig. § 18; Dec. Dig. § 6.*]

8. VENDOR AND PURCHASER (§ 187*)—DEFAULT IN PAYMENT—WAIVER.

Where a contract for the sale and purchase of land has been forfeited by default in payments, the vendor may waive the forfeiture so long as the rights of third persons do not intervene, but, if he has resold the land after forfeiture, the rights of the second purchaser will prevent his waiver of forfeiture.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 374, 375; Dec. Dig. § 187.*]

9. PRINCIPAL AND AGENT (§ 178*)—KNOWLEDGE OF AGENT IMPUTED TO PRINCIPAL.

The knowledge of an agent acting in the matter of a sale of land is the knowledge of the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 680-684; Dec. Dig. § 178.*]

10. VENDOR AND PURCHASER (§ 29*)—CONTRACT—IMPLIED AGREEMENTS.

A vendor after the rights of cotenants under an executory contract for purchase had been forfeited by default in payment, with knowledge of the forfeiture and of the abandonment of the contract by one of the cotenants, and that the other purchaser was making payments thereafter for herself, and not for the cotenancy, and with the intention and expectation of acquiring the land as her individual property, accepted payments to the full amount of the purchase price as fixed by the contract. *Held*, in view of the provisions of Civ. Code, § 1589, as to the obligation of a party knowingly accepting a benefit, that a contract for the sale of the property to the party making payments would be implied.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 29.*]

Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Interpleader by the Northern Assurance Company of London, a corporation, to compel Martha Stout, the Cramer Meat & Packing Company, a corporation, and others, to interplead their claims to an amount due from complainant under a policy of insurance issued by it to defendant Stout. Judgment for defendant Stout, and defendant the Cramer Meat & Packing Company appeals. Affirmed.

Frank Freeman and Charles L. Donohoe, for appellant. Ben F. Geis, for respondent.

HART, J. This is an appeal by the defendant Cramer Meat & Packing Company from the judgment on the judgment roll alone. The complaint was filed by plaintiff to compel the defendants above named to interplead their alleged respective rights to the sum of \$400 which was due from plaintiff on a policy of insurance issued by it to the defendant Martha Stout, and underwritten on a building erected by her on a certain lot situated in Hamilton City, Glenn county, said building having been, after the issuance of said policy, destroyed by fire.

The facts, as adopted from the findings of the court, are these: On the 18th day of June, 1906, the Hamilton Land Company and one Joseph Dineen and the defendant Martha A. Stout entered into a contract in writing by which the first named agreed to sell said Dineen & Stout, and the latter agreed to purchase, a certain lot situated in said Hamilton City. The purchase price of said lot was \$300, of which the sum of \$50 was paid on the date of the execution of the agreement, and by the terms of said instrument the balance was to be paid in "twenty-five equal monthly installments on or before twenty-five months from date hereof, with interest thereon from date until paid, at the rate of five per cent. per annum." The second parties were to have possession of said premises from the date of the agreement and "to pay all taxes and assessments levied or assessed on said land after the date hereof as they become due and payable." The con-

tract further provides: "Time is the essence of this contract, and the balance of the purchase price must be paid as it becomes due, and should second parties fail to make any payment at the time stipulated, then this contract is to be deemed canceled and of no effect, and first party may enter and take possession of said premises as if this contract had never been made, and all moneys paid prior to the time of said failure shall belong to first party and be deemed the amount due as rentals for the use of said property." It is then provided that when said land is paid for in full, according to the terms of said agreement, the first party will execute and deliver to the second parties "a good and sufficient deed conveying said land free from all incumbrances."

The findings further show: "The said Dineen & Stout took possession of said lot immediately upon the delivery of said contract, and began the erection of a building thereon, and it was their intention to conduct a restaurant in the building to be erected thereon, or in a part thereof as partners, and to that end a few hundred dollars was deposited in the partnership name of Dineen & Stout in a bank in Chico, California, and the partnership contracted a number of debts under the firm name, among them being the judgments hereinbefore described, but the said lot was not a part of the partnership property, but the said Dineen & Stout took said property as tenants in common. On July 11, 1906, Mrs. Stout and her family were sleeping on said lot and had partially moved into the building then in course of construction thereon; and on that day, and before any of said deferred payments had been made, said Dineen abandoned said property and said contract, and secretly left this part of the state of California for parts unknown, taking with him all of the partnership funds on deposit as aforesaid, amounting to about \$350, and since the departure of said Dineen as aforesaid he has never asserted any interest in or claim to said property or said contract, nor made or offered to make any payments on said contract, nor has he returned to this part of the state. After the departure of said Dineen and before any of the deferred payments had been made as provided in the contract, and before any of the payments hereinafter set forth had been made, defendant Stout and said Howe, the agent of the land company, who had full knowledge of the foregoing facts, discussed between themselves the advisability of allowing the said contract to lapse by forfeiture by nonpayment of the installments remaining unpaid, to the end that Mrs. Stout might then acquire the property in her individual right, but no agreement was made to that effect, and neither the defendant Dineen nor the defendant Stout paid the first monthly installment within the time provided by the contract. That thereafter, on the 24th day of July, 1906, for the purpose of acquir-

ing said property in her individual right and with the belief that her and said Dineen's rights under said contract were forfeited and that she could so acquire the legal title thereto, all of which was then and at all times since known to said land company, defendant Stout paid said land company \$10 toward the purchase of said property, and thereafter continued to make monthly payments of \$10 each until said property was fully paid for, and the said land company, with full knowledge of all of the aforesaid facts, accepted all of said payments and credited them on the original contract, and on the 18th day of July, 1908, indorsed the said contract as paid in full.

"The account on said land company's books respecting these payments was carried throughout the whole time covered by said payments in the name of Dineen & Stout, but the defendant Stout did not consent to or have knowledge of the fact that said account was so kept, and, after all payments had been made as aforesaid, defendant Stout demanded a deed from said land company conveying said property to her, but the land company refused to comply with her demand on the ground that the contract was made in the name of Dineen as well as in the name of the defendant Stout. On September 25, 1906, while said building was in course of construction but not fully completed, defendant Stout was residing therein with her family and occupying the same as the home of herself and family, at which time she had made three monthly payments of \$10 each toward the purchase price of said lot as aforesaid, said defendant Stout duly executed and acknowledged according to law and filed with the county recorder of Glenn county her declaration of homestead."

On the 31st day of October, 1906, the plaintiff executed to said Martha Stout its policy of insurance, to which we have hitherto referred, "whereby it insured her for a term of one year from said date against all the loss or damage by fire to an amount not exceeding \$400, covering a dwelling house" situated on the lot involved in this controversy. On the 19th day of September, 1907, said dwelling was destroyed by fire, and "thereafter said Martha Stout duly presented and filed with plaintiff her proof of loss under said policy, duly verified, for the full amount thereof." On the 25th day of April, 1907, and the 27th day of April, 1907, respectively, the defendants Hamilton Mercantile Company and Cramer Meat & Packing Company obtained judgments in the justice court of the Second judicial district of Glenn county against Joseph Dineen and Martha A. Stout, the first named for the sum of \$213.82, with interest, etc., and costs then amounting to the sum of \$29.80, and the last named for the sum of \$123.85, with interest, etc., and costs then amounting to the sum of \$30.40. On October 5, 1907, executions were issued upon said judgments in said actions, and each was

regularly served as a garnishment upon the plaintiff of the money due upon the said insurance policy issued to said Martha Stout and underwritten upon the dwelling erected upon the land in question by Dineen & Stout.

Upon the facts as found by the court and as briefly presented in the foregoing statement, the sole question submitted here for determination is as to the validity of the alleged declaration of homestead filed upon the premises concerned in this action by Martha Stout.

The contention of the appellant Cramer Meat & Packing Company is that the land company waived the forfeiture of the contract and the rights of Dineen & Stout occurring by virtue of the default in the payment as prescribed by the contract of sale; that the payments were made by Stout and accepted by said company and the installments so paid credited on said contract in execution of its terms; and that no implied contract of sale between said company and Martha Stout could under such circumstances have arisen. But in a well-considered written opinion filed herein by the learned trial judge, Hon. Wm. M. Finch, the greater part of which opinion is set forth in the brief of respondent, he holds that, as time for the payment of the installments is expressly made by the contract of the essence thereof, the default on the part of Dineen & Stout in the payment of a certain installment, as called for by said contract, operated ipso facto as a forfeiture of the same and of the rights of the vendees thereunder; that thereafter the acts and conduct of the land company and Mrs. Stout with respect to the property, as disclosed by the evidence, were such as to establish an implied agreement upon the part of the former to sell said property to Mrs. Stout in her individual right and an agreement upon her part to so purchase the same on the terms disclosed in the former agreement to which she was a party.

[1] Unless we can say that the court's conclusions of law from the findings are erroneous or not in accord with the findings, the judgment cannot be disturbed. We perceive no inconsistency between the findings and the conclusions of law. To the contrary, no other just conclusions could well follow the findings.

[2, 3] As to the latter, in the absence of a bill of exceptions, or a statement of the case or other authorized method of bringing up the evidence, this court must assume that the findings are sufficiently supported. And this proposition is equally true where the trial court, as here, has filed a written opinion in which it has presented and discussed some of the facts which the evidence has established, for obviously the opinion of the court, however elaborately it may purport to deal with the facts, cannot supplant or be made to serve the purpose of a bill of exceptions or a statement of the case or any other recognized form of certifying the testi-

mony to a court of appeal, and consequently cannot disturb in the slightest degree the presumption that must be indulged in favor of the findings where the appeal is upon the judgment roll alone. We could therefore, if we so desired, well rest the decision of this case on the findings and the judgment. But we are satisfied with the opinion of the trial judge stating and applying the law to the facts as found, and we shall therefore adopt from said opinion, as it appears in the brief of respondent, the following part thereof:

"In the making of the contract the land company was represented by Reuben Howe, who is admitted to have been the agent of the company. The said purchasers took possession of the lot, and began the erection of a building thereon. It was their intention to conduct a restaurant in the building as partners, and to that end a few hundred dollars was deposited in the partnership name of Dineen & Stout, all of which Mrs. Stout testifies belonged to her. The contract for the purchase of the premises in question was not made in the partnership name, but the second parties took the property as cotenants. On July 11, 1906, Mrs. Stout and her family were sleeping on the lot and had partially moved into the building then in course of construction; and on that day, and before any of the deferred payments had been made, Dineen abandoned the property and secretly left this part of the state, taking with him all of the partnership funds on deposit, some \$350.

"After the departure of Dineen, Mrs. Stout and Mr. Howe, the agent of the vendor, had a conversation as to the advisability of letting the contract lapse by forfeiture for nonpayment, to the end that Mrs. Stout might then acquire the property in her own name. Neither of the second parties paid the first monthly installment within the time provided by the contract, but on the 24th of July, 1906, Mrs. Stout paid the land company \$10. Thereafter Mrs. Stout continued to make monthly payments of \$10 on or before the 18th of each month, except that the payment for the month of April following was made on the 19th, and the company credited these payments on the contract, and on July 18, 1908, indorsed the contract as paid in full. We here insert the finding upon this question, which is as follows: 'That thereafter, on the 24th day of July, 1906, for the purpose of acquiring said property in her individual right and with the belief that her and said Dineen's rights under said contract were forfeited and that she could so acquire the legal title thereto, all of which was then and at all times since known to said land company, defendant Stout paid said land company \$10 toward the purchase of said property, and thereafter continued to make monthly payments of \$10 until said property was fully paid for; and the said company, with full knowledge of all the aforesaid facts, accepted all of said payments and

credited them on the original contract, and on the 18th day of July indorsed the said contract as paid in full.' On the 25th of September, 1906, at which time the building was not fully completed, but Mrs. Stout was living therein with her family, and she heretofore having made three monthly payments of \$10 each, she executed and filed with the county recorder her declaration in due form claiming the premises as a homestead.

"The account on the land company's books was carried throughout the whole time in the name of Dineen & Stout, but it does not appear that Mrs. Stout consented to or had any knowledge of how the account was kept. After all payments were made Mrs. Stout demanded a deed of the property to her and the company refused on account of the fact that the contract was in the name of Dineen as well as Mrs. Stout. Dineen has never since his departure asserted any interest in the property, or made or offered to make any payments on the contract, nor has he returned to this part of the state. Mrs. Stout insured the building with the plaintiff, and it was thereafter burned. Certain judgment creditors hereinbefore referred to levied upon the proceeds of the insurance in the hands of the plaintiff, and, since Mrs. Stout also claimed the same money, the plaintiff brought this action to have it determined to whom the money should be paid, making all of the claimants defendants. At the trial it was stipulated by the parties that the court should determine the sole question of the validity of the alleged homestead, and render judgment for Mrs. Stout, if the homestead was found to be valid, and otherwise for the other defendants.

[4] "The authorities are uniform that one who holds possession of land under an executory contract of purchase may declare a valid homestead therein.

[5] "The decisions in this state are equally uniform in holding that a valid homestead cannot be created in lands held in cotenancy. The important question, then, is whether Mrs. Stout and Mr. Dineen were cotenants when the declaration of homestead was made. There can be no doubt that from the date of the contract of purchase to the departure of Dineen they were tenants in common of the property, and the question is whether there was a severance of such cotenancy. The only rational conclusion to be drawn from the conduct of Dineen under all the circumstances of the case is that he intentionally abandoned the contract and the premises. In determining his intention in leaving, the court may consider all of his subsequent acts and omissions as well as the circumstances under which he left; not that a subsequently formed intent can in any manner qualify the act of leaving, but his subsequent conduct may be looked to in ascertaining what his intent was at the time he left.

[6] "In so far as Dineen was able to do so

he abandoned his rights in the premises. Could he divest his title by mere abandonment? It seems clear that title in fee cannot be so divested. *Davenport v. Turpin*, 43 Cal. 597. It is equally clear that title by naked possession can be so divested. *Gluckauf v. Reed*, 22 Cal. 469; *St. John v. Kidd*, 26 Cal. 264; *McCann v. McMillan*, 129 Cal. 350, 62 Pac. 31.

"Title under an executory contract of purchase not being dependent upon the fact of possession, it is at least doubtful whether under the circumstances of this case Dineen could divest himself of title by mere abandonment, independent of any question of estoppel, adverse possession or forfeiture. Then as to forfeiture:

[7] "By the terms of the contract, time of payment is made of the essence thereof, and failure to make payment at the time provided worked a forfeiture without the necessity of the vendor's indicating its election to claim a forfeiture, and the effect of such forfeiture was to nullify the agreement, and the vendor was thereafter entitled to act as if the contract had not existed. 29 Am. & Eng. Ency. Law, 683.

[8] "Thereafter, of course, the vendor could have waived the forfeiture, so long as the rights of third persons did not intervene, but not otherwise. 'After a forfeiture, where the vendor has resold the land, the rights of the vendee will prevent the vendor's waiving the forfeiture.' 25 Am. & Eng. Ency. of Law, 685. A state may waive a forfeiture, and if, before a waiver, the state resells the land forfeited, the waiver will not have the effect to divest the rights acquired by the second purchaser. *Borland v. Lewis*, 43 Cal. 569. Where time is of the essence of a contract of purchase, failure to make payment at the time specified works a forfeiture. *McAdams v. Felkner*, 140 Cal. 354, 73 Pac. 1064. Under the facts of the case last cited, the decision supports the doctrine that after default in payment under a contract of the character of that in this case, if the vendor resells the land, the rights of the second purchaser will prevent the vendor's waiving the forfeiture.

"By nonpayment of the installment due July 18, 1906, Mrs. Stout and Mr. Dineen forfeited all their rights under the contract, and thereafter the land company was at liberty to resell the property, either to Mrs. Stout or to any other person. Had Mrs. Stout then purchased the property by agreement with the land company, after the forfeiture, in the absence of fraud, she would have taken it freed from any claim of Dineen as cotenant or otherwise. There was a severance of the cotenancy by the forfeiture. All interests were united in one person, the land company. The forfeiture was complete without the necessity of any affirmative action by the vendor, and, while the vendor might have waived the forfeiture, it did not do so. If the contract had provided for a

forfeiture at the option of the vendor, and after default the vendor had declared the contract forfeited, the parties would then have been in the same position that they were after the default in this case. In either case it would still have been within the power of the vendor to waive the forfeiture, either expressly or by unequivocal acts manifesting an intention to waive it. Had the contract provided for a forfeiture, not absolutely, but only at the option of the vendor, in the event of nonpayment at the time specified, then, of course, the act of one cotenant after forfeiture and prior to the exercise of such option by the vendor would inure to the benefit of his cotenants; but, after the forfeiture is complete, then a cotenant may proceed as if the cotenancy had never existed. The principle is not unlike that involved in a redemption by a cotenant of lands sold under foreclosure. Prior to the expiration of the period allowed for redemption, the purchase of the property or its redemption by one cotenant will inure to the benefit of all, but after the period of redemption has expired either of the former cotenants may purchase the property as his own, without incurring any liability to his former cotenants.

[9, 10] "Since the knowledge of Howe, the agent, was the knowledge of the land company, it must be held that the company was aware of all the circumstances surrounding the transaction, the abandonment of the property by Dineen, the default in payment, the fact that Mrs. Stout was making the payments thereafter for herself and not for the cotenancy; and, while the company did not expressly resell the premises to her as it might lawfully have done, it did accept her payments to the full amount of the purchase price first agreed upon, with full knowledge of the facts, knowing that such payments were made by her with the intention and expectation of acquiring the premises as her individual property, and in such a case I am of the opinion that an implied contract resulted between the parties in the terms mutually understood between them, though not expressed in words.

"An implied contract may be said to exist where the intention of the parties, though not expressed in words, may be gathered from their acts, viewed in the light of surrounding circumstances. It will be implied that a party did make such agreement as under the circumstances disclosed he ought in fairness to have made. The land company having accepted payment from Mrs. Stout for the property, it ought in fairness to transfer it to her, and I do not understand that the land company is endeavoring to escape that obligation, but that in its refusal to convey to Mrs. Stout its only purpose was to be protected from any claim which Dineen might have to the property.

Mrs. Stout's tender of payment, in view of the circumstances under which it was made, must be treated as an offer to purchase the property, and the unqualified acceptance of such payment by the company was in effect an acceptance of her offer. A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting. Civ. Code, § 1589; *Simmons v. Bedell*, 122 Cal. 341 [55 Pac. 3, 68 Am. St. Rep. 35.]"

We think the judgment is a just one, and, for the reasons stated in the foregoing, it is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

16 Cal. App. 484

CLIFTON et al. v. HERRICK et al.
(Civ. 983.)

(District Court of Appeal, Second District,
California. June 22, 1911.)

1. FRAUDULENT CONVEYANCES (§ 299*)—EVIDENCE—SUFFICIENCY.

Evidence in an action involving the issue of fraudulent conveyance held to sustain a finding that the judgment debtor purchased the property with her separate funds, and took title thereto in her daughter's name with intent to defraud the judgment creditor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 881; Dec. Dig. § 299.*]

2. FRAUDULENT CONVEYANCES (§ 230*)—EFFECT AS TO CREDITORS.

Under Civ. Code, § 3439, declaring a transfer of property, with intent to defraud a creditor, void against the creditor, a judgment debtor having bought property with her separate funds and taken title in the name of her daughter with intent to defraud the judgment creditor, such creditor may levy on and sell the property as that of the judgment debtor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 660-664; Dec. Dig. § 230.*]

3. FRAUDULENT CONVEYANCES (§ 181*)—UNDECLARED VOLUNTARY TRUST.

There having been no declaration of a voluntary trust, duly executed, till C. delivered money to her daughter, which was after C. had become indebted to others, the fact that she had been secretly holding the money which belonged to her as heir of a decedent for her daughter, because decedent wanted the daughter to have it, gave the daughter no right thereto as beneficiary of a voluntary trust against the creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 181.*]

4. EXECUTION (§ 288*)—RIGHTS AGAINST PURCHASER—VOLUNTARY ADVANCEMENTS.

The payment of taxes and assessment against and installments on the purchase price of property by one not the owner or claiming to be the owner thereof constitute a voluntary advancement, giving him no interest in the property as against the purchaser on execution against the owner.

[Ed. Note.—For other cases, see *Execution*, Dec. Dig. § 288.*]

Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by Flora K. Clifton and her husband against C. N. Herrick and another, Judgments for defendants. Plaintiffs appeal. Affirmed.

Schweitzer & Hutton, for appellants. F. C. Austin and W. P. L. Stafford, for respondents.

SHAW, J. Action to quiet title to real estate. Plaintiffs were husband and wife, and by a complaint in the usual form in such cases alleged that Flora K. Clifton was the owner of the property in question, and that defendant C. N. Herrick and his codefendants wrongfully and without right asserted a claim and interest therein. Defendants answered, denying Flora K. Clifton's ownership of the property, and alleged that title thereto was vested in C. N. Herrick under and by virtue of a sheriff's deed made and delivered to him by virtue of a sale under an execution issued upon a judgment against Kate Cockran, the mother of plaintiff Flora K. Clifton, who, it is alleged, purchased and paid for the property with her separate funds, and while the judgment was in force caused the same to be conveyed to plaintiff Flora K. Clifton for the purpose of defrauding the holder of the judgment.

The court, in effect, found that Flora K. Clifton was not the owner of the lot in question and had no estate or interest therein; that on October 1, 1902, and while Kate Cockran, mother of said Flora K. Clifton, was a judgment debtor of Ann Herrick, she, said Kate Cockran, with her separate funds, purchased the lot and took title thereto in the name of Flora K. Clifton with intent to defraud said Ann Herrick and hinder and delay her in the collection of said judgment so held by her against said Cockran; that thereafter Ann Herrick duly assigned said judgment to defendant C. N. Herrick, who brought suit thereon and obtained a renewal thereof, upon which an execution was issued and levy thereof made upon said lot and the same was thereafter sold to defendant C. N. Herrick, to whom, in due time, the sheriff made and delivered his deed conveying the property to said C. N. Herrick, by virtue of which he became the owner thereof in fee; that at the time of the sale under said execution said Kate Cockran, the judgment debtor, was the real owner in fee of the lot so standing in the name of Flora K. Clifton, who held the title as a secret trust for the benefit of Kate Cockran.

Upon these findings the court rendered judgment that Flora K. Clifton had no right, title or interest in the property. The appeal is from the judgment and an order denying plaintiff's motion for a new trial.

[1] Appellants' sole contention for a reversal is based upon the claim that the findings are not supported by the evidence. It appears that the purchase price of the lot,

which was bought in October, 1902, was \$2,650, of which sum \$300 was paid in cash and the balance thereof paid in monthly installments of \$25 each. Appellants contend that Flora K. Clifton paid this \$300 out of \$600 left to her by Jane Poindexter, her grandmother, that upon the purchase of the property she rented it to her parents, who paid her \$20 per month rent, and this rental, plus \$5 per month taken from the remainder of the \$600 so left her by Poindexter, was used in making the monthly payments upon the property. There is evidence tending to show that Jane Poindexter, the mother of Kate Cockran, died intestate in 1892, leaving as her sole heir the said Kate Cockran, her daughter; that a few days after her death Kate Cockran discovered among her effects \$600 in cash. No administration was had upon the estate, and it does not appear that Jane Poindexter at any time expressed any wish to Kate Cockran as to the disposition of the \$600; and while the husband testified to the fact, wholly immaterial, that he heard Jane Poindexter in her lifetime say that she wanted all her property to go to Flora K. Clifton, it does not appear that he ever informed his wife of the wish so expressed. Nevertheless, Kate Cockran testifies that she regarded the money as belonging to her daughter Flora K. Clifton, and from the time of her mother's death until the daughter reached the age of 18, comprising a period of eight years, she held this \$600 intact in denominations as found, and in moving from place to place kept it in her house and delivered it to her daughter on her eighteenth birthday.

Upon the purchase of the property, Kate Cockran and her husband took possession thereof, and from that time continued to occupy the same down to the date of the filing of the complaint, December 24, 1907, a period of some 62 months, the husband testifying that during said time he paid Flora K. Clifton \$20 per month rent thereon, and she testifying that she used this \$20, together with \$5 of her own money, which included the remainder of the fund claimed to have been left by the grandmother, in payment of the monthly installments due upon the purchase price of the property. This continued to the time that Flora K. Clifton was married, during which time without, so far as disclosed by the record, the payment by her of anything on account of board or lodging. The evidence further tends to show that the negotiations for the purchase of the property were conducted by Kate Cockran, who personally made the payment of \$300 thereon and at the time stated to the agent of the seller that the sum paid "represented about all she had in the world and she wanted to be careful of it," and that she stated that she was buying the property for her daughter. There was also evidence to the effect that Kate Cockran had said that she put the property in Flora's

name so that Ann Herrick could not get hold of it, and that Flora should always speak of it as her property, together with other testimony of like character. We are of the opinion that this evidence is ample to support the findings.

[2] The fraudulent intent being established, the transfer of the property as against Herrick, the holder of the judgment, was void. Section 3439, Civ. Code. Being void, the property remained that of Kate Cockran, the judgment debtor, and Herrick was authorized to levy upon and sell the same as though no transfer had been attempted. 1 Freeman on Executions, § 136; Bull v. Ford, 66 Cal. 176, 4 Pac. 1175; Bekins v. Dieterle, 5 Cal. App. 690, 91 Pac. 173.

[3] It is strenuously argued by appellants that as to the \$600 Kate Cockran was a self-constituted trustee for Flora K. Clifton. The record gives no support to the contention that the latter acquired this money from Jane Poindexter. Under the statute of descents and distribution, it descended to Kate Cockran subject to the right of administration of the estate of the deceased. In the absence of an exercise of such right, Kate Cockran, the sole heir, converted the same to her own use. Until the delivery of the money to her daughter, there was no declaration of a voluntary trust duly executed, as urged by appellants. Therefore the case of Estate of Webb, 49 Cal. 541, cited, has no application, and does not support appellants' contention. The money, \$1,500, which forms the basis of the Herrick judgment, was borrowed from Ann Herrick in 1896. Hence it clearly appears that Kate Cockran at that time was in possession and control of this \$600 and did not execute the alleged self-imposed trust until some four years after becoming indebted to Ann Herrick. The \$600, like property otherwise acquired, became Kate Cockran's property and subject to the payment of her debt to Ann Herrick. It is unnecessary to cite authorities in support of the principle that she had no right to make either the money or the property bought therewith the subject of a gift to her daughter in fraud of her creditors. The facts here presented are substantially the same as those involved in the case of Lander v. Beers, 48 Cal. 546, wherein it was held to be the duty of a court of equity at the suit of a judgment creditor to declare the deed fraudulent and void as against such creditor.

[4] There is some evidence that after the marriage of Flora K. Clifton she and her husband contributed something towards the monthly payments on account of the purchase price of the property, as well as paid something on account of assessments and taxes, and appellants contend that, if for no other reason such payments entitled plaintiffs to some interest in the property,

and for that reason a new trial should be granted. It appears from the record that only \$300 of the \$600 left by Jane Poindexter and converted by Kate Cockran was applied in making the initial payment upon the property, leaving, as shown by the evidence of Flora K. Clifton, the sum of \$300 in her possession. This balance of \$300, exclusive of interest thereon, together with the \$20 per month, claimed to have been paid as rent by Kate Cockran and her husband, would constitute a fund practically sufficient in amount to cover all of the deferred payments up to the time of instituting the suit. The husband of Flora K. Clifton testifies that he paid taxes upon the property, but he does not state the amount of such taxes, and assuming that he would be entitled to an interest in the property by reason of such payment, a fact which we do not concede, nevertheless, it cannot be determined upon this record what sum he paid. We are of the opinion, however, that inasmuch as he did not own the property, nor claim to own it, the payment of taxes and assessments by him, and instalments upon the purchase price as well, must be deemed voluntary advancements under which he could be entitled to no interest in the estate itself.

The facts clearly established, together with the legitimate inferences which the court was justified in drawing from such facts (Maxson v. Llewelyn, 122 Cal. 195, 54 Pac. 732), fully support the findings, and the judgment and order are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

16 Cal. App. 567
CREDITORS' UNION v. LUNDY. (Civ. 798.)

(District Court of Appeal, First District,
California. July 6, 1911.)

1. BILLS AND NOTES (§ 493*)—ACTIONS—PRESUMPTIONS—CONSIDERATION.

Under Code Civ. Proc. § 1963, subd. 21, making it a disputable presumption that a note was indorsed for a sufficient consideration, and Civ. Code, § 1614, providing that a written instrument is presumptive evidence of consideration, the introduction in evidence of a note assigned to plaintiff raised the presumption that it was given for a valuable consideration so as to make out a prima facie case for plaintiff, so as to place the burden of showing want of consideration upon defendant, Civ. Code, § 1615, providing that the burden of showing want of consideration to support an instrument is upon the party seeking to avoid it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1652-1662; Dec. Dig. § 493.*]

2. EVIDENCE (§ 96*)—BURDEN OF PROOF—NEW MATTER.

In an action on a note given to a nonresident life insurance company as a premium payment, the burden was upon defendant to show that the insurance company issuing the policy failed to comply with the laws relating to the transaction of insurance business in this state;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that being new matter pleaded by it as a special defense.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 119-121; Dec. Dig. § 96.*]

3. EVIDENCE (§ 474½*)—OPINION EVIDENCE—OPINION OF AGENT.

In an action on a note given to a life insurance company, a soliciting agent of the company could not give his opinion as to whether under the circumstances stated in the application the company would have paid the policy upon defendant's death.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2220-2233; Dec. Dig. § 474½.*]

4. EVIDENCE (§ 158*)—BEST EVIDENCE—CERTIFICATE OF INCORPORATION.

A certificate of incorporation filed in the office of the Secretary of State was the best evidence of its contents as well as the best evidence of the incorporation of the company; Code Civ. Proc. § 1829, providing that a written instrument is itself the best possible evidence of its existence and contents.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 510; Dec. Dig. § 158.*]

5. CORPORATIONS (§ 28*)—DE FACTO CORPORATIONS—POWERS.

A de facto corporation could sue on a note assigned to it; Civ. Code, § 358, providing that the due incorporation of a company claiming in good faith to be a corporation and doing business as such shall not be inquired into collaterally in a private suit to which such de facto corporation may be a party.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 70; Dec. Dig. § 28.*]

6. INSURANCE (§ 188*)—PREMIUM NOTES—ACTIONS—INSTRUCTIONS.

Where, in an action on a note executed by defendant to an insurance company for the first premium, there was evidence supporting plaintiff's theory that the negotiations for the insurance were merged into a completed and executed written contract of insurance enforceable against the company, a requested instruction by defendant requiring a verdict for defendant if there was at the beginning of the negotiations an oral agreement by the insurance company's agent that the note sued on need not be paid unless defendant finally concluded to accept the policy was properly refused.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 188.*]

7. INSURANCE (§ 187*)—PREMIUM NOTES—ACTIONS—DEFENSES.

That insured's original application for a life policy stated that he had not paid the soliciting agent the first year's premium and the application was subsequently altered, without insured's knowledge, so as to state that the premium was paid, would not of itself authorize a verdict for insured in an action on a first-premium note given by him on the ground that no binding agreement had been executed.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 187.*]

8. APPEAL AND ERROR (§ 1064*)—INSTRUCTIONS—REQUESTS—MODIFICATION.

There was no prejudicial error in modifying a requested instruction where the subject thereof was sufficiently covered in the court's charge.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1064.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by the Creditors' Union against A. L. Lundy. From a judgment for plaintiff

and an order denying a motion for a new trial, defendant appeals. Affirmed.

R. H. Countryman, for appellant. Aitken & Aitken, for respondent.

LENNON, P. J. The defendant, A. L. Lundy, made application to the Northwestern Mutual Life Insurance Company for a policy of insurance upon his life, in the amount of \$10,000, and gave his promissory note for the sum of \$601.60 in payment of the first premium. The note was made payable to Clarence M. Smith, the general manager of the company, who personally paid to his principal the amount of the premium upon the issuance and delivery of the policy to the defendant. The note was subsequently assigned to the corporation plaintiff. When the note became due the defendant refused to pay it, and this action was brought to enforce payment. Judgment was entered in favor of the plaintiff upon the verdict of a jury. This appeal is from the judgment and the order denying the defendant's motion for a new trial.

As a defense to the action the defendant relied upon the absence of a consideration for the execution of the note, and also pleaded a total failure of consideration therefor if it should be found that a consideration ever existed. The defendant's motion for a nonsuit was properly denied.

[1] The introduction of the note in evidence as a part of the plaintiff's case carried with it the presumption that it was given for a valuable consideration (Code Civ. Proc. § 1963, subd. 21; Civ. Code, § 1614), and established a prima facie case for the plaintiff. The burden of showing a want of consideration was upon the defendant. Civ. Code, § 1615.

[2] The plaintiff was not required to show as a part of its case in chief that the nonresident insurance company which issued the policy of insurance in question had theretofore complied with the existing laws governing the transaction of insurance business in this state. This was new matter pleaded by the defendant as a special defense to the action, and, assuming it to be a valid defense, the burden of proof in that behalf was upon the defendant. *Coppedge v. Goetz Brewing Co.*, 67 Kan. 851, 73 Pac. 908; *American Ins. Co. v. Smith*, 73 Mo. 368; *American Ins. Co. v. Cutler*, 36 Mich. 261; *Mason v. Edw. Thompson Co.*, 94 Minn. 472, 103 N. W. 507; *Northrup v. Wills Lumber Co.*, 65 Kan. 769, 70 Pac. 879.

[3] There was no error in the ruling of the trial court sustaining plaintiff's objection to the hypothetical and speculative question put to the witness Dewey. This witness was merely a soliciting agent of the insurance company, and the question objected to called only for his conclusion based upon an assum-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ed state of facts. Clearly the declarations of this agent as to whether in his opinion his principal under the circumstances assumed by the question would have paid the policy upon the death of the defendant could not bind his principal or the plaintiff in this case. The allegation of plaintiff's complaint that it was a corporation organized and existing under the laws of the state was denied by the answer of the defendant; and, in an endeavor to establish this fact the plaintiff was permitted to show that in the year 1903 it had filed articles of incorporation with the county clerk of the city and county of San Francisco; that a copy thereof, certified to by the county clerk of said city and county, was forwarded to and filed in the office of the Secretary of State; and that the original articles of incorporation were destroyed by fire.

No complaint is now made of the admission of this particular testimony, but it is claimed that the court subsequently erred in allowing parol testimony of the contents of a lost or destroyed paper writing issued from the office of the Secretary of State, which acknowledged the receipt of a certified copy of the original articles of incorporation, and purported to recite and certify to the contents of the same. Although not so designated in the testimony, it is evident that the destroyed paper writing therein referred to was the certificate of incorporation required to be issued by the Secretary of State in conformity with the provisions of section 296 of the Civil Code. At the trial the defendant objected to the oral testimony of the contents of this certificate, upon the ground that it was immaterial, irrelevant, incompetent, and not the best evidence. The objection was overruled, and a subsequent motion to strike out denied. If the certificate of incorporation had been in existence, its production would have been primary evidence of the facts which it purported to declare and publish.

[4] In other words, the certificate itself was not only the best possible evidence of its contents (Code Civ. Proc. § 1829), but the best evidence as well of the plaintiff's incorporation (People v. Hagar, 52 Cal. 183; Wall v. Mines, 130 Cal. 27, 62 Pac. 386). Upon proof of its due execution and that it was lost or destroyed, secondary evidence of its contents, by copy, or by the recital of its contents in some authentic document, or by the recollection of a witness, was admissible. Code Civ. Proc. §§ 1855, 1937.

[5] Assuming, as defendant contends, that the plaintiff's case falls short of the evidence required to establish the creation of a corporation de jure, the record nevertheless discloses evidence amply sufficient to support plaintiff's existence as a de facto corporation, and as such it was entitled to maintain this action. Civ. Code, § 358; People v. La Rue, 67 Cal. 530, 8 Pac. 84; First Baptist

Church v. Branham Co., 90 Cal. 22, 27 Pac. 60.

[6] Complaint is made of the trial court's refusal to give certain instructions requested by the defendant, which required a verdict for the defendant if the jury found, as claimed by the defendant, that there was, at the inception of the negotiations for the contract of insurance, an oral agreement by the soliciting agent of the insurance company that the note in suit need not be paid when due unless the defendant then and finally concluded to accept the policy. Upon this phase of the case the evidence is in conflict, and the record further discloses that the defendant's written application for insurance was accepted and approved by the insurance company in the sum of \$10,000, with a receipt acknowledging payment of the first year's premium, issued and delivered to the defendant. The instructions referred to directed a verdict for the defendant regardless of the plaintiff's theory of the case, founded upon the issues raised by the evidence, that the negotiations of the parties had been merged into a completed and executed contract of insurance expressed in writing which, in the event of the defendant's death, could have been enforced against the company, and for this reason, if for no other, the defendant's requested instructions in this behalf were rightfully refused.

[7] It appears that defendant's application for insurance as originally written contained a statement by the defendant that he had not paid the agent taking the application the first year's premium, and that the application had been subsequently and without the knowledge of the defendant altered so as to read that the said premium had been paid. This was a fact in the case which the jury might consider in arriving at a conclusion as to when the contract of insurance was completed and executed, if at all, but in and of itself it was not sufficient to justify a verdict for the defendant, and therefore the defendant's requested instruction No. 6 was properly modified by the trial court striking out that portion of the instruction which directed the jury to give a verdict for the defendant if the jury found that the defendant's application had been altered as stated.

[8] It is claimed that the trial court erred in modifying defendant's requested instruction No. 7, but the record fails to show whether the instruction was modified or refused, and, if modified, how and to what extent. In any event, the subject of this particular instruction, and of all the remaining requested instructions, was sufficiently covered in the charge of the court; and therefore, whatever the action of the court may have been in refusing or modifying the defendant's instructions it was free from error.

The judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; HALL, J.

16 Cal. App. 574

McMURRAY v. BODWELL. (Civ. 805.)(District Court of Appeal, First District,
California. July 12, 1911.)**1. LIMITATION OF ACTIONS (§ 100*)—FRAUD—COMPLAINT.**

The complaint in an action to recover from the estate of plaintiff's daughter money which had been the community property of plaintiff and his wife, and had by the wife been saved and placed in a safety deposit box of the daughter, and on the mother's death had been appropriated by the daughter, brings the case within Code Civ. Proc. § 338, subd. 4, providing that a cause of action for fraud is not deemed to have accrued till discovery by the aggrieved party of the facts constituting the fraud, it showing that plaintiff had not known of his wife's saving the money, or of its existence, and so that the fraud was secret, the fund concealed, and that there was nothing about the transaction to excite plaintiff's suspicions, so as to make inquiry a duty.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 100.*]

2. WITNESSES (§ 168*)—COMPETENCY—ACTION AGAINST EXECUTOR—MATTERS OCCURRING BEFORE TESTATOR'S DEATH.

Plaintiff's testimony in an action against his daughter's executor on a claim against her estate for money his wife had placed in a safety deposit box, and the daughter had misappropriated after her mother's death, that it was not till after his daughter's death that he learned his wife had placed the money in the box, and that his daughter had misappropriated it, is not as to a matter occurring before the daughter's death, as to which he is by Code Civ. Proc. § 1880, subd. 3, declared incompetent to testify.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 704, 705; Dec. Dig. § 168.*]

3. HUSBAND AND WIFE (§ 249*)—COMMUNITY PROPERTY.

Money saved by a wife from a monthly household allowance is community property, in the absence of an agreement or understanding between the spouses that it was to be the wife's separate property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 887, 889-892; Dec. Dig. § 249.*]

4. HUSBAND AND WIFE (§ 262*)—COMMUNITY OR SEPARATE PROPERTY—BURDEN OF PROOF.

Defendant in an action for money saved by plaintiff's wife from her monthly household allowance, and which after her death her daughter, defendant's testator, appropriated, has the burden of proving an agreement or understanding between plaintiff and wife, that the money so saved, presumptively their community property, was to be her separate property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 913-914; Dec. Dig. § 262.*]

5. HUSBAND AND WIFE (§ 264*)—COMMUNITY PROPERTY—SUFFICIENCY OF EVIDENCE.

Evidence in an action involving the question of there having been an agreement or understanding that money saved by a wife from her monthly household allowance was to be her separate property, in the absence of which it was their community property, held to sustain a finding that it was community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 916; Dec. Dig. § 264.*]

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by John P. McMurray against Samuel P. Bodwell, executor of Eva F.

Craig, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

M. S. Eisner and Harry K. Wolff, for appellant. Sullivan & Sullivan and Theo. J. Roche, for respondent.

KERRIGAN, J. This is an action on a claim against an estate to recover money which it is alleged was fraudulently appropriated by the defendant's testatrix.

On October 28, 1889, Margaret McMurray died. At that time and for many years prior thereto she and the plaintiff were husband and wife, living together as such. At the time of Margaret McMurray's death the family consisted of the plaintiff, Kip McMurray, a son, and two daughters—Mrs. Eva F. Craig and Mrs. Carrie I. Barrows. Plaintiff was a contracting decorator, and he earned about \$5,000 a year. It was his custom to make his wife a monthly allowance for the upkeep of the house and the support of the family. Out of this monthly payment Margaret McMurray, by doing nearly all the housework herself, was enabled to save "part of the allowance," which was regarded, so one of the witnesses testified, as separate property of Margaret McMurray by both herself and her husband. In October, 1882, Eva F. Craig rented in her own name a safe deposit box in San Francisco, to which she and her mother had exclusive access. On September 3, 1886, Margaret McMurray, with the knowledge of the plaintiff, purchased a lot of land in Berkeley out of said savings, the deed to said lot being taken in her own name. At various times during her life Margaret McMurray deposited sums of money in the said safe deposit box, which at the time of her death aggregated the sum of \$1,800. About a month after her decease her two daughters, at the request of plaintiff, consented that the lot in Berkeley should go to and become the property of Kip McMurray. About this time Eva F. Craig told her sister, Carrie I. Barrows, of the existence of this \$1,800, and, warning her to say nothing about the matter to any one, suggested that they divide this sum equally between them, and also agree to the plaintiff's proposal as to the disposition of the Berkeley lot, which was done. The estate of Margaret McMurray was probated, the only property accounted for being the said lot, which was treated as the separate property of the deceased. The estate being settled, Eva F. Craig delivered to Carrie I. Barrows \$900 of the said deposit, and kept the remainder. The existence of this fund was not divulged to any one except to the husband of Carrie I. Barrows, who, notwithstanding that he was plaintiff's attorney in the administration of the estate of said Margaret McMurray, and was informed of the facts sur-

rounding the accumulation of the \$1,800 and its disposition, concealed them from the plaintiff. On February 20, 1900, Eva F. Craig died, leaving the whole of her estate to the defendant, to whom she was in no way related; and plaintiff now for the first time learned from Carrie I. Barrows the matters above related, and 30 days thereafter presented the claim, upon which this suit is based, against the estate of said Eva F. Craig. The present action is brought within three months after the rejection of the claim. In the trial of the cause witnesses testified that all knowledge of the \$1,800 was carefully concealed from plaintiff until he was made aware of it by Carrie I. Barrows as just mentioned. At the conclusion of plaintiff's case defendant moved for a nonsuit, which was denied, whereupon defendant rested without introducing any evidence. Thereafter plaintiff, in open court, waived all right to recover against the defendant a judgment exceeding \$900 and interest on that sum; and judgment was accordingly rendered in the sum of \$1,040.35 and costs.

This appeal is from the judgment and from an order denying defendant's motion for a new trial.

Defendant asks for a reversal of the judgment upon three grounds: (1) That the complaint fails to state a cause of action in this, that the cause of action alleged in the complaint is barred by the provisions of subdivision 4, § 338, Code Civ. Proc. (2) Error of the court in permitting certain questions to be asked of the plaintiff during the trial. (3) Insufficiency of the evidence to justify the findings of the court. Of these in their order.

[1] This action was commenced 12 years after the transaction complained of; and defendant insists that the allegations of the complaint fail to bring it within the protection of subdivision 4, § 338, Code Civ. Proc. Said subdivision reads as follows: (The periods prescribed for the commencement of actions other than for the recovery of real property are as follows: Within three years.) "An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party, of the facts constituting the fraud or mistake." The allegations of the complaint bearing on this point read as follows (paragraph 10): "That all of said facts were concealed from plaintiff by said Eva F. Craig during her lifetime." (Folios 19 and 20): That plaintiff "was wholly ignorant of the existence of said money, or that said money had ever been placed or deposited by said Margaret McMurray in said safe deposit box, or that she had said money, or any part thereof, at the time of her death, or that possession of said moneys or any part thereof had been obtained, or that said moneys had been appropriated by said Eva F. Craig after the death

of said Margaret McMurray. * * * That the first time that plaintiff had any knowledge or means of knowledge of such facts, or any of them, was within three months prior to the commencement of this action."

As stated in the statute, an injured party is barred unless he brings his action within three years after becoming aware of the fraud, and in this connection it is a familiar rule of law that he is deemed to have knowledge of the fraud or mistake if he had the means of knowledge, or the circumstances were such as to put a prudent man on inquiry. *Archer v. Freeman*, 124 Cal. 529, 57 Pac. 474. *Pomeroy*, in his work on Equity Jurisprudence, at section 917, after stating that the time within which to bring an action for fraud commences to run from the knowledge of the fraud, or of facts and circumstances which would impart to him knowledge, says: "To thus rule there is one limitation: It applies only when the fraud is known or ought to have been known. No lapse of time, no delay in bringing a suit, however long, will defeat the remedy, provided the injured party was during all this interval ignorant of the fraud. The duty to commence proceedings can arise only upon his discovery of the fraud; and the possible effect of his laches will begin to operate only from that time." The rule on the subject is also stated in a note to the same section.

It is very true, as contended by defendant, and as stated by Mr. Justice Shaw in the case of *People v. San Joaquin, etc., Ass'n*, 151 Cal. 797, 91 Pac. 740, that "it is not enough that plaintiff merely aver that he was ignorant of the facts at the time of their occurrence and has not been informed of them until within the three years. He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them—as that they were done in secret or were kept concealed; and he must also show the time and circumstances under which the facts constituting the fraud were brought to his knowledge, so that the court may determine whether the discovery of these facts was within the time alleged." It is clear from the facts in the case at bar that the plaintiff was wholly ignorant of this deposit of \$1,800, and that he was aware at no time, until informed by Mrs. Barrows, of any circumstance that would have put a prudent man upon inquiry; and having pleaded these facts with ample sufficiency, he has, we think, brought his case within the exception to section 338, permitting an action for relief upon the ground of fraud commenced within three years after the discovery by the injured party of the facts constituting the fraud. Cases sustaining this position are *Lataillade v. Orena*, 91 Cal. 565, 27 Pac. 924, 25 Am. St. Rep. 219; *Tarke v. Bingham*, 123 Cal. 163, 55 Pac. 759; *Matthews v. Sontheimer*, 39 Miss. 174; *Shiels v. Nathan*, 12 Cal. App. 604, 108 Pac. 34.

In the first of these cases the court held in sustaining the complaint that the plaintiff had no knowledge and no reason to suspect that fraud was being practised on him; that, therefore, there was nothing to put him upon inquiry, and under such circumstances, said the court, "we do not see that it can be said that he failed to use due diligence to detect the fraud, or how he can be presumed to have known about it." *Tarke v. Bingham*, supra, was an action brought to reform a mortgage in respect of a note incorrectly copied therein and made a part thereof. It was commenced more than three years after the execution of the mortgage. The defendant pleaded the statute of limitations. The evidence in the case was to the effect that the plaintiff did not discover the mistake until a few days before the action was begun. The court held that the cause was not barred, saying (in the course of its opinion) "that it was not sufficient for a plaintiff in an action based upon fraud merely to plead or prove ignorance of the fraud at one time, and discovery or knowledge at another; that it was incumbent upon a pleader to show diligence and that he has not failed to avail himself of sources of information of which he had knowledge, and then proceeds: "But the converse of the proposition is equally true. Where no duty is imposed by law upon a person to make inquiry, and where under the circumstances 'a prudent man' would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery. The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission. In this case, though means of information were open to the plaintiff, it does not appear that there was any duty devolving upon him to make use of them. Nothing had occurred to excite his suspicion, or to put him upon inquiry, and for these reasons, under the facts of this case, we think the finding of the court sufficient and sufficiently supported by the evidence." So in the recent case of *Shiels v. Nathan*, supra, plaintiff and her husband by reason of differences had agreed to separate and live apart after dividing the community property. Appraisers were appointed to make a correct inventory of the property, and to divide it equally between the spouses. A division was made. Contrary to his agreement, the husband failed to notify the appraisers of the existence of certain community property, which the wife did not discover until the lapse of considerably more than three years, at which time her husband had died and she had been appointed the representative of his estate. It was held that the action was not barred by the statute of limitations, and in so holding the court said: "Accepting the settlement upon the belief that her husband had returned all the com-

munity property, she had a right to rest in that belief and was not called upon to pursue an independent search for other property." In the case at bar the fraud was secret, the fund was concealed, and there was nothing about the transaction to excite the suspicion of the plaintiff, and we think the case falls squarely within the exception contained in the statute.

[2] 2. Plaintiff was called to the stand, and, over the objection and exception of defendant, answered two questions, each of which defendant claims was concerning matters of fact occurring before the death of Eva F. Craig, and therefore, as this is an action on a claim against the estate of a decedent, the evidence elicited was, so defendant argues, inadmissible under section 1880, subd. 3, Code Civ. Proc. In answer to these questions, plaintiff testified that it was not until after the death of Eva F. Craig that he learned that his wife had money placed in a safe deposit box, and that Eva F. Craig had misappropriated the same. Plaintiff's said answers related obviously to matters occurring after the death of the deceased, and hence the evidence thus adduced is not within the inhibition of the section mentioned. *Cowdery v. McChesney*, 124 Cal. 363, 57 Pac. 221; *Corbus v. Leonhardt*, 114 Fed. 10, 13, 51 C. C. A. 636; *City Bank of Savings v. Enos*, 135 Cal. 167, 67 Pac. 52; *Roche v. Ware*, 71 Cal. 375, 12 Pac. 284, 60 Am. Rep. 539.

Defendant finally contends that the evidence is insufficient to support the finding that Mrs. McMurray had any such sum of money as is claimed, and also that, even if there was money left by Mrs. McMurray, it was her separate estate.

The evidence is clear and uncontradicted that Margaret McMurray saved the \$1,800 from money given her by plaintiff for the upkeep and support of the home and family. We also think that the evidence is amply sufficient to support the finding of the court that the money in question was community property. That Mrs. McMurray took the deed to the Berkeley lot in her own name, and that the property apparently was regarded in the probate proceedings as her separate estate, tends to prove that the lot was in fact her separate property; and if the plaintiff so regarded the lot that circumstance would tend, in some degree, as argued by defendant's counsel, to prove that all money saved by Mrs. McMurray in the manner indicated became, by the acquiescence of the husband, her separate property. But the fact that in the probate proceedings the lot was treated as her separate property is a matter of slight significance, for as, by the agreement of the plaintiff and his daughters, the lot was to go the latter's brother, it was doubtless a matter of indifference to the plaintiff whether it was regarded as the community property of himself and deceased wife, or the latter's separate estate. In any

event, having no knowledge, according to the evidence, of the existence of the \$1,800, any action he took with regard to the lot could have very little influence upon the character of this fund, whether community property or the separate estate of his wife. The testimony of Carrie I. Barrows that the plaintiff and his wife regarded said savings as the wife's separate property, besides being a mere conclusion of the witness, manifestly referred only to those savings of which he had knowledge; i. e., those that went for the purchase of said lot.

[3, 4] There can be no doubt that money saved by Mrs. McMurray from the monthly household allowance was community property, unless there was an agreement or understanding between the spouses that it was to be her separate property, and the burden of proving such an understanding was on the defendant. *Davis v. Green*, 122 Cal. 364, 55 Pac. 9; *Rowe v. Hibernia S. & L. Soc.*, 134 Cal. 403, 66 Pac. 569.

[5] The trial court held, in effect, that the presumption that the \$1,800 was community property of both spouses was not overcome by the evidence introduced, and we think the conclusion reached by the court is both just and correct. The following cases support this view: *Moseley v. Heney*, 66 Cal. 478, 6 Pac. 134; *Martin v. S. P. Co.*, 130 Cal. 285, 62 Pac. 515; *Rowe v. Hibernia Sav. & Loan Society*, supra.

The judgment and order are affirmed.

We concur: **LENNON, P. J.; HALL, J.**

FOUNTAIN et al. v. CONNECTICUT FIRE INS. CO. OF HARTFORD. (Civ. 625.)

(District Court of Appeal, Third District, California. March 3, 1910. Opinion Supplementing Order Denying Petition for Rehearing April 6, 1910.)

1. INSURANCE (§ 646*)—FIRE INSURANCE—ACTIONS—BURDEN OF PROOF—DEFENSES.

The burden was upon defendant in an action on a fire policy to prove by a preponderance the affirmative defense that the building in which the insured goods were fell from an earthquake before the fire attacked the goods, so as to avoid the policy under the provision making it void in such case.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1645-1668; Dec. Dig. § 646.*]

2. INSURANCE (§ 665*)—FIRE INSURANCE—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence in an action on a fire policy, in which defendant claimed that a part of the building had fallen from earthquake before the fire began, held to sustain a finding that the fire attacked the insured goods before a substantial part of the building had fallen from the quake.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 665.*]

3. APPEAL AND ERROR (§ 1002*)—FINDINGS—CONCLUSIVENESS—CONFLICTING TESTIMONY.

The jury's finding on substantially conflicting evidence will be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

4. EVIDENCE (§ 598*)—"PREPONDERANCE OF THE EVIDENCE."

Whether a fact is established by a "preponderance of the evidence" is not determined alone from the number of witnesses or by the fact that the affirmative evidence may be direct, while the negative evidence may be circumstantial.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 598.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5516-5518; vol. 8, p. 7761.]

5. APPEAL AND ERROR (§ 994*)—FINDINGS—CONCLUSIVENESS—CREDIBILITY.

It is for the jury in the trial court to pass upon the credibility of witnesses, and draw any reasonable inferences from their testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901-3906; Dec. Dig. § 994.*]

6. APPEAL AND ERROR (§ 1005*)—REVIEW—NEW TRIAL—INSUFFICIENCY OF EVIDENCE.

After the trial court has refused to set aside a verdict as not sustained by the evidence, it is not sufficient to authorize an appellate court to set it aside that it is against the preponderance of the evidence, or that another conclusion might be justified, if there be any evidence to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3948-3954; Dec. Dig. § 1005.*]

7. TRIAL (§ 296*)—INSTRUCTIONS.

In an action on a fire policy, providing that it should be void if any part of the building fall except as a result of fire, in which defendant claimed that a substantial part fell from earthquake before the insured goods were attacked by fire, the court instructed that the falling wall clause should not be literally understood, so as to avoid the policy if a minute part of the material in the building fell, but that it meant some substantial part, the falling of which "would destroy its distinctive character as such," so that if the front windows or part of the front wall fell, but the building was substantially standing as a building so as not to increase the risk to the goods by fire, and was burned in that condition, the clause would not exempt from liability. The court also instructed that it was not necessary that the building as a whole should fall to avoid the policy, but only a material part, and that if a part fell, and by reason thereof the contents were placed in a condition whereby they were more readily subject to fire than if such part had not fallen, the policy was void. Held, that the question whether a substantial part of the building had fallen when the fire attacked the goods was correctly submitted, the use in the first instruction of the words "destroy its distinctive character as such" not having misled the jury, when construed with the other instructions, as to what would constitute a substantial part of the building.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713; Dec. Dig. § 296.*]

8. INSURANCE (§ 324*)—FIRE INSURANCE—FALLEN BUILDING CLAUSES—CONSTRUCTION.

A provision in a fire policy that if the building or any part thereof fall, except as a result of fire, all insurance on the building or contents shall cease, releases the company from liability where the building falls as a structure or such a substantial part thereof falls as to impair its usefulness as a building, and leave the remaining part subject to an increased fire risk.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 749; Dec. Dig. § 324.*]

9. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTING TOGETHER.

Instructions should be read and considered together.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

10. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS.

Where the instructions given fairly and sufficiently presented a question involved, a requested instruction on the same subject-matter was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

11. APPEAL AND ERROR (§ 1070*)—HARMLESS ERROR—SPECIAL INTERROGATORIES—MATHEMATICALITY.

In an action on a fire policy, which provided that all insurance should cease if a part of the building fall except by fire, in which defendant claimed that a material part fell from an earthquake before the fire, the jury answered, "Don't know," to interrogatories as to whether, if a part of the building fell before its destruction from a cause other than fire, its usefulness was impaired for the purpose for which it was constructed by reason of such falling, whether the falling of any such parts exposed the interior to the inclemency of the weather, and whether such falling occurred before the goods were attacked by fire. The jury had answered that the insured goods had been attacked by fire before a substantial part of the building had fallen, and that parts of the building had fallen before the building had been destroyed by fire, but that such parts were "trivial and inconsiderable." *Held*, in view of the questions directly answered, that the three questions not so answered were immaterial to the issue, so that failure to answer them directly did not prejudice defendant.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1070.*]

12. INSURANCE (§ 654*)—FIRE INSURANCE—ACTIONS—ADMISSION OF EVIDENCE—CONDITION OF OTHER BUILDINGS.

In an action on a fire policy, which made the policy void if any part of the building fell except from the fire, in which defendant claimed that a material part fell from an earthquake before the insured goods were fired, evidence as to the effect of the earthquake upon other buildings located in the block and as to the condition of the whole block after the earthquake was properly excluded, in the absence of a showing that the construction of the other buildings was substantially similar to that of the building containing the insured goods, and that the force of the earthquake was practically uniform.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1680-1685; Dec. Dig. § 654.*]

13. EVIDENCE (§ 5*)—JUDICIAL NOTICE.

Courts cannot take judicial notice of the character of other buildings in the block with the building in which the insured goods were.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 4; Dec. Dig. § 5.*]

14. EVIDENCE (§ 8*)—JUDICIAL NOTICE.

The courts cannot take judicial notice of the fact, if so, that the great earthquake of April 18, 1906, operated with approximately the same force over the area covered by a city block.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 7; Dec. Dig. § 8.*]

15. WITNESSES (§ 392*)—IMPEACHMENT—INCONSISTENT STATEMENTS.

Where defendant's witness, whose office was situated over the building in which the insured goods were, testified in an action on a fire policy that he was near the building a half an hour after the earthquake accompanying the fire and

saw no fire in the building, plaintiff could show that he filed an affidavit with another insurance company to the effect that his office furniture was destroyed by fire on the morning referred to, Code Civ. Proc. § 2052, permitting a witness to be impeached by evidence that he has made at other times statements inconsistent with his present testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1249-1251; Dec. Dig. § 392.*]

On Rehearing.**16. WITNESSES (§ 330*)—IMPEACHMENT.**

A witness may be asked for purpose of impeachment any question, a favorable answer to which would tend to weaken or contradict his testimony, or destroy the harmful impression made thereby.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1106-1108; Dec. Dig. § 330.*]

17. APPEAL AND ERROR (§ 1053*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in admitting evidence in an action on a fire policy, in which defendant claimed that a material part of the building in which the insured goods were was destroyed by earthquake before the fire, that the building was "doomed to destruction by fire whether or not it had fallen by reason of the earthquake," was not prejudicial to defendant where the only issue was whether the fire attacked the goods before a substantial part of the building fell, and the court instructed the jury to find for defendant if it appeared that a substantial part of the building fell before the goods were attacked by the fire.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4173-4184; Dec. Dig. § 1053.*]

18. APPEAL AND ERROR (§ 1001*)—VERDICT—CONCLUSIVENESS.

Under the Constitution, an appellate court can set aside a verdict as not sustained by the evidence only where it can declare as a matter of law that it is not sufficiently supported; it not having power to require the trial judge or jury to give a certain amount of weight to the testimony of particular witnesses in preference to other testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3923-3934; Dec. Dig. § 1001.*]

Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by O. Fountain and another against the Connecticut Fire Insurance Company of Hartford, Conn. From an order denying defendant's motion for a new trial after judgment for plaintiffs, defendant appeals. Affirmed.

See, also, 112 Pac. 546.

A. B. Ware and T. C. Van Ness, for appellant. T. J. Geary, for respondents.

HART, J. This is an action by the plaintiffs to recover upon a policy of insurance issued by the defendant and covering certain goods or merchandise contained in a certain brick building in the city of Santa Rosa, known as the "Shea Building." The complaint sets out in general terms the conditions and covenants of the policy, and alleges that on the 18th day of April, 1906, the goods upon which said policy was issued were destroyed by fire; that thereafter and

in due time plaintiffs furnished the defendant with proof of their loss; and that said defendant has not paid the said loss or any part thereof, etc. The answer, in addition to denials of the material allegations of the complaint, pleads as an affirmative defense the claim that the building in which the insured goods were situated at the time of their destruction by fire, or a substantial part of said building, had before said fire had attacked the goods fallen as a result of the shock of the earthquake which occurred on said 18th day of April, 1906. This defense is founded on the following provision of the policy declared upon: "If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." The cause was tried by a jury and verdict returned in favor of the plaintiffs for the sum of \$1,000, the sum for which the policy called together with interest on said amount in the sum of \$116.66. The court thereupon entered judgment for plaintiffs in conformity with the terms of said verdict. This appeal is from the order denying defendant's motion for a new trial.

Besides the general verdict, the jury returned answers to a number of particular questions of fact submitted to them by the court:

The validity of the general verdict and the answers to the particular questions of fact are assailed by the appellant upon several grounds: (1) That they are not justified by the evidence; (2) that the court misdirected the jury in matters of law; (3) that the court erred in its rulings admitting and rejecting certain testimony; (4) that the court erred in refusing to compel the jury to return definite answers to certain of the particular questions of fact submitted to them. It is further insisted that the refusal of the court to submit to the jury certain instructions proposed by the defendant involved rulings prejudicial to the defendant.

The dispute between the parties to this action is one of a number of the same kind and involving like issues of law and of fact which have found their way into the courts of this state through the earthquake and fire occurring in many of our coast cities in the month of April, 1906, and the real controversy here, around which revolve all the points upon which a reversal of the order is demanded, arises out of the question presented by the affirmative defense set up in the answer, viz., whether there had fallen prior to the time at which the fire attacked the insured merchandise a material or substantial part or parts of the building in which the plaintiff's store was situated.

[1] The burden was cast upon the defendant to prove by a preponderance of the evidence the contention founded upon its affirmative defense. If the court's interpretation of the "fallen building" clause of the policy sued on, as declared in its charge to the jury,

is correct, then, in our opinion, there plainly exists a substantial conflict in the evidence upon the vital point or issue tendered by the special or affirmative defense. Or, to put the proposition more accurately, assuming the court properly interpreted the clause mentioned, the defendant failed to sustain the burden cast upon it to satisfactorily prove the claim involved in its affirmative defense.

[2] We think the law of the case was well and correctly stated by the court, as we shall presently undertake to show by both reason and authority. We shall therefore first briefly examine the testimony for the purpose of showing that the most that can be claimed by the defendant in that regard is that some of its witnesses gave testimony which, had it been accepted by the jury, would undoubtedly have been sufficient to have sustained a verdict returned in harmony therewith against the power of a reviewing court to disturb it. The store in which the insured goods were situated and destroyed was a part of a building known as the "Shea Building," but sometimes referred to by the witnesses as the "Eagles' Building" and the "Fountain Building."

As already stated, a majority of the witnesses for the defendant testified to facts from which it would follow that a substantial part of the building had fallen before the fire broke out, or, at least, before there was any visible evidence of fire in the building. But, after the defendant had rested its case, the plaintiffs introduced proof which, while in its nature largely circumstantial, tended to contradict that of the defense, as will appear from the following brief reference to the testimony of witnesses testifying on behalf of plaintiff.

The witness Hahman, member of a firm engaged in business in a building adjoining the one occupied by the plaintiff Fountain, reached the block in which his and the Fountain store were located shortly after the earthquake shock was first noticed by him, and he testified in part as follows: "Our store occupied the storeroom of the Kinslow Building, adjoining the Fountain (Shea) Building. I went into the building. The main part of the store was intact. Part of the gallery was down. Our stock of goods and merchandise, as far as I could observe, was some of it shaken off the shelves, but no material damage done. As near as I can tell the west, east, and north walls of our storeroom were intact, when I went in there. I remained in our store that morning a very short time. Not over two or three minutes, I believe. I left because I was afraid the fire might catch me inside the building. I heard the crackling of the flames in the adjacent building there, the Fountain Building on the east. The noise made by the fire in the Fountain Building was sufficient to make me think my life was in danger to stay in the storeroom. I expected to see it break

through our walls there at any moment. * * * It was half an hour after the earthquake that I heard the fire in the Fountain store. When I got out of my store, there were flames burning in some of the adjacent buildings. I think it was along there in the Fountain Building and the saloon adjoining. The Fountain Building and the Pohley saloon were afire at that time. * * * As near as I can remember, the back walls of the Fountain Building were intact at that time. * * * I did not pay much attention to the front walls of the buildings. There was some debris in the street."

L. W. Burris, cashier of the Santa Rosa Bank, testified: "I am the cashier of the Santa Rosa Bank. I was a member of the city government on April 18, 1906. I made an examination of the front and rear of the Fountain Building on the morning of April 18, 1906. The rear wall towards Fifth street did not seem to be damaged. The lower walls, I didn't see any trouble with them. I didn't notice any breaks in the structure of the storeroom occupied by Mr. Fountain. For the purpose of ascertaining whether there were fires in there or not, I looked into the Fountain store, and it seemed to be shook up inside, goods scattered and things of that sort. I did not see any break in the structure of the lower walls of that building."

M. G. Hall stated that within 60 seconds after the earthquake he observed a large column of smoke issuing from either the Moodey or Shea Building. (These buildings adjoined each other.) He said that when he first noticed the smoke it had arisen to a height of 75 or 100 feet. After he reached his own office, which was located near the Fountain store, he could hear the "crackling of the flames" either in said store or in the Moodey Building.

Dr. Hoffer, a dentist, had an office in the upper story of the Shea Building, over the Fountain store. Immediately after the earthquake he reached his office. He testified: "Dr. Mallory had an office right over Fountain and I had the hall opposite. Between Dr. Mallory's window and mine the brickwork was about eight or nine feet in width. My office was about 12 feet in width. The staircase between my office and Dr. Mallory's office was about five feet wide. When I got into my office the floor was intact and the floor of my office was over the ceiling of the stores below, and was not broken. I did not pay any attention to the lower story, but I think they were all right. The party walls of the Eagles' Building were up. I could not see the rear walls. The two side walls were up. The side wall on my side of the office was up, but Dr. Mallory's walls I could not see."

Mrs. Martin, who, at the time of the earthquake, lived in the Doyle & Overton Building, situated two doors from the Shea building, testified in part as follows: "The west

wall of the Doyle & Overton Building constituted the east wall of the Moodey Building. A fire broke out in the Doyle & Overton Building a very short time after the earthquake, hardly an appreciable time the fire broke out. I saw fire before I got back to my office—I was right out in the hall. While the earthquake was still acting, I saw fire in the room adjoining my offices. I could not tell by seeing it through a glass door, and I broke it open and found it raging. There was gas in those offices and evidently the gas pipes had broken and something had ignited it, and it was roaring. This was within a minute after the earthquake had ceased."

From the foregoing brief review of the evidence as we find it in the record, it is very plain that there is a conflict between the testimony produced by the defendant and that of the plaintiff upon the vital point submitted as the special defense.

[3] It is true, as counsel for the appellant maintain, that witnesses introduced in behalf of the defendant testified that they were present at the scene of the fire which destroyed the building in which Fountain's store was situated immediately after the first noticeable vibration of the earth from the temblor, and that a material part of said building had fallen before the fire was observed by them. And it is also true, as we have stated, that the evidence presented by the plaintiff was largely circumstantial in character; but the circumstances to which plaintiff's witnesses testified were, in our opinion, sufficiently forceful to overcome the effect of defendant's testimony, or, at least, to create a substantial conflict upon the proposition to which the evidence for both sides was mainly addressed, which is all that was required to justify the jury's conclusion. Besides, some of defendant's own witnesses failed to fully sustain the special defense. For instance, Dr. Mallory, who had previously testified for the defense, upon being recalled for further cross-examination by plaintiff, admitted that after the fire he made an affidavit of loss and filed the same with the New Zealand Fire Insurance Company, in which he deposed that his personal property, consisting of office equipments, contained in his office situated directly over the Fountain store, had been destroyed by fire on the morning of the 18th of April, 1906. Again, the chief of the fire department of Santa Rosa, having testified as defendant's witness, made the following statements on cross-examination: "I made an examination of the buildings in the block in which the Fountain store was situated, not over 20 minutes after the earthquake and I concluded that that block was doomed by fire. Within 15 minutes after the earthquake, every building in the block was doomed, whether the earthquake touched them or not. Within 15 minutes after the earthquake I could see a blaze or two, but I could see smoke coming out of at least five or six buildings. Within 15 min-

utes after the earthquake there was considerable smoke coming from these buildings." This witness further testified, referring to the quantity of brick and other debris in the street directly in front of the Shea Building, that the upper front of the said building was composed of large bay windows, and that "there was not enough brick in the upper front walls of the Shea (Fountain) Building, exclusive of the fire wall, to have caused any considerable amount of brick to have fallen on the street, when the bay windows are taken out." He further stated that the fire wall constituted the largest part of the brick in front, and that "excluding that, and if you had taken every other brick in front of the Eagles' Building and dumped it on the sidewalk, it would not have been brick enough to have made any considerable pile of bricks extending out into the street. * * * The pillars (iron) that I spoke about were merely placed against the wall. When the earthquake commenced shaking, they fell away, but the wall did not fall out with them. The presence of those iron pillars in the street did not indicate the destruction of the building behind."

[4] As declared, we perceive no substantial ground upon which we would be justified in holding that the jury's verdict does not find sufficient support from the evidence. After all, the meaning of the verdict is simply that the defendant failed to establish its affirmative defense by a preponderance of the evidence, and, as is well understood, the question whether a fact is established by a "preponderance of the evidence" is not determinable alone from the mere number of witnesses whose testimony goes to the proof of such fact, nor is it determinable alone by the fact that the testimony addressed to the proof of the fact in dispute may be direct, while that offered to overcome it may be entirely circumstantial. There are other elements and other tests equally as important as either the fact of the number of witnesses testifying one way or the character of the testimony, whether direct or indirect, which may be considered and invoked for the purpose of determining upon which side the preponderance of the evidence prevails.

[5] "It was for the jury to pass upon the credibility of the witnesses and to draw any reasonably permissible inferences from their testimony." *Clayburgh v. Agricultural Ins. Co.*, 155 Cal. 708, 102 Pac. 812. For aught that we can determine from the record to the contrary, the jury might have deemed the testimony of the witnesses for the defendant as entitled to no weight whatsoever. We must at least assume that they regarded it with little favor, and we must, moreover, assume that they had good and sufficient reasons for so treating it. That it was within the peculiar province of the jury to totally discard any testimony which, in their judgment, did not bear the ear-marks of verity,

is a proposition which will not, of course, be challenged.

[6] It must be borne in mind that the trial judge, whose mind is trained in and accustomed to weighing testimony, declined to grant defendant's motion for a new trial upon the ground, among others, of the insufficiency of the evidence to support the verdict, and, as is said in the case of *Meyer v. Great Western Ins. Co.*, 104 Cal. 381, 38 Pac. 82, "the refusal of the trial court to set it (the verdict) aside is itself of great weight, and shows that in the opinion of the judge who heard the case the evidence was sufficient to uphold it. It is not sufficient thereafter upon an appeal to point out, or even demonstrate to this court, that the verdict is against the preponderance of evidence, or that upon the same evidence other persons would come to a different conclusion. *If there is any evidence upon which the jury could have found its verdict, it must be upheld.*" (Italics ours.) But no question can arise as to the rule as it is thus explained. It is too plainly elementary to require the citation of authorities for its exposition or application. The real question here is, as stated, Did the defendant support its special defense by sufficient proof to justify a verdict in its favor? To this question the answer is to be found in the verdict of the jury.

Upon the question whether a substantial conflict arises in the evidence upon the principal issue upon which the trial was had, it is important to keep in mind the testimony of the chief of the Santa Rosa fire department, brought out on his cross-examination. There was, according to his version of the situation, but little debris—brick, etc.—in front of the Shea Building immediately after the first noticeable evidence of the shock. The fire, he said, originated in all the buildings in the block in which the Shea Building was situated in the north and east ends, at which points there was, at the time he first observed the Shea Building, no evidence of any part of the structure having fallen before the fire was noticed. He could see from the front into the interior of all those buildings, including plaintiff's store, and declared that the goods appeared then to be intact on the shelves, "as though piled there yesterday." He further stated, it will be recalled, that the "upper front of the building was composed of large bay windows," and that, excluding the fire walls, "there was not enough brick in the upper front walls to have caused any considerable amount of brick to have fallen on the street, when you take out the bay windows," the fire wall being, he continued, "the biggest part of the brick in front."

Counsel for appellant subject the testimony presented by the plaintiff to an analytical examination in an attempt to demonstrate its utter unreliability as a support for the verdict from any standpoint from which it may be viewed. The argument thus ad-

duced, addressed to those to whose judgment questions of fact must be submitted and committed, is persuasive, if it may be assumed that nothing appeared in the manner in which the witnesses for the defendant testified which justified the jury, after a full and fair consideration of their testimony, which we must assume they gave it, in disregarding it. This, as we have shown, they had the right to do, if, in their conscientious opinion, it did not carry with it sufficient weight to lead to the conclusion that defendant's resistance to recovery was sustained. On the other hand, if the jury believed, from the testimony of Mrs. Martin, Dr. Hoffer, Hall, Muther, and other witnesses, whose testimony in behalf of plaintiff was not direct but involved only circumstances, that the fire broke out and attacked the goods of plaintiff before any material or substantial part of the building in which they were situated had fallen as the result of the earthquake shock, we cannot say, from the record before us, but that they were thus justified in reaching their conclusion, for, we think, from those circumstances the fact that the fire did attack the goods before the building or any substantial part thereof fell is reasonably inferable.

It is a fact within the range of common knowledge, and worthy of remark in connection with the question we are here considering, that the average person is generally so disconcerted in mind on the occasion of a seismic disturbance that his subsequent recollection of the exact nature and order of events necessarily following one after another with lightning rapidity during the progress of such disturbance is exceedingly hazy and dubious. This is true, perhaps in not so great a degree, in cases of fire and conflagrations. No two persons, it is safe to say, can ordinarily be found who, relying upon their own recollection, can even approximately agree as to the length of time during which an earthquake shock of unusual severity has lasted. Often the most exaggerated notion of the duration of a temblor is conceived and adhered to, and frequently, while it lasts, some ordinarily very courageous men temporarily lose their better judgment and betray themselves into the most absurd and ridiculous attitudes and antics. And a severe earthquake, immediately succeeded by a fiercely raging conflagration, whose progress cannot be successfully resisted, would probably intensify the situation, with the result that every spectator, particularly every owner of property doomed to inevitable destruction, would, quite naturally, be in a state of confusion and excitement. These are facts, we say, within common knowledge, and thus readily may it be perceived how, many months after so exciting an event, witnesses could be honestly mistaken in an attempted recital of the many and varying circumstances attending it, and how a jury could well

conclude, without impugning or challenging the honest intentions of such witnesses, that their testimony was unworthy of credence or weight.

We do not question the soundness of the position of appellant that, if any substantial part of the building in which plaintiff's store was situated had fallen before the fire had attacked plaintiff's goods, then, in that case, defendant would not be liable under the clause of the policy upon which its defense is interposed. But, as we think we have satisfactorily shown, the jury, either because the testimony presented by the defendant was not of sufficient probative strength to establish its defense to the requisite degree, or because the proof of plaintiff destroyed whatever force its testimony, standing alone, might possess, has by their verdict, of necessity declared that the plaintiff's goods were attacked by the fire before any material part of said building had fallen from a cause other than from the fire.

[7] The claim is vigorously put forth that the court erred to the prejudice of the defendant in submitting to the jury the following instruction: "I instruct you that the falling wall clause in the policy of insurance in this action is not to be literally understood so as to avoid the policy if some minute portion of the material in the assured building fall. It means some substantial portion of the building, the falling of which *would destroy its distinctive character as such.* (Italics ours.) So that if the proof in this case establishes the fact that the front windows fell away from the building mentioned in the policy, or part of the front wall thereof, fell away, but that, notwithstanding such injury to the building it was substantially standing as a building so as not to increase the risk to plaintiff's goods by fire and in that condition it was burned, the clause in the policy as to the falling of the building or any part thereof would not exempt defendant from liability, if otherwise liable, as before explained."

In *Home Mut. Ins. Co. v. Tompkins et al.*, 30 Tex. Civ. App. 404, 71 S. W. 812, the trial court instructed the jury in the following language: " * * * To avoid the policy, the falling must be of some substantial part of the building; that is, such an integral part of the building, as a whole, as that the falling of the same would destroy the distinctive character of the structure." The Texas court, condemning said instruction as erroneous and prejudicial and reversing the judgment of the trial court, said: "By the instruction given the jury in this case they were required to find, in order that the policy should be avoided, not that some material or substantial part of the building, as such, had fallen, but that there had fallen such an integral part thereof as a whole as that the falling of the same would destroy the distinctive character of the structure.

According to the decisions in this state under the valued policy law, the jury were required to believe that the building had been totally destroyed, before they could find for the defendant, thereby nullifying the stipulation as to a part entirely (citing *Ins. Co. v. Garlington*, 66 Tex. 103, 18 S. W. 337, 59 Am. Rep. 613). While the part that should fall in order to avoid the policy should be a substantial and material part of the building, it would not be necessary for it to be so great a part as would destroy the distinctive character of the structure. In such case the structure could no longer be considered a building, but only *débris* or ruins." The foregoing language furnishes the inspiration for the criticism of the challenged instruction in the case at bar that the court thus in effect told the jury that, in order to avoid the policy, it was necessary for the defendant to show that the building had been entirely destroyed or become a mass of ruins before the fire broke out and attacked the insured merchandise.

[8] The accepted interpretation of the "fallen building" clause of fire insurance policies, such as the one contained in the policy here, is as it is stated in *Nelson v. Traders' Ins. Co.*, 181 N. Y. 472, 74 N. E. 421. It is there said: "The meaning of the clause in question, when reasonably interpreted, is that the insurer is excused from its obligation by either the fall of the building as a structure, or of such a substantial and important part thereof as impairs its usefulness as such, and leaves the remaining part of the building subject to an increased risk of fire." See *Clayburgh v. Agricultural Ins. Co.*, *supra*, and *Home Mut. Ins. Co. v. Tompkins*, *supra*.

We are of the opinion that an impartial examination of the entire charge in the case at bar will disclose that the court kept fairly well within the rule as laid down by the foregoing authorities. And we further think that a comparison of the challenged instruction in this case with the instruction condemned by the Texas Court of Appeals will make it very plain that there is a marked distinction between the two; for, whatever interpretation may justly be given the language, employed in both instructions, "the distinctive character of the structure," when considered alone and without regard to other parts of said instructions, we think it becomes very clear that the instruction in the present case, when considered in its entirety, as it should be to get its full meaning, furnishes no possible ground upon which its effect may properly be subjected to the interpretation which the Texas court gives to the instruction to which it was called upon to give attention. In the instruction here there is a clear explanation by the trial court that the meaning intended to be conveyed by the language, "the falling of which would destroy its distinctive character as such," was not that the building should be completely

destroyed, so that "the structure could no longer be considered a building, but only *débris* or ruins," but that the clause upon which the special defense is based was not contravened if the proof established the fact that the front windows only fell from the building, or part of the front wall thereof fell away, but that, "notwithstanding such injury to the building, if it was substantially standing as a building, so as not to increase the risk to plaintiff's goods by fire and in that condition it was burned," the defendant would not in that case be exempt from liability under the clause of the policy upon which it founds its resistance to the payment of the indemnity to which it obligated itself. Moreover, the court, in another part of its charge, in clear and unmistakable language, specifically pointed out to the jury that "it is not necessary that the said building as a whole should have fallen in order that all insurance under the said policy shall be avoided." "It is only necessary," the court declared, "that a material part of said building should fall in order that all insurance under the policy shall be avoided." In the same instruction the court further instructed the jury: "As to what is a material part, I charge you that if you find that a portion of said building fell, and that by reason of said portion falling said building or its contents were placed in a position or condition whereby the same were more readily subject to fire than they would have been if said portion of said building had not fallen, then, in that case, I instruct you that it is your duty to be governed by the evidence, and you should return a verdict in favor of the defendant and against the plaintiff." Thus, it will be observed, the court explicitly explained to the jury what would constitute such a falling of the building as would avoid the insurance under the policy—that is, it plainly put before the jury the real, pivotal proposition in the case, by declaring that if such portion of the building had fallen before the fire attacked plaintiff's goods as would increase the risk of fire, or as would "more readily subject the building and goods to fire than they would have been if said portion of said building had not fallen," then defendant would not be liable. And we think that this instruction is equally as clear in explaining the meaning of the phrase, "material or substantial part of the building," as the instructions upon the same subject approved in *Clayburgh v. Agricultural Ins. Co.*, *supra*. Among other instructions given to the jury the court in that case, construing the "fallen building" clause of the policy, said: "As to what constitutes a falling of the building within the meaning of this clause, I charge you that the meaning of the language is that the building must have fallen in whole or in part to such an extent that its integrity as a building was destroyed or substantially impaired." The

contingency against which by the adoption of the "fallen building" clause in an insurance policy an insurance company seeks to protect itself is manifestly the assumption of a risk not contemplated by the policy of insurance—that is, to protect itself against a risk which is not involved in the destruction of the subject of insurance by a fire originating from usual and ordinary as distinguished from unusual and extraordinary causes. There is, so far as we are able to understand them, practically no distinction, in effect, between the last referred to instruction in the present case and the instruction from which we have just made an excerpt in the Clayburgh Case. In the latter the court very properly assumes that if the building "had fallen, in whole or in part, to such an extent that its integrity as a building was destroyed or substantially impaired," then there would have been shown such a destruction as would increase the risk of fire beyond that contemplated by the policy and assumed by the company; hence the latter would be immune from liability under the policy. In the case at bar, as we have seen, the court expressly declared that, if so much of the building had fallen as would increase the risk beyond that assumed by the company under the terms of the policy, then the company would not be liable. Thus it must readily become manifest the question whether a material or substantial part of the building within the meaning of the clause under consideration had fallen before plaintiff's goods had been attacked by the fire was fairly placed before and submitted to the jury for determination. And, furthermore, the language, "the falling of which would destroy its distinctive character as such building," employed in the first instruction here to which we gave our attention, was by the last instruction referred to fully and clearly explained to mean, not that the whole building must have been destroyed in order to avoid the policy, but that only such portion thereof as would be material or substantial or as would increase the risk of fire to plaintiff's goods. Throughout its entire charge the court, time and again, declared that, while the destruction or falling of a mere trivial or minute part of the structure would not suffice to avoid the policy, the falling or destruction of any material or substantial part thereof would.

[9] It appears very clear to us that when the instructions are read in connection with each other, as they should be so read and considered, the jury could not have been misled by the language in the first instruction, "the distinctive character of the building as such," assuming that said language involves an erroneous statement, and that it would be prejudicially misleading when read alone.

[10] Counsel complain because the court refused to submit to the jury the instruction, requested by the defendant, expressly de-

claring that "if such part of said building fell as would, if said building were not repaired, have impaired the usefulness of said building, then, and in that case, all insurance under the policy herein sued on is void." The rejected instruction perhaps states the law correctly, and it would have been just as well to have allowed it; but we think that the charge of the court covered the principle therein declared, and, as stated, fairly and correctly presented to the jury the law, by the aid of which they were enabled to intelligently consider the evidence addressed to the important question of fact tendered as the main issue in the case, and to reach a just and intelligent conclusion upon the evidence. The refusal to give the instruction could not, therefore, have resulted in any harm to the defendant.

[11] At the request of the defendant, the court submitted to the jury certain particular questions of fact, to which, save in three instances, direct answers were returned. These answers were, briefly, that the building did not, as a whole, fall prior to its destruction by fire from a cause other than fire; that a part or parts of said building did fall prior to the destruction of said building by fire, from a cause other than fire, but that such part or parts were neither a material nor substantial part or parts of said building, but only "trivial and inconsiderable"; and that neither a substantial nor a material part of said building fell from a cause other than fire prior to the burning of the "stock of goods of plaintiffs contained in said building."

To the following questions the jury answered, "Don't know":

- (1) "If you find that a part or parts of said building * * * fell prior to the destruction of said building from a cause other than fire, was the usefulness of said building for the purpose for which it was constructed impaired by reason of said falling?"
- (2) "If you find that a part or parts of said building * * * fell prior to the burning of said building and from a cause other than fire, state whether or not the falling of such part or parts exposed the interior of said building to the inclemency of the weather?"
- (3) "If you find that any part or parts of said building * * * fell prior to the burning and from a cause other than fire, state whether such falling occurred before the said goods were attacked by fire?"

Counsel for appellant undertake to show by an ingenious treatment of the special findings of the jury that there is no finding by the jury, either in its general verdict or by its special findings, with regard to the time at which the fire attacked either the building or the insured merchandise—whether before or after the falling of a material or substantial part of the building. We shall not follow counsel in their rather subtle or metaphysical reasoning in their arraignment of the special findings. We perceive in none

of them anything inconsistent with the general verdict. To the contrary, they appear to sustain it. To one of the particular questions the jury unqualifiedly replied that a substantial or material part of the building had not fallen prior to the burning of the insured goods. There is no incongruity between this and the other special findings, and it reinforces the general verdict. Nor do we see anything in those questions to which neither affirmative nor negative direct answers were returned which would have shed any light upon the main issue had they, or such of them as were capable of being intelligently answered, been directly answered in one way or the other.

The first of these questions was too general to call for a direct and unqualified answer. Besides (and this may be somewhat technical, yet not lacking altogether in substance), there was no evidence introduced disclosing the purpose for which the building was constructed.

The second question, not directly answered, was whether the part or parts of the building which fell prior to the burning of said building and from a cause other than fire exposed the interior of said building or its contents to the inclemency of the weather. It is very evident that the mere falling away of a window to a building might expose the interior thereof or its contents to the inclemency of the weather, yet the falling of such a trivial part of a building from a cause other than fire would not be deemed sufficient to avoid a policy of insurance under the "fallen building" clause of the policy here. Hence an affirmative answer to the question we are now considering would not necessarily mean that such part or parts of the building as would avoid the policy had fallen prior to the burning of plaintiff's goods from a cause other than fire. The question was misleading, and the jury's failure to answer it directly was immaterial and without prejudice.

An affirmative answer to the third of the unanswered questions would not have militated in the least either against the general verdict or any of the special findings. The jury had answered that the stock of goods of plaintiff had been attacked by fire before a substantial or material part of the building had fallen. They had also answered that a part or parts of the building had fallen before the building had been destroyed by fire, but that such part or parts were "trivial and inconsiderable." What material difference, then, could it make whether, before or after such part or parts had fallen, the goods of plaintiff had been attacked by fire? In other words, the jury having already specifically found that the goods had been burned or were attacked by fire prior to the falling of a material or substantial part of the building from a cause other than fire, what, then, would be the necessity for further inquiry whether the goods had been burned or at-

tacked either prior or subsequently to the falling of an inconsequential part or parts of the building? What substantial purpose could be accomplished by a further answer that the goods had been attacked after such part or parts had fallen? The failure of the jury to answer this question was harmless.

There were some of the particular questions requested by the defendant which the court refused to submit to the jury, and it is claimed that the court committed prejudicial error by such refusal. We have examined these rejected questions, and have found that most of them involve propositions which are substantially covered by those which the court gave to the jury.

The instructions of the court are further attacked, because, it is contended, the jury were told that it was the duty of the defendant in order to maintain its claim of exemption from liability under the "fallen building" clause to show that the falling from the earthquake or from a cause other than fire occurred before the fire had attacked either the building or the indemnified goods; whereas, the defendant was only required to show, in order to avoid the policy, that the building or a material part thereof had fallen prior to the fire attacking the goods. The court, in a number of its instructions, explained to the jury in very clear terms that the defendant must prevail if it were satisfactorily shown that the building or any material or substantial part thereof had fallen before the goods were attacked by the fire; and, while in some of the instructions the building and the goods were referred to in this connection in the disjunctive, from which phraseology, if taken alone, the jury might gather the impression that the court meant to say that if the building were attacked by fire prior to the falling of a material part thereof the defendant would not be exonerated from liability, the instructions, read as a whole or in their entirety as the charge of the court, could have left no other impression upon the minds of the jury than that it was necessary that the insured property should have been attacked prior to the falling before recovery upon the policy would be justified. The following may be given as an example of the instructions to which appellant objects in the respect mentioned: "If you believe and find from the evidence that the building described in said policy or a part thereof fell, and that by reason of the falling of said building, or a part thereof, said building or the contents thereof were placed in a condition or situation whereby said building or said contents were more easily subject to fire, then, and in that case, I instruct you that your verdict should be in favor of the defendant and against the plaintiffs." This instruction correctly states the law, and, when carefully scrutinized, is not inapplicable to the fact in this case—that is, the fact that the property insured were the goods and not the building. If the falling were of such

a character as to subject the building the more readily to fire than if the falling had not occurred, it is very clear that the contents of the building would thus be exposed to a greater risk of destruction by fire, and, while perhaps the instruction could have been more clearly expressed, it could not, as stated, when considered with the other instructions, have produced any injury to the rights of the defendant.

It is, lastly, urged that the court's rulings upon certain questions involving the admissibility of certain testimony were prejudicially erroneous.

[12] The refusal of the court to allow the defendant to prove the effect of the earthquake upon other buildings located in the block in which the building containing the insured merchandise was situated was in our judgment perfectly proper. In order to have rendered such proof relevant and competent, it must first have been shown that there was a substantial similarity in the character of the construction of the other buildings to the one in which the insured property was situated and that the force of the earthquake was practically uniform in said block. No such preliminary showing was made, and there was therefore no foundation for the proffered but rejected proof. The proof of the destruction or falling of a frail building by a heavy gale of wind or an earthquake would not necessarily be proof that such wind or earthquake was the cause of the destruction of another building situated in the same block where another cause, like fire, had intervened and might have been the cause of the falling or the destruction of the latter structure. If, however, as suggested, proof were made that two buildings situated in very close proximity to each other were constructed in equally as substantial a manner in all respects, proof that one had fallen from the effect of a wind or an earthquake would doubtless be competent as tending to sustain the theory that the other had likewise fallen or been destroyed.

[13, 14] There appears to have been no effort made to make such proof, and the courts cannot take judicial notice of the character of the other buildings in the block in which the building containing the insured goods was situated, nor can the courts take judicial notice of the fact, if it was a fact, that the earthquake on the morning of April 18, 1906, operated with uniform or approximately the same force over the area covered by the block. If evidence addressed to both these propositions could have been secured, counsel should have produced it, and thus have laid the foundation for the proof which they vainly sought to make.

[15] Nor did the court err in permitting the plaintiff to cross-examine the witness Mallory with reference to an affidavit be filed with the New Zealand Fire Insurance Company, in which he deposed that his office furniture and equipments, which were in-

sured in that company, had been destroyed by fire on the morning of the 18th of April, 1906. Mallory's office, it will be recalled, was situated over plaintiff's store, and on direct examination he testified that he was at or near the building a half an hour after the quake, and that he saw no fire in Fountain's store. The cross-examination, to which objection is made, was proper as showing that there had been previously made by him a statement inconsistent with his testimony. Code Civ. Proc. § 2052. Counsel's specific objection, however, is that the witness' testimony on direct was confined to the question whether there was a fire in Fountain's store, and that he was not thus asked whether either the earthquake or fire had anything to do with the destruction of his property. But the fact that he was not questioned on his direct examination about the destruction of his own property or the manner in which it was destroyed rendered the cross-examination none the less pertinent and proper, since the necessary inference from his direct testimony was that there was no fire in the building in which his office and Fountain's store were situated, and that consequently the plaintiff's goods must have been exposed to greater risk by the fall of the building from the shock of earthquake than they otherwise would have been subjected to.

There are some other specifications alleging error in the court's rulings on the evidence, but they are not of sufficient importance, in our judgment, to require special attention.

We have discovered no valid reason for interfering with the order of the court denying defendant's motion for a new trial, and said order is therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

Opinion Supplementing Order Denying Petition for Rehearing.

We deem it proper to notice a few of the propositions to which the petition for a rehearing of this cause directs special attention.

We are satisfied with the conclusion at which we arrived with respect to the ruling of the court on the cross-examination of the witness Dr. Mallory, and to which we paid brief attention in the original opinion filed herein. The object and tendency of Dr. Mallory's direct testimony, given in behalf of the defendant, was to show that neither the Fountain Building nor plaintiffs' property was attacked by fire before a material part of the building had fallen as the result of the earthquake. That there could be no other object of the testimony is a proposition so obvious that no intelligent person could fail to readily discern its purpose, and it is, therefore, plain that the jury so understood its purpose, and to that extent at least its

inevitable tendency was to achieve the purpose for which it was offered and received. We know of no rule of evidence which will permit one party to introduce proof which tends, however remotely, to establish the truth of his theory as to the ultimate fact, and thus furnish some ground upon which the jury may gather the impression that the truth is on his side, and then preclude the opposite party from a full cross-examination of the witness giving such testimony, not alone upon the matter to which he has specifically testified, but as to all relevant matters which may naturally be inferred therefrom.

[16] In other words, a party should be permitted to ask a witness upon cross-examination any question, an answer to which favorable to the cross-examiner would either tend to contradict or weaken his direct testimony or destroy the injurious impression naturally to be gathered from such testimony. Singular as it may appear, appellant seems to think that because Mallory testified solely that there was no fire in the Fountain Building half an hour after the earthquake, the cross-examination complained of was entirely erroneous and prejudicial. But manifestly the plain and natural inference from such testimony is that there was no fire in said building and that the goods of plaintiff could not consequently have been attacked by fire prior to the falling of the building or a substantial part thereof. Admittedly, the building did fall at some time, either from the fire or the earthquake.

But it is declared that Mallory's affidavit did not state that his office equipments, on which there was a policy issued by the New Zealand Fire Insurance Company, were destroyed by fire on "the morning of the 18th day of April, 1906, or at any other time." This contention only represents another case of "a drowning man grasping at a straw." The affidavit of Mallory is not in the record, and therefore we are not advised, except through his cross-examination, what statements his affidavit contained. But it is as clear as language can make any proposition from his cross-examination that his affidavit related to the destruction of his office furniture and other equipments by fire on the morning of the 18th day of April, 1906, and that counsel for plaintiffs, in conducting this cross-examination, referred to the fire of that morning. That counsel for the appellant must have so understood the cross-examination is conclusively shown by the fact that they nowhere at any time during the progress of said cross-examination, made any such objection as is urged here, nor offered as a reason for the general objection that the cross-questions of counsel for plaintiff did not constitute "proper cross-examination," the one urged here against the pertinency of respondents' cross-examination of Mallory on the lines here considered. The only fire to

which reference was made or could have been properly made in the cross-examination of Mallory was the fire which the jury found destroyed the goods of plaintiff, and there is not a single line in the record indicating in the remotest degree that the jury could have formed any impression that any other fire was referred to in Mallory's affidavit, to which the cross-examination related, from the nature or form of the questions constituting such cross-examination.

There are some of the rulings of the court excluding and allowing certain testimony to which we felt that there was no necessity for giving special attention in the main opinion. Counsel are of the opinion that we misapprehended the importance of these rulings and the significance of their objections thereto.

Among these objections was one addressed to the ruling of the court refusing to allow defendant to show the condition of the whole block in which the Fountain Building was situated. In the original opinion it is held that testimony showing or tending to show that other buildings in the same block were thrown down by the force of the temblor was inadmissible in the absence of a preliminary showing that all the buildings were substantially the same kind of structures and that the force of the quake was practically or approximately uniform throughout said block. The principle governing this ruling is equally as applicable to the ruling excluding the proffered testimony of the "condition of the whole block." It does not necessarily follow that, because one building in a particular block might fall into a mass of ruins from the force of an earthquake shock, other buildings in the same block would likewise fall from the same cause. It is not an improbable proposition that all the buildings of the block, except one, might fall to the ground from the shock of an earthquake, and that that one would remain standing perfectly intact. The relevant effect of testimony of the general condition of the whole block upon a particular building in said block would of necessity depend upon the circumstance whether all the buildings, including the particular building, were built alike as to strength of foundation and superstructure, and the further proposition whether the force of the earthquake was uniform throughout such block. No such conditions were shown to exist in this case, and we think, therefore, that the court's ruling excluding that testimony was eminently proper.

[17] It is further said in the petition that the trial court seriously erred in permitting the witness Muther to say, in response to his cross-examination, that "the Fountain Building was doomed to destruction by fire whether or not it had fallen by reason of the earthquake." Muther was the chief of the fire department of Santa Rosa at the time of the fire and earthquake of 1906. The claim is

that the testimony thus elicited was "wholly irrelevant." Admitting but not deciding it to be so, still the answer could not have been prejudicial in view of the instructions of the court clearly explaining the circumstances which would absolve the defendant from liability under the policy. There was but one single important question of fact submitted to the determination of the jury, to wit: Did the fire attack the goods before or after a material or substantial part of the building fell? Upon this question the court, in its instructions, repeatedly told the jury that their verdict must be for defendant if it appeared from a preponderance of the evidence that the building or a substantial part thereof fell before the goods were attacked by the fire. To hold, therefore, that Muther's statement to the effect that the building was doomed to destruction by fire, whether or not it had fallen by reason of the earthquake, was prejudicial, would be to impute to the members of the jury, without justification from the record, and, in the face of the well-understood presumption on that proposition, the densest ignorance or the most flagrant dishonesty.

We find nothing in the petition for a rehearing which would justify a departure from the conclusion reached in the original opinion that it was a matter entirely with the jury to determine and decide whether the special defense of the defendant was sustained by a preponderance of the evidence.

The power of reviewing courts to disturb verdicts of juries or findings of trial courts under our system, by which juries are made the exclusive judges of questions of fact and the courts of questions of law, is necessarily restricted to very narrow limits. Article 6, § 19, Const. Our law provides that juries are the exclusive judges, of the value and effect of evidence in all cases where the evidence is not, for reasons of convenience and public policy, declared by law to be conclusive proof of the fact in dispute. Section 2061, Code Civ. Proc. There may arise cases, it is true, where the court, for the sole purpose of illustrating the application of its instructions, may, with perfect propriety, state the testimony, but in such cases the court "must inform the jury that they are the exclusive judges of all questions of fact." Section 608, Code Civ. Proc. The appellate courts of this state may in effect set aside the verdict of a jury or the findings of a court where it can properly be said from the record that the evidence is either insufficient to sustain the verdict or findings or that there is no evidence whatsoever to support them.

[18] In such case manifestly a question of law is presented, and it is obviously only where an appellate court can declare from the record as a matter of law that the verdict or findings are not sufficiently supported or not supported at all that such court has

any right, according to the plain terms of the Constitution, to interfere with a judgment or order for that reason. But it is beyond the constitutional province and right of an appellate court to declare that a judge, trying the questions of fact, or a jury should have given credit or a certain amount of weight to the testimony of certain witnesses in preference to other testimony upon which their conclusions must have been founded. Plainly, if appellate courts possessed such power, they could set at naught and render nugatory, according to their pleasure, the rules laid down by the Legislature for the determination and decision of questions of fact. Nor has a reviewing court the right to say that a jury committed error for which the judgment or order or both should be reversed because their verdict indicates or clearly shows that they attached no weight to certain testimony; for, while juries have no right to arbitrarily reject the testimony of a witness, no one will gainsay their right, as the exclusive judges of the value of testimony, to disbelieve any witness and reject his testimony as possessing no probative value, if they have sufficient reason for so regarding it. And who but themselves and perhaps the trial judge can say that they were without sufficient reason for rejecting as unworthy of belief the testimony of any witness or any number of witnesses?

If the established rules governing the determination and decision of questions of fact are to be respected, then this proposition is impregnable: That where there is some competent evidence supporting a verdict of a jury or the findings of a court, and the testimony is not of that character that it may justly be said to be inherently improbable or unbelievable, a reviewing court plainly transcends its power and right under the Constitution when, in such a case, it reverses the judgment or the order upon the ground that the verdict or the findings are not supported by the evidence. A judge or jury must know, before reaching a just conclusion upon the facts, upon which side of the controversy the truth prevails, and whether witnesses tell the truth or an untruth is a question which no human can determine who has not seen and heard them give their testimony. And whether a fact has been or is sustained by a preponderance of the evidence is a question as far removed from the proper cognizance of an appellate tribunal as is the determination of all other questions of fact which it is the constitutional duty of juries to determine, except, as pointed out, in those cases where the testimony, on its face, bears the indubitable earmarks of improbability.

To follow appellant's suggestion and order a retrial of this cause upon the ground that the evidence does not support the verdict would, of course, be tantamount to holding that defendant's special defense was supported by a preponderance of the evidence, and

this would most certainly amount to a clear invasion of the right of trial by jury as guaranteed by our state Constitution.

For the reasons stated in our original opinion and those added here, the petition for a rehearing is denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

16 Cal. App. 532

LOOMIS v. CONNECTICUT FIRE INS. CO.
(Civ. 678.)

(District Court of Appeal, Third District,
California. June 28, 1911.)

1. INSURANCE (§ 665*)—FIRE INSURANCE—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action on a fire policy which provided that the insurance should cease if the building or any part thereof fell, except by fire, evidence held to show that a substantial part of the front wall fell from an earthquake before the fire attacked the building or goods, but that the rear and side walls were not materially damaged.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 665.*]

2. INSURANCE (§ 324*)—FIRE INSURANCE—CONSTRUCTION OF POLICY—CAUSE OF DAMAGE.

In order to exempt the insurer from liability under the provision of a policy that all insurance should cease if the building or any part thereof fall, except as the result of fire, a material or substantial part of the building in which the insured goods were must have fallen from another cause than fire "before" the building or goods were attacked by fire.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 749; Dec. Dig. § 324.*]

3. INSURANCE (§ 652*)—FIRE INSURANCE—ACTIONS—ADMISSION OF EVIDENCE.

In an action on a fire policy negating liability if the building or any part thereof fell, except from fire, in which defendant claimed that a part of the building fell from an earthquake before attacked by fire, evidence of the effect of the earthquake on other buildings was properly excluded.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 652.*]

Appeal from Superior Court, Sonoma County; Emmett Seawell, Judge.

Action by F. C. Loomis against the Connecticut Fire Insurance Company. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Reversed.

A. B. Ware and T. C. Van Ness, for appellant. T. J. Geary, for respondent.

CHIPMAN, P. J. The action is to recover upon a policy of fire insurance issued by defendant and covering certain goods of plaintiff while contained in the two-story brick building, No. 521 Fourth street, north side, between B and Mendocino streets, Santa Rosa. The loss occurred April 18, 1906, by fire. Defendant based its defense upon the following clause in the policy: "If the building or any part thereof fall, except as the result of fire, all insurance by this policy on

such building or its contents shall immediately cease." The cause was tried by a jury, and plaintiff had the verdict on which judgment was duly entered. The appeal is from the judgment on the verdict and the order denying defendant's motion for a new trial.

In addition to the general verdict the jury answered certain particular questions as follows:

"(1) Did the building * * * fall as a whole from a cause other than fire before plaintiff's stock of goods was attacked by fire? No.

"(2) Did said building fall as a whole from any cause after plaintiff's stock of goods was attacked by fire? No.

"(3) Did a part or parts not constituting a material or substantial part of the building * * * fall from a cause other than fire before said stock of goods was attacked by fire? No."

Four was not answered because the answer to No. 3 was "No."

"(5) Did a part or parts of the building * * * fall from a cause other than fire after plaintiff's stock of goods was attacked? No."

Six was not answered because of the last negative answer.

"(7) Did a material or substantial part or parts of said building * * * fall from a cause other than fire before plaintiff's stock of goods was attacked by fire? No."

Eight was not answered because of this negative answer.

"(9) Did the building * * * or a material part thereof fall from a cause other than fire prior to the occurrence of fire in said building? No.

"(10) Did the building * * * or a material part thereof fall from a cause other than fire after the occurrence of fire therein? No."

While urging certain errors committed by the trial court, appellant states that the principal grounds relied upon for a reversal are: First, that the court erred in permitting plaintiff to introduce evidence of a waiver by defendant of the plaintiff's compliance with the provision of the policy relating to the furnishing of notice of loss; and, second, that the jury, in finding upon the issues presented to it under the "fallen building" clause, "wholly disregarded the undisputed evidence before it," and "based its conclusion solely upon its prejudice against the defendant."

We find it unnecessary to consider the first objection.

[1] After a careful examination and analysis of the testimony we are satisfied that it appears without substantial conflict in the testimony that a material and substantial part of the front wall fell before the fire attacked the building or the goods of plaintiff.

There was evidence sufficient to show that

the rear wall and the side walls of the building, except towards the front, were not materially damaged, although there is evidence to the contrary. As to the second story front wall, there is much evidence that it went out as far down as the floor of the second story, and that the front part of the roof was down to this floor, slanting back to where it was not disturbed. The testimony relates to what certain witnesses observed at the rear of the building on Fifth street, and what certain others observed at its front on Fourth street. Only one witness, Frank Muther, the chief of the fire department, seemed to have been in a position to observe the entire building, and he was the one most likely to have made his observations with a cool head and some deliberation. Both parties quote quite freely from his testimony. He was called by the defendant. He resided two blocks from Fourth street. He had a store at No. 513 and plaintiff's store was No. 521, east in the same block. He testified: "When the shock first began I was in my bed, that was two blocks from Fourth street. As soon as I could stand on my feet and gather myself together, I slipped on part of my clothes and took the rest in my hands, and I skinned down the street towards Fourth street. * * * When I went up towards my store, I went somewhere around the center of the street. I know where the Loomis store was. I was at 513 and his number was 521. That was the same block, I believe, same side of the street. I saw my store and all the other stores that morning. I went up on top of them. Q. What store did you go on top of? A. Well, it was about 50 feet between my store and Loomis'. I won't be positive exactly which store these conditions were. It was either the electric light works or the store next door. I got up on the roof by climbing over the débris. The débris came from the top of the buildings. I saw the front and back of the Loomis store that morning, and I was on top of it. The roof was in pretty good condition in the rear, but it was not in the front. In front the upper story had fallen down through the awning, as far as the windows were concerned, but the lower story I think was in pretty good tact. The side walls also stood in the middle of the building. The front part of the roof slanted towards the front. The top of the roof had not sagged down or settled uniformly, because some of the windows had fallen down further out than the other and the roof lay promiscuously, and it was uneven. With reference to the floor in the second story, the roof was in some places down pretty low and in some places seemed to be pretty near intact. Of course, the walls was broken more or less. I couldn't say as to the floor of the second story, whether it was broken, because I was on top of it. I couldn't see down through where there was any holes broken through, anything of that kind. I don't think there was. I couldn't swear

positively. The building in front was faced with cast iron, and the lintels that crossed were out. Them buildings were only just faced. This cast-iron stuff was only there for a veneer. It didn't hold nothing, and they were all shook away on every building in the block. The lintels were the cast irons that went over the doors of the lower story in front. They had gone out into the street or onto the sidewalk, but the brick did not. The lintels all left the buildings on every building in the block, because they were all cast-iron veneer. They are not built into the building; only stuck up there. On the Fourth street side the awning, the top, the fire wall was pretty well broken down, and went through the building and some places it had broken the windows and some of the parts between the windows were down. Some stood up uneven, of course. The rear wall was not down, and the roof was resting in the center. The front part of that building was the worst, the Fourth street side. The roof might have been resting on the second floor right in front where the front broke out. I went into that building from Fourth street by climbing over the débris. I had no ladder there. There were awnings. The brick came down and went through these awnings, and I partly used the awnings and partly piled over the stuff that leaned against the building, and climbed up that way. I went up there a purpose to take in the situation of the fire, and what to do to fight the fire, and at that time there were fires next adjacent to this building, also in the drug store, and in the electric light office next door. Q. At that time was there any fire in the Loomis Building? A. There was in the store next door and in the one next to that. Q. I ask you the question: At that time when you were up there was there any fire in the Loomis Building; that is, anywhere on the top of the roof? A. Well I am stating where I am standing, Mr. Ware. I am not stating whether it was one store or two. I think it was two stores in that building, wasn't there? Q. No, only one. A. Only one? Well, then, there was not. But the next store to that towards mine was afire, and that next one to that was afire; that is, the electric light office and the drug store. From the information I got from my men at the engine house, when they were drove out of the engine house, there was fire there as soon as they came out in the electric lighting company. I remained on the top of that building long enough to make up my mind that the block was doomed and I would get down and fight the frame district, and let the brick district go. It couldn't burn up soon enough to suit me. I knew it had to burn, and, when it was gutted, it would stop jeopardy to other property, my own included. Of course, I said that the rear wall was not down. I mean by that in a general way. I do not know that there was not a brick off from it. There might have been, because

where was not time that morning to look very close. There was plenty of work to do, but in a general way the rear wall was up. The upper story of the front wall was broken out. The lower story was all right, I think. Those iron pillars were nothing but facing. I am not positive that there were any iron posts or pillars that supported the lintels for the doors, because those fronts have been changed around so often. I don't know how old a building the Loomis Building was, but it had been there a good many years. The Loomis Building was like all of them buildings was, mostly 13-inch brick walls, and then patched over a dozen times in front, and change the stores around a half dozen times since I have been in this town. The lintels lay on the sidewalk. I think that after the earthquake anybody could have entered that store by the lower door, if they had been willing to take chances. I wasn't willing to do it. I peeped into those places front and back. I could have crawled in. I looked into all of them stores to see if it was broke down inside or not, in front and back. I didn't see a fire in that store. There was next door."

Cross-examination: "To Mr. Geary: These lintels in there was a stiff sheet of cast iron that was placed on the building for ornamental purposes; did not support any weight at all. The second story front of that building was made up of two large bay windows, occupying almost the entire front of it, more window than brick, and then a line of brick between the bay windows and at the edge of the bay window, and the roof rested on that, so when those windows broke out, it let the front of the roof sag down, and they had very heavy fire walls up there, very high ones, to make a showing, and, of course, those high walls soon went. I don't know how high the fire wall was in the Loomis Building. It was on the same line to me and mine was seven feet. A fire wall is a wall that projects over the main building, above the roof which is called a fire wall, because in case of fire next door the blaze could not catch the roof. The blaze could go on up. It necessarily projects over the roof line, carrying no weight on it whatsoever, only its own weight, no bracing, no timbers or anything. Loomis occupied one store in the Clute Building and Brooks the other store. Next to my place was a millinery shop. Next to that was the Davis drug store. Then came the electric light company and then Loomis and then Brooks. Loomis was immediately adjoining the electric light building. When I climbed up, I couldn't tell within 10 feet one way or what. My object in going up on top of the building was to observe the condition of the town. There was a fire back, and there was a fire in the electric lighting company. There was a fire in the Davis drug store, one in the Doyle Block in Newman's, and it looked like there was another one right in back of King's some-

where, or back of the Grapevine saloon. There was one fire back of Loomis' or one back of the electric company, or the Newman drug store. There was one in the electric light company and there was one back of the next door, the drug store, and there was one in Mrs. Carither's on the other side. I could see the rear part of these buildings where Mr. Loomis' store was. The stairs alongside the wall of them in the back yard was already afire. Just as fast as I could run two blocks and get there, I was on top of that building. I hardly think it was within five minutes after the shock; it was almost 10 minutes. Q. At that time all the rear of the Loomis Building and the electric light building was then on fire? Mr. Ware: To that we object, the witness has not so stated, and it assumes a fact in reference to the Loomis Building that is not in his testimony. Mr. Geary: Go back and read the answer. The Witness: Well, I said there was a fire back there from the Loomis building, but not in the Loomis store; in back of his store and back of the next store. That is it. Mr. Geary: You say it was in the same building? A. Back of it. The fire engine house was situated in the rear of the Davis store and the others on Fifth street. I went on top of the Loomis store and took that observation of the fire adjoining the Loomis store before I went to the engine house, and, when I came down there by that time, the boys were getting the rigs out. * * * Q. How soon after you got there did you see the wooden buildings in the rear of the brick buildings on the north side of Fourth street on fire? A. When I got there, they were afire. The alleyway back of the Loomis store, Brooks' store, and back of the electric light company all along there were piled all kinds of boxes as high as they could pile them up, all along there and wooden sheds. When I looked over there from the top of the Davis Building they were afire and the wooden buildings in the rear were on fire and traveling right towards the engine house. * * * The firemen had already commenced playing water upon the rear of the Loomis store when I got there, and I ordered it stopped. The Davis drug store was immediately adjoining the Loomis store. * * *

Redirect examination: "To Mr. Ware: Immediately back of the Loomis Building about 20 feet there I think was vacant. There were all kinds of sheds in the rear of the Loomis Building. The sheds did not face on Fifth. They were back against the building, and them sheds connected with other sheds that did go up against these other buildings. Some of the sheds, the woodsheds that were on fire in the rear, were immediately adjacent to or in rear of the Loomis Building. * * * The sheds which connected the Loomis store on the west side clean to the firehouse was all connected to one another and fences and everything else. There were different owners and different sheds all built

together. When I went up on the roof of the Loomis Building there was no fire in the Loomis Building or the Brooks store."

Witness Hearn, for defendant, testified: "I was up and around and dressed at the time of the earthquake. I was tending bar in Mr. Bloom's. (Nearly opposite the plaintiff's store.) I jumped over the bar and ran out in the middle of Fourth street right in the middle of the track. The earthquake had not ceased when I got to the middle of the track. As the result of the earthquake shock, so far as I could judge, the block including Mr. Loomis' store was pretty well down from the first story up. I could not tell much about the bottom story. Of course, I did not look close enough for it, but I could see that the upper story was pretty well down. * * * At that time there was no fire in that building." On cross-examination he testified: That he did not notice the Loomis Building particularly any more than any other building; that he stood there some minutes; saw fire in the block after the earthquake at Pohley's saloon, 60 or 80 feet away from where he was standing; also on the corner of B and Fourth streets. Witness Barnes, for defendant, testified that he passed along Fourth street in front of the Loomis Building eight or ten minutes after the earthquake; that the buildings were all down as far as he saw; did not see any fire in the Loomis Building. On cross-examination he testified: "I cannot separately state to the jury what was the condition of the Loomis Building." On redirect he testified: "I cannot describe the Loomis Building separately. There was none in the block standing but I could not say it separately."

Witness Ward testified that he lived about a block and a half from Fourth street on Mendocino: "I observed the buildings on the north side of Fourth street between Mendocino and B somewhere from 10 to 20 minutes after the earthquake. * * * At that time I couldn't tell for the life of me which was the Loomis Building. Q. Why? A. Well, because of the dilapidated condition. Q. What? A. They were down, had fallen down mostly all along there, and I could not tell one building from another. In front of that building and the other buildings in that block there was debris all along there from Mendocino down on that day. I walked down Fourth street about the center of the street. I don't think any one could have walked on the sidewalk."

Cross-examination: "To Mr. Geary: I went from my house to the crossing of Fourth and Mendocino and then over to Hinton avenue and looked in the jail, then turned and went down Fourth street. I think I was considerably excited. I remember some things I saw, of course. I did not stop to look for any particular building as I went down Fourth street. I walked down Fourth street. Q. Now, then, was the roof still on the Loomis Building when you passed it? A. As I said before, I

could not recognize the Loomis Building. Q. I am asking you now where was the roof of the Loomis Building when you went by. If you saw anything, what did you see? A. Well, mashed in more or less like all the rest. I could not designate the Loomis Building. It is like all the rest of them, down. I have not a distinct recollection of how the Loomis Building was at that time, not particularly the Loomis Building."

Witness Wilson testified that he came down to his place of business immediately after the earthquake. He testified: "I went straight down Fourth street, past the St. Rose. That was at the corner of Fourth and A. I know where the Loomis store was. I passed that. I saw the block on the north side—the buildings on the north side of Fourth street, between Mendocino and B, that morning. Nearly half an hour from the time I left home. I could not tell the condition of the Loomis Building or of any particular buildings. They were all down it seemed to me. Taking all of the buildings from Mendocino street clear through to B, two-story brick, on the north side, they appeared to be all down to me."

Witness Owen testified: "I know where the Loomis store was. I passed by there that morning. It could not have been more than three-quarters of an hour after the earthquake when I passed that store. The brick buildings on the north side of Fourth street, between B and Mendocino, including, of course, the store occupied by Mr. Loomis, looked to me as though they were all down. The street in front of those buildings and on the north side was pretty well filled up with debris. I mean by debris the walls of the fronts of the buildings falling towards the street. These fallen walls covered much of the street."

Cross-examination: "To Mr. Geary: * * * I passed by in front of the Loomis store and stopped and observed the buildings as I went along. I did not observe the rear wall. I was not on Fifth street. I could not see the rear wall because the roof was sloping this way, the wall was sloping."

Witness Broback testified: "I was living in the city of Santa Rosa on the 18th of April, 1906, at 415 A street. I was at my residence at the time of the earthquake. I know where the place of business or store of Mr. Loomis was. I passed by his store that morning, probably from a half to three-quarters of an hour after the earthquake. I observed the buildings in the block between Mendocino and B street on the north side of Fourth street as I passed by, including the Loomis Building, and I believe it was down. The buildings looked to me like they were all shaken down, some one way, some in another, some in the street; in fact, you could hardly get up the street. I could not get up the street on account of what was shaken in the street, or what was in there. Bricks and wood. Some of them were directly in the street, some of them were clear out in

the car track in the center of the street. Q. Now from B street to Mendocino street, on the north side of Fourth street, was there any brick two-story building standing? A. No, sir; I didn't see any."

Cross-examination: "To Mr. Geary: Q. Did you notice the building which was occupied by Mr. Loomis as you went by there that morning? A. No, sir; I don't believe I could have found the building. I didn't make any effort to find it. I cannot give to this jury any separate impression of the condition of the Loomis Building that morning. I had no interest in observing the condition of any building. I don't believe I could exactly describe the building next to the Loomis Building, its condition as I passed by it. I did not stop to look at any particular building as I went by in any particular."

Redirect examination: "To Mr. Ware: Those buildings most all looked about alike to me. Q. Why was it that you could not answer Mr. Geary's question as to want of ability on your part to identify any particular store or number of building between Mendocino and B on the north side of the street? A. I don't think I could have found any one building without making a particular—looking particularly for it. Q. Why? A. In the condition they were in. Q. Well, describe that condition to this court and jury, please. A. I don't know as I can do that exactly. They were all shaken down in such a shape that I did not look for any particular building. Q. Why is it that you could not identify any one store that you passed by? A. Well, in the first place, I did not pay particular attention to any one store, and then they were in such shape that I don't believe I could have found a store unless I had some interest in it in looking at it. The Court: Why was it? What do you mean by 'they were in such a shape,' what do you mean by that? A. Well, they were shaken down in such a condition that, if I did not have any particular interest in the building, I didn't notice it any more than I did all the rest—just merely walking along, looking at them all."

Recross-examination: "To Mr. Geary: I don't believe I saw the roof of the Loomis building that morning as I went by. I do not know whether the roof or the rear wall was down. I don't believe I know whether the sidewalls were down."

Witness Simpson testified: "I reside in Santa Rosa and have resided in Santa Rosa for a little more than 30 years. My business is that of a contractor and builder. I know the building where Mr. F. C. Loomis did business up to the time of the earthquake. My firm put in new fronts, store fronts, lintels, in that building. The lintels that were put in by my firm were constructed of steel. They were anchored to the store joists and also to the other lintels at the ends. These lintels were supported at the end by the pilasters of the walls and the center by cast-iron columns. These lintels

were 12-inch 35-pound steel T-irons, two of them, put about 11 inches apart, and supported with bolts through them, and at the ends there were holes for the anchorage, from the one to the other. They were all anchored together, with straps of iron and boltings. Usually we have two columns of what is called three-quarter cast columns that go in the corner of the show-windows, made out of cast iron. At the bottom there is iron sills for those columns to rest on, and then the woodwork came in between that. Then on top, of course, the brick was built from there up. On the face of the lintels was a wooden facing, which came down up to the ceiling on the inside, usually about one foot below the ceiling inside was the bottom of the lintel, and these lintels were anchored above to the joists. Usually a 20 foot would be anchored in the center, a big one in the center like that, and would go back four or five feet into the building. That is the way they was constructed at that time. The lintels supported the brickwork of the building immediately above the lintels. * * * The Loomis Building was built when I came here, and I have been here 30 years. The front of that building had been changed four or five different times, probably."

Cross-examination: "To Mr. Geary: The columns in front on the first story of the Loomis Building which held up the lintels were iron. There was wood inside these columns. The weight of the second story front of that building would be something like four tons. The iron columns each of them would carry about 27 or 28 tons. There were two iron columns there. If there had been no columns there at all the lintels would carry the weight."

Redirect examination: "Mr. Ware: Q. With reference to the vibration, if the vibration comes and these columns slant and the lintels go out of the building, what would they support? A. They wouldn't support anything, I suppose. Q. The lintels are placed above the columns, aren't they? A. Yes, sir. Q. When the lintels go out, the columns would go with them? A. I suppose they must go. I don't see how—they could not stand there alone unless the framework held them. Q. Assuming now that the lintels of the Loomis Building went out from the effect of the earthquake—assuming that; and they were out in the street, what would there be to support the brick and mortar above the windows? A. There is no question; if the lintels could go out, of course, the brickwork would go down—there is no question about that. How it could do it I couldn't say. I don't know anything about that."

Witness Mathews testified: "I resided in this city on April 18, 1906. I was rooming at the Ramona rooming house, on the south side of Fourth street, between B and Exchange avenue. Q. How nearly opposite to

Loomis' store, where Mr. Loomis then had his store? A. Just a little west, about one store west I should say. I remember the occurrence of the earthquake. I was at the Ramona rooming house at that time. I stayed in bed until the thing was over, and then I got up and got out, walked out on the bricks. Those bricks came from the building I was in. I saw some of the buildings on the North side of Fourth street, between B and Mendocino. It looked to me as though they were all down, and I was just across the street from the Loomis Building. I paid no particular attention to any one building there, but the street was pretty well filled up with debris on both sides, from the side I was on and the other side."

The plaintiff introduced no testimony as to the condition of the front wall of the building following the earthquake. The testimony upon this point is without conflict. Plaintiff's rebuttal is addressed exclusively to the condition of the rear wall and the side walls and to the time the fire was first discovered in or about the building. As already observed, the evidence justified the finding of the jury so far as concerned the rear wall and the greater part if not all of the side walls. But we think it insufficient to justify the findings when applied to the front wall, for we can reach no other conclusion from the uncontradicted testimony than that a material and substantial part of the front wall had fallen. The only question admitting of controversy is, Did this front wall fall before the fire attacked the building or plaintiff's goods within the building? Defendant states the theory of the instructions given the jury as follows: "That, in order for the insurer to be exonerated from liability under the 'fallen building' clause of the policy, both of two events must have happened: First, a material or substantial part of the building, in which the insured goods were contained, must have fallen from a cause other than fire, i. e., earthquake; and, second, that such falling must have occurred before either the building or the insured goods, contained therein, had been attacked by fire." Defendant disputes the correctness of the second proposition.

The jury found that no part of the building fell by reason of the earthquake shock, either before or after the fire had attacked the goods of plaintiff therein, but it seems not to have considered whether the falling occurred before or after the fire and it could not have found on this fact by its general verdict, for it found explicitly that there was no falling at all from any cause. In this state of the case defendant contends that, if the finding of the jury that a material or substantial part of the building did not fall by reason of the earthquake shock, is unsupported by the evidence, the judgment must be reversed for the jury

made no finding as to the time of the falling, and the appellate court cannot supply a finding upon that question—citing *Smith v. Immigration, etc., Ass'n*, 78 Cal. 289, 20 Pac. 677, 12 Am. St. Rep. 53, and other cases. In the case noted the court held that, although the evidence was sufficient to have supported the omitted finding, the court had no authority to supply it.

[2] There is force in the point made, but we think the theory of the instruction given is supported by reason and authority. *Western Assurance Co. of Toronto v. J. H. Mohlman Co.*, 83 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 561; *London L. F. & I. Co. v. Crunk*, 91 Tenn. 376, 23 S. W. 140. "If the building, or any material part of it, should fall before any fire broke out and caused damage to the property insured, the insurer would not be liable." *Nelson v. Traders' Ins. Co.*, 181 N. Y. 472, 74 N. E. 421.

That a material and substantial part of the front wall of the building went out before the fire attacked the building or plaintiff's goods satisfactorily appears. The evidence is that the earthquake occurred at 5:13 a. m. and lasted about 45 seconds. Fire Chief Muther was on top of the building eight or ten minutes after the earthquake shock, and there was no fire in the building then, although the fire had attacked adjoining buildings and the sheds and boxes and other inflammable material at the rear of plaintiff's store were on fire. Several witnesses saw the fire in these outbuildings or shacks at times varying from five to ten minutes after the earthquake. Plaintiff himself arrived at the rear of his store building five or ten minutes after he was aroused by the shock and these sheds were on fire. He testified that the fire had burned through the rear door of the building, and he could see that the fire was attacking his goods. He did not go to the Fourth street front, and did not know its then condition. The evidence was that this fire in the rear of the block was first discovered back of the Davis and the electric light company building and spread to other of these sheds. There was no evidence such as appeared in the case of *Davis v. Conn. F. I. Co.*, 158 Cal. 766, 112 Pac. 549, showing that the fire occurred through the breaking of electric wires by the earthquake and appeared simultaneously with the shock. In the present case the fire is traceable to the earthquake indirectly, but it is reasonably certain that the fire had nothing to do with the falling of the walls, and it is also reasonably certain, as appears from the evidence, that the walls had fallen before the discovery of any fire in the building or among the sheds and debris immediately in its rear.

Appellant makes no complaint of the instructions given, and it seems to us that they correctly state the law and substan-

tially meet the object of defendant's requested instructions, pointed out in its brief, which the court refused.

[3] One other point made in appellant's brief should be noticed. It sought to prove the effect of the earthquake on other buildings—the courthouse, among them. We think the court rightly denied the offer. We passed upon the point in *Fountain v. Conn. Fire Ins. Co.*, 117 Pac. 630. See *Wigmore on Ev.* § 442.

The judgment and order are reversed.

We concur: HART, J.; BURNETT, J.

160 Cal. 598

COOK et al. v. CIVIL SERVICE COMMISSION OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 5,724.)

(Supreme Court of California. Aug. 24, 1911.)

APPEAL AND ERROR (§ 781*)—DISMISSAL—COMPLIANCE WITH JUDGMENT PENDING APPEAL.

The powers of the civil service commission of the city and county of San Francisco being derived from the charter of such municipality, and the only authority given it to strike names from the list of eligibles prepared by it, being the charter provision that it may strike off names of candidates from the register after they have remained thereon two years, its action in setting aside such a list, prepared by it after an examination, taken pending its appeal from a judgment against it declaring the examination void and ordering the list annulled, was beyond its authority; and so was not ground for dismissal of the appeal, as leaving only a moot question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3122; Dec. Dig. § 781.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Walter A. Cook and others against the Civil Service Commission of the City and County of San Francisco and others. From an adverse judgment, defendants appeal. Plaintiffs move to dismiss the appeal. Motion denied.

See, also, 117 Pac. 663.

Percy V. Long, City Atty., and John T. Nourse, Asst. City Atty. (Chas. W. Slack, of counsel), for appellants. Choynski & Humphreys and John T. Williams, for respondents.

MELVIN, J. An appeal was taken to the district court of the first appellate district from a judgment of the superior court of the city and county of San Francisco, setting aside and annulling an examination which had theretofore been held by the civil service commission of that city and county, for promotion of certain captains in the fire department to the rank of battalion chief. On motion the district court dismissed the appeal for the reasons shown in the following order: "It appearing in this case that the civil service commission, defendants, in an action brought in the superior court to annul and set aside an order made by them, prosecuted this appeal from that order, and that since taking said appeal they have complied with the order made by the said superior court and have of their own volition obeyed the order made by the superior court of which they complain, and they being the only parties before this court, the proceedings here relate to what is now a moot ques-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tion, and that any decision this court might make would avail nothing except to probably lay the law for other parties, the appeal is dismissed."

This court granted a petition for hearing here, and the matter now comes up for action. The dismissal of the appeal is opposed upon several grounds, but, in view of the conclusion which we have reached, only one of them need be noticed. It is insisted that the attempted compliance with the judgment of the superior court was utterly without effect, because of lack of power in the civil service commission to make an order vacating the examination and setting aside the eligible list which had been made as a result thereof. The civil service commission derives its powers from the charter of the city and county of San Francisco. Among those powers is not the arbitrary right to strike names from the list of eligibles. The only authority to remove names from such a list is given by section 10, art. 13, of the charter, which provides: "The commissioners may strike off names of candidates from the register after they have remained thereon more than two years." True, the superior court had declared the examination void and had ordered the list annulled, but, an appeal having been taken from that judgment, it was of no binding, mandatory effect until made final by the action of a court of competent appellate jurisdiction. If the commission could have set aside the eligible list while the matter of the validity of the examination was sub judice, it could have done the same thing in the absence of any proceeding, and without any order of court. The very purpose of holding examinations by the civil service commission was to create a permanent eligible list not subject to expunction upon the caprice of any board or officer of the municipal government. There was no grant of power directly given by the charter, or necessarily implied from the prerogatives conferred, which enabled the commission properly to set aside its own action after it had declared a list of eligibles, except in the single instance cited above. It follows that the board acted beyond its authority in taking the action which was the basis of the order of dismissal by the district court of appeal. There is nothing in this conclusion conflicting with the reasoning in the opinion in *Nunan v. Valentine*, 83 Cal. 588, 23 Pac. 713. In that case there was no question that prima facie the appellant had the right to dismiss the appeal. Here, however, we are called upon to determine the power of a municipal agency, created and limited in its authority by charter, to make an order setting aside its previous action.

The motion is denied.

We concur: SLOSS, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

180 Cal. 589

COOK et al. v. CIVIL SERVICE COMMISSION OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 5,724.)

(Supreme Court of California. Aug. 24, 1911.)

CERTIORARI (§ 28*)—EXAMINATION BY CIVIL SERVICE BOARD.

The office of the writ of certiorari being limited by Code Civ. Proc. § 1068, to review of acts of a body exercising "judicial functions," and that only when it has exceeded the conferred jurisdiction, it will not lie to set aside an examination held by the San Francisco Civil Service Commission, though it had not complied with the charter provision that it shall make rules to carry out the purposes of the article relating to civil service, which shall be forthwith printed for distribution; the commission's holding of examinations and the declaration of the percentages attained by the various candidates not being judicial acts, and the provision as to adopting rules being merely directory, so that their adoption is not a jurisdictional prerequisite to the holding of the examinations by the board.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 41; Dec. Dig. § 28.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Certiorari by Walter A. Cook and others against the Civil Service Commission of the City and County of San Francisco and others. From an adverse judgment, defendants appeal. Reversed.

See, also, 117 Pac. 662.

Percy V. Long, City Atty., and John T. Nourse, Asst. City Atty. (Chas. W. Slack, of counsel), for appellants. Choynski & Humphreys and John T. Williams, for respondents.

MELVIN, J. Appeal from a judgment of the superior court of the city and county of San Francisco on certiorari, setting aside and annulling an examination which had theretofore been held by the civil service commission of that city and county, for promotion of certain captains in the fire department to the rank and standing of battalion chief. Cook, who was one of those taking the examination, petitioned with several of his associates for the writ, setting forth five separate counts, on the first and third of which the matter was finally submitted.

The first and most important question presented by this appeal, and, indeed, in view of the conclusion we have reached the only one we need to consider, is whether or not certiorari will lie in a case of this kind; and in this connection it will be necessary to quote those parts of the charter of the city and county of San Francisco which we deem applicable to the matter before us. Article 12 of the charter deals exclusively with the subject of civil service. Section 3 is as follows: "The commissioners shall make rules to carry out the purposes of

this article, and for examinations, appointments, promotions, and removals, and in accordance with its provisions may from time to time make changes in the existing rules. All rules and changes therein shall be forthwith printed for distribution by the commissioners." In the opinion of the learned judge who issued the writ and gave judgment according to petitioner's prayer it is shown that his conclusions were based upon the following errors: (1) The civil service commission had failed to adopt the necessary rules for promotions before calling and conducting examinations as provided by section 3 above quoted. (2) Improper credits were given for "seniority of service." (3) No credits on "ascertained merit" were given at all, but certain arbitrary markings were made for "meritorious service," which the court held to be by no means synonymous with "ascertained merit."

There is a great diversity of decision upon the question of the applicability of the writ of certiorari, due almost entirely to the difficulty of determining in many cases the line of division between functions of a judicial nature, and those of legislative, administrative, or executive character. By section 1068 of the Code of Civil Procedure the office of the writ is limited to a review of the acts of an inferior tribunal, board, or officer, exercising judicial functions, when such tribunal, board, or officer, has exceeded the conferred jurisdiction, and there is no appeal, nor any plain, speedy, and adequate remedy at law. Did the civil service commissioners perform a judicial function, and did they act beyond their jurisdiction when they declared the list of eligibles for promotion to the rank of battalion chief after an examination held without the previous adoption of rules, and the printing and distribution of said rules? We think that the great weight of authority in this country is that the conducting of an examination is not in itself the exercise of a judicial function. The courts are slow to interfere by certiorari with the acts of boards or officers, unless it appears that such acts are clearly judicial in their nature, and it is now almost universally held that the exercise of the judgment of such an officer or board in determining the existence or non-existence of facts is not necessarily nor usually a judicial act. The rule was thus expressed in *Fraser v. Rader*, 124 Cal. 134, 56 Pac. 797: "All political, executive, legislative, and ministerial boards, bodies, and officers are constantly, and indeed perpetually called upon to make decisions affecting the conduct of matters intrusted to them. They exercise their judgments in so doing, and they determine the existence or nonexistence of facts. No street in any municipality of the state may be ordered improved until the proper authorities have

first decided as a fact that public necessity or convenience requires it. Such decisions, however, are not judgments pronounced by a judicial tribunal. They do not, as to be judicial decisions they must, declare the law and define the rights of the parties under it. But this subject has been discussed so recently and so fully in *Quinchard v. Board of Trustees*, 113 Cal. 664, 45 Pac. 856, and in *People v. Supervisors*, 122 Cal. 421, 55 Pac. 131, that it would be supererogatory to continue."

In the *Matter of Carter*, 141 Cal. 317, 74 Pac. 997, this court held that the action of the mayor of San Diego in removing an appointive officer was not reviewable on certiorari where the charter did not provide for the filing and hearing of charges and deciding their sufficiency before the mayor might act. The modern tendency is to limit, we think, rather than to extend the functions of this writ. Our attention has been called by respondents' counsel to the case of *Robinson v. Board of Supervisors*, 16 Cal. 208, in which this court (Field, C. J., dissenting) held that the action of a board of supervisors in passing an ordinance by which the salaries of certain officers were fixed was judicial and reviewable upon certiorari. While the case has never been formally overruled, we think that the doctrine announced in the opinion has been long abandoned. In *Quinchard v. Board of Trustees of Alameda et al.*, 113 Cal. 667, 45 Pac. 856, it was held that the complicated duties of the trustees of a municipality in the matter of street improvements are legislative, and that the functions of the street superintendent are ministerial in their character. This case was cited with approval in *People ex rel. Dean v. Board of Supervisors of Contra Costa County*, 122 Cal. 423, 55 Pac. 131, decided by the court in bank, in which the granting of a franchise by a board of supervisors was declared to be not a judicial act subject to examination on certiorari. See, also, *Brown v. Board of Supervisors*, 124 Cal. 276, 57 Pac. 82; *Borchard v. Supervisors*, 144 Cal. 13, 77 Pac. 708. *Whitney v. Board of Delegates of the San Francisco Fire Department*, 14 Cal. 494, is also called to our attention. That was a case in which the board authorized by law to canvass the votes for the office of chief of the fire department declared, after hearing a contest, that no one had been elected, and passed a resolution to annul and set aside the election. But the question presented to us here was not before the court in that case. There was objection to the use of the writ to review the acts of a purely voluntary association, but, after holding that there was no merit in that contention, the court said: "It is not disputed that the controversy before the board of delegates was judicial in its nature; and it is conceded that the powers of the board were sufficient for the

determination of all questions involved in the controversy."

Although the court did not determine whether the act of the board of delegates in canvassing the election returns was judicial in its nature or not, we apprehend that the judicial functions which in the opinion of the court authorized the issuance of the writ of certiorari were those appertaining to the hearing and decision of the election contest. Certain it is that the great weight of authority declares the act of a board in canvassing election returns to be ministerial, and not a subject for examination under a writ of review. *Lansdon v. State Board of Canvassers*, 18 Idaho, 596, 111 Pac. 133; *State v. Osburn*, 24 Nev. 195, 51 Pac. 837; *Bouldin et al. v. Lockhart*, 3 Baxt. (Tenn.) 262; *Esmeralda Co. v. Third Judicial District Court*, 18 Nev. 438, 5 Pac. 64; *State v. Barber*, 4 Wyo. 56, 32 Pac. 14; 15 Cyc. of Law and Procedure, 399.

It is conceded by respondents' counsel that the giving of an examination by a board of civil service commissioners is not a judicial function, but they assert that the promotion was a judicial matter, and that many things connected with the promotion require the exercise of judicial discretion, as, for example, the making of the schedule of credits for the different subjects upon which examinations were held. But the promotions were to be made by the fire commissioners. The holding of examinations and the declaration by the civil service commissioners of the percentages attained by the various candidates for promotion were not judicial acts. In *People ex rel. Schau v. McWilliams*, 185 N. Y. 94, 77 N. E. 785, there was an effort made to review the action of the civil service commission in refusing to certify the relator's pay as battalion chief of the fire department. The court held that certiorari was not the relator's proper remedy. In that case the commissioners had refused to take the office of battalion chief out of the competitive class, and of that matter in delivering the opinion of the court Cullen, C. J., said: "I admit that the propriety of classifying this office as competitive or noncompetitive involves in a high degree the exercise of judgment, but the judgment is that of the legislative or executive officer rather than that of the judge. Its proper determination involves considerations which cannot well be the subject of judicial inquiry. I do not assert that the action of the commissioners in failing to so place offices which should, under the constitutional provision, be placed in the competitive class, is not subject to control, but as said by Judge Martin in *People ex rel. Sweet v. Lyman*, 157 N. Y. 368, 375 [52 N. E. 132, 134]: 'The obvious purpose of this provision (the constitutional one) was to declare the principle upon which promotions and appointments in the public service should be made, to recognize in that instrument the principle of the existing statutes

upon the subject and to establish merit and fitness as the basis of such appointments and promotions in place of their being made upon partisan and political grounds. It then declares that merit and fitness shall be ascertained by examinations, and also the extent to which they shall be thus determined. The extent to which examinations are to control is declared to be only so far as practicable. This language clearly implies that it is not entirely practicable to fully determine them in that way. It was the purpose of its framers to declare those two principles and leave their application to the direction of the Legislature.' If it should appear that there was a plain violation by the commission of its duty to classify as competitive an office which was clearly and manifestly so, there should be a remedy in the courts. But there is necessarily a large debatable field as to cases within which there will be great differences of opinion, even among the most intelligent and fair-minded men, and as to this field it seems to me that it is not reasonable that the judgment of an appellate court should be substituted for that of the commissioners. Yet, if the action of the civil service commission is to be reviewed by certiorari, there seems to be no escape from the conclusion that ultimately the classification of every officer or employé in the service of the state, or its political subdivisions, must be determined by this court, for, if the classification presents a question of law reviewable by the Supreme Court, that question survives in this court. Surely such a result was never contemplated by the framers of the Constitution or by the Legislature when it enacted the civil service laws. It would cast upon the courts a burden which would not only be difficult for them to bear, but which they are by no means the officers best qualified to discharge. The proper classification of a part of the civil service depends in no small degree on the practical operation of the classification. A priori arguments must often yield to actual experience. Take the present case. If we should affirm the action of the civil service commission, and it should appear in the future that the classification failed to secure competent officers, surely the classification should be changed. Should the action of the commission be again brought before us for review? It appears that in some of the cities of the state similar offices to that sought by the relator are filled by competitive examinations, and in others not. If the question of the classification is always a judicial one, then there must be the same classification everywhere, for there must be at least some degree of finality in judicial determinations. It does not at all follow that the action of the civil service commission is not in any case subject to judicial control; but that such control is a limited and qualified one to be exercised by mandamus."

This language is peculiarly applicable to the present case. If the petitioners here had been dissatisfied with the announcement made by the civil service commissioners that examinations were to be held on certain dates, and setting forth the subjects and the percentages attainable, they might have compelled the commissioners by mandamus to make the general rules prescribed in the charter. This they failed to do, but they submitted themselves to the examination by a body authorized to give such examinations. See, also, *People ex rel. Buckley v. Roosevelt*, 19 App. Div. 431, 46 N. Y. Supp. 517. The section of the charter requiring the adoption of general rules for examinations, etc., by the commissioners, expressed, not a mandatory, but a directory admonition. There is nothing in the language of the act which makes the adoption of such rules a jurisdictional prerequisite to the holding of examinations by the board. These rules were merely "to carry out the purposes of this article"; i. e., those relating to civil service. The rules were to be a part of the scheme of testing the fitness of candidates for promotion, but the right to examine candidates was not made to depend upon the adoption of these general rules. Having jurisdiction to act, and not acting judicially in holding examinations, the civil service commissioners, even if acting unfairly, could not have their action subjected to examination by a writ of review. *Greene v. Knox et al.*, 76 App. Div. 405, 78 N. Y. Supp. 779; *Devlin v. Dalton*, 171 Mass. 338, 50 N. E. 632, 41 L. R. A. 379.

We have carefully examined the cases cited by respondent, but are still convinced that the great weight of authority is against the employment of certiorari in a case of this kind. *People v. Collier*, 175 N. Y. 196, 67 N. E. 309, cited by respondent, was expressly overruled in *People ex rel. Schau v. McWilliams*, supra. Of the other cases cited in this behalf in respondents' brief, nearly all, if not all of them, differ so materially in their facts from this one as to be of little value. *Dill v. Wheeler*, 100 App. Div. 155, 91 N. Y. Supp. 686, holds that mandamus will not lie to compel a classification of the position of battalion chief. The opinion does not express the theory that certiorari will lie, and in the affirming opinion (*Matter of Dill*, 185 N. Y. 106, 77 N. E. 789) the court held that "the position or office of battalion chief in the fire department of Buffalo is one of that character the classification of which rests in the discretion and judgment of the civil service commission, and is not properly the subject of review by the courts." The case of *People ex rel. Schau v. McWilliams*,

supra, is cited, and the ruling is expressly based on the doctrine of that case. The case of *Chittenden v. Wurster*, 152 N. Y. 345, 46 N. E. 857, 37 L. R. A. 809, also cited by respondent, is thus distinguished in the case last cited above: "That whether a particular position in the civil service of the state or its subdivisions is or is not exempt from examination may present a judicial question within the constitutional provision requiring appointments thereto to be made 'according to merit and fitness, to be ascertained so far as practicable by examinations, which, so far as practicable, shall be competitive,' has been held by this court. *Chittenden v. Wurster*, 152 N. Y. 345, 46 N. E. 857, 37 L. R. A. 809. Any other principle would allow the constitutional mandate to be violated with impunity. But, granting that principle to its fullest extent, it by no means follows that the action of the civil service commission can be reviewed on certiorari." *People v. Common Council of Troy*, 78 N. Y. 33, 34 Am. Rep. 500, was another case in which mandamus was held not to be the proper remedy. There was no hint that certiorari would lie to review the determination by the common council that the relator was not one of the four official papers of the city, but, even if there had been such suggestion, the case of *People v. Wiggins*, 199 N. Y. 382, 92 N. E. 789, upon the same state of facts, holds that the function of the city council was administrative, and that a writ of review should not issue. In *People ex rel. Myers v. Barnes*, 114 N. Y. 317, 20 N. E. 609, 21 N. E. 739, the court held that certiorari was the proper remedy to review the action of a board of auditors after refusal to pay a claim against a municipality. We do not see the applicability of the doctrine of that case to the one at bar, but, even if it were apposite, the Californian rule is different. See *Andrews v. Pratt*, 44 Cal. 318; *Townsend v. Copeland*, 56 Cal. 615. In *re Ricketts*, 111 App. Div. 669, 98 N. Y. Supp. 502, was a proceeding in mandamus. The functions of the writ of certiorari were not considered, and we cannot see its applicability as an authority.

From the foregoing we conclude that petitioners did not select the proper remedy. The commissioners' failure to pass general rules, and the errors, if any, in establishing the possible percentages in the awarding of credits, were not matters of judicial fiber, and in no wise affected the jurisdiction of the commission.

The judgment is reversed.

We concur: SLOSS, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

160 Cal. 577

GARDINER v. BANK OF NAPA.

(S. F. 5,366.)

(Supreme Court of California. Aug. 24, 1911.
Rehearing Denied September 22, 1911.)**1. CORPORATIONS (§ 225*)—EXTENT OF STOCKHOLDER'S LIABILITY FOR CORPORATE DEBTS—CONSTITUTIONAL AND STATUTORY PROVISIONS.**

Const. 1879, art. 12, § 3, provides that a stockholder shall be individually liable for such proportion of the corporate debts contracted while he was a stockholder as the amount of his stock bears to the whole of the subscribed capital stock. Art. 22, § 1, provides that all laws in force at the adoption of the Constitution not inconsistent therewith shall remain in force until altered or repealed. Civ. Code, § 322, as it existed at the time the Constitution of 1879 was adopted, provides the same liability for stockholders as that fixed by art. 12, § 3, and further provides that any creditor may institute joint or several actions against any of its stockholders for the proportion of his claim payable by each, and that the court must ascertain the proportion of the debt for which each defendant is liable, and render a several judgment therefor against each. *Held*, that the constitutional measure of a stockholder's liability was not curtailed by section 322, but that the liability thereunder is for such proportion of the creditor's total claim as the amount of stock owned by him at the time the debt was contracted bears to the whole subscribed capital stock, and not a sum equal to such proportion of the total corporate indebtedness contracted while he was a stockholder as his stock bears to the total subscribed stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 872; Dec. Dig. § 225.*]

2. CORPORATIONS (§ 351*)—DIRECTORS' LIABILITY FOR EMBEZZLEMENT—CONSTITUTIONAL PROVISIONS.

Under Const. 1879, art. 12, § 3, which provides that during the term of their office the directors or trustees of corporations shall be jointly and severally liable to creditors and stockholders for money embezzled by officers of the corporation, the recourse of creditors and stockholders is by an action in equity, whereby the creditors would be brought in as parties, so that each might receive his distributive share of the funds created for the benefit of all.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1492-1493; Dec. Dig. § 351.*]

3. CORPORATIONS (§ 279*)—CONTRIBUTION AMONG STOCKHOLDERS.

Where a stockholder has paid his liability for the debt of the corporation in proportion to the amount of his stock, he has no cause of action against any other stockholder for the money so paid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1177-1185; Dec. Dig. § 279.*]

4. CONSTITUTIONAL LAW (§ 18*)—CONSTRUCTION—ADOPTION OF PREVIOUS CONSTRUCTION OF PROVISIONS.

During the existence of a constitutional provision making each stockholder individually liable for his proportion of all the corporation's debts, it was decided under one of two existing statutory provisions for carrying that provision into effect that a creditor could collect his whole claim from a single stockholder, provided it did not exceed in amount such stockholder's proportion of the corporation's entire in-

debtedness, and, when the Constitution of 1879 was adopted, the Civil Code contained section 322 in its present form, which is substantially the one of the former statutory provisions on which the decision was held not to rest, and the law at that time furnished no substitute for that provision on which the decision had been rested. *Held*, that the previous decision as to a stockholder's liability was not adopted by Const. 1879, art. 12, § 3.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 13, 17; Dec. Dig. § 18.*]

In Bank. Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by Frank H. Gardiner against the Bank of Napa. Judgment for plaintiff for partial relief, and he appeals. Affirmed.

Walter K. Tuller, Frohman & Jacobs, and Titus & Creed, for appellant. Percy S. King, for respondent.

MELVIN, J. [1] Judgment was entered in favor of appellant in the superior court, but being dissatisfied with the court's computation of respondent's liability, and consequently with the amount awarded, he has taken this appeal. The action was one by a creditor of a corporation against a stockholder thereof. The court held that plaintiff could recover such proportion of his total claim against the corporation as the amount of stock owned by defendant at the time the debt was contracted bears to the whole subscribed capital stock. Plaintiff contends that he is entitled to recover a sum equal to such proportion of the total corporate indebtedness contracted while defendant was a stockholder as defendant's stock bears to the total subscribed stock. In other words, he seeks to establish the right of a creditor to collect upon his individual claim a sum equal, if necessary to the satisfaction of the creditor's claim, to the stockholder's entire liability upon the debts of the corporation. The individual liability of a stockholder for the debts of the corporation is in California a matter of constitutional creation. Section 3, of article 12 of the Constitution of 1879 provides that: "Each stockholder of a corporation, or joint-stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock, or shares of the corporation or association. The directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint-stock association, during the term of office of such director or trustee." In addition to the constitutional provision we have section 322 of the Civil Code; the applicable portion of that section being as follows: "Each stock-

holder of a corporation is individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation. Any creditor of the corporation may institute joint or several actions against any of its stockholders, for the proportion of his claim payable by each, and in such action the court must ascertain the proportion of the claim or debt for which each defendant is liable, and a several judgment must be rendered against each, in conformity therewith. If any stockholder pays his proportion of any debt due from the corporation, incurred while he was such stockholder, he is relieved from any further personal liability for such debt, and if an action has been brought against him upon such debt, it must be dismissed, as to him, upon his paying the costs, or such proportion thereof as may be properly chargeable against him." This section of the Civil Code would seem to be conclusive of the proposition that a single stockholder is liable to a single creditor for his proportion only of that creditor's debt. While conceding that section 322 of the Civil Code is probably not in accord with his contention, appellant insists that the measure of relief fixed by the Constitution is curtailed by that section, and that, to that, extent, the section is unconstitutional.

Appellant's counsel lay great stress upon the use of the word "all" in the Constitution. In adopting the Constitution they say the people had the alternative of making a stockholders' personal liability a certain proportion of each debt of the corporation or of all debts incurred during the time he held the stock, and that by choosing the latter course they took away from the Legislature the power of providing a different rule by section 322 of the Civil Code. But the Code section does not change the rule. On the contrary, the first sentence of the Code section is practically identical with the first sentence of section 3 of article 12 of the Constitution. The constitutional provision fixes the liability, while the legislative enactment prescribes the manner of enforcing the rights of a creditor of the corporation as against a stockholder. We see no conflict between the Constitution and the Code. The Constitution, while fixing the measure of liability of a stockholder, does not provide any machinery for the enforcement of the creditors' rights. Under it, the Legislature might provide that any creditor should bring a joint or several action to enforce his claim (as it has done), or the law might require (as it does in some states) that all of the creditors be joined in an equitable action. Either method would leave the stockholder's liability the same. Even if it be conceded that without legislation the creditor could enforce his claim, such concession would not support appel-

lant's theory that any single creditor may satisfy his whole claim out of the sum for which a stockholder is made liable under the Constitution. We apprehend that without a prescribed form of action the recourse of a creditor, if any, would be an action in equity, whereby all creditors would be brought in as parties, so that each might receive his distributive share of the fund created for the benefit of all.

[2] Indeed, that has been declared to be the rule with reference to directors who are made jointly and severally liable under this very section 3 of the twelfth article of the Constitution for moneys embezzled or misappropriated. *Winchester v. Mabury*, 122 Cal. 523, 55 Pac. 393; *Winchester v. Howard*, 136 Cal. 439, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153.

[3] The liability of a stockholder is not joint and several, but as was said in *Brown v. Merrill*, 107 Cal. 447, 40 Pac. 558, 48 Am. St. Rep. 145: "Each stockholder has a several liability and that liability is proportionate to the amount of his stock; and, when he has paid his portion of any debt, or of all the debts of the corporation, he is freed from all liability, and has no cause of action against any stockholder for money so paid." The Legislature has seen fit to provide a method for enforcing the first portion of section 3 of article 12 of the Constitution by the adoption of the section of the Civil Code quoted above. We think that the method of establishing the claims of a creditor provided by that section must be upheld if not in conflict with the Constitution. The United States Circuit Court of the Northern District of California had occasion to discuss this matter in the case of *Borland v. Haven* (C. C.) 37 Fed. 404, and it was there held that section 322 of the Civil Code was continued in force upon the adoption of the new Constitution.

[4] Appellant relies upon the case of *Larrabee v. Baldwin*, 35 Cal. 155, as conclusive in favor of his contention. In that case, tried during the existence of section 36, of article 4 of the former Constitution, very similar to the one now in force (the only difference being that the present Constitution prescribes the method of computing a stockholder's liability, while the former one did not furnish any definite rule), the court held that, in view of the facts before it and the statute applicable to them, the creditor could collect his whole claim from a single stockholder, provided it did not exceed in amount the said stockholder's proportion of the corporation's entire indebtedness. When more than a decade later the people adopted a new constitutional provision practically identical with the old one, they read into it, according to appellant's theory, the interpretation given by *Larrabee v. Baldwin*, supra. There would be great force in this argument, were it not for the fact that in *Larrabee v. Baldwin* the court was construing, not alone that part

of the Constitution fixing a stockholder's liability, but also the legislative enactment prescribing the creditor's remedy. There were two laws in existence at that time, with reference to the subject of the collection from a stockholder of his proportion of the corporation's indebtedness. Mr. Chief Justice Sawyer, who wrote the prevailing opinion, reached the conclusion that the litigation was governed not by section 32 of the general act concerning corporations (St. 1850, p. 350), but by section 16 of "An act to provide for the formation of corporations for certain purposes." St. 1853, p. 90. The Chief Justice quoted the latter section, and commented upon it as follows: "Each stockholder shall be individually and personally liable for his proportion of all the debts and liabilities of the company contracted or incurred during the time that he was a stockholder, for the recovery of which joint and several actions may be instituted and prosecuted. In any such action, whether joint or several, it shall be competent for the defendant or defendants, or any or either of them, on the trial of the same, to offer evidence of the payment by him, or them, or any or either of them, of any debts or liabilities of such corporations, and upon proof of such payment the same shall be taken into account and credited to the party or parties making such payment, and judgment shall not be rendered against the party or parties defendant proving such payment for a sum exceeding the amount of his or their proportion of the debts and liabilities of such incorporations, after deducting therefrom the sums proven to have been paid by him, them, or any or either of them, on account thereof. Laws 1863, p. 736. It would be no strained construction to so hold upon the first clause of the section down to the first period, if there had been nothing more. But, in that case the construction might be open to some doubt, whether it was contemplated that each creditor should be compelled to pursue each stockholder for his individual share of his debt, or whether he might make his money out of the first one he could find, whose liability is sufficient to cover the indebtedness, and where he could make it easiest.

* * * That the Legislature did not contemplate that each stockholder should be the debtor of each creditor for a share of his whole liability, corresponding to the creditor's share of the whole debts of the corporation and no more, or that one creditor, by his diligence, should get no advantage over another, in case of the insolvency of the corporation and a portion of the stockholders, seems plain to our minds from the remainder of the section. It provides that 'in such action, whether joint or several,' against a stockholder or stockholders to enforce the personal liability, 'it shall be competent to show on the trial payment by him, or them, or any or either of them of any debts or liabilities of such corporation, and upon proof

of such payment the same shall be taken into account and credited to the party or parties making such payment, and judgment shall not be rendered against the party or parties defendant proving such payment for a sum exceeding the amount of his or their proportion of the debts and liabilities of such incorporations, after deducting therefrom the sums proven to have been paid by him or them, or any or either of them on account thereof.' This shows no intention to protect one creditor against the superior diligence of another, or to divide up the liability of the stockholder, giving a part to each creditor, but indicates a contrary purpose. It authorizes the payment of the whole liability to the first who comes with a demand sufficient to absorb it, and, by implication at least, authorizes the creditor to make his money out of any party liable to pay the amount."

After indicating that section 32 of the general corporation act had no application to the stockholders of the kind of corporation then before the court, the learned Chief Justice proceeded as follows: "Section 16 of the act of 1853, and section 32 of the act of 1850, were both amended by two several acts, passed on the same day, April 27, 1863, but neither amendment was made applicable to any class of corporations, except those provided for in the particular act to which it was an amendment. Section 16 of the act of 1853 has already been given. Section 32 of the act of 1850, as amended on that day, reads as follows: 'Each stockholder of any corporation shall be severally, individually and personally liable for such proportion of all its debts and liabilities as the amount of stock owned by him in such corporation bears to the whole of the capital stock of the corporation, for the recovery of which joint and several actions may be instituted and prosecuted; and in any such action against any of the stockholders of a corporation, the court shall ascertain and determine the proportion of the debt which is the subject of the suit for which each of the stockholders who are defendants in the action are severally liable, and judgment shall be given severally in conformity therewith. If any stockholder in a corporation shall pay his proportion of any debt due by such corporation he shall be released and discharged from any further individual or personal liability for such debt.' It will be seen by comparison that those two sections are wholly different, that they could not be made to apply to the same subject-matter and could not possibly be intended to accomplish the same object. Both provide for prosecuting joint or several suits to enforce the liability, but section 32 provides that in any such action against any of the stockholders 'the court shall ascertain and determine the proportion of the debt which is the subject of the suit for which each of the stockholders who

are defendants in the action are severally liable, and judgment shall be given severally in conformity therewith.' This provision expressly contemplates that each creditor shall recover a portion of the whole personal liability of the stockholder, corresponding to the portion of the whole indebtedness held by him, and no more, and directs the court to ascertain the proportion of the 'debt which is the subject of the suit,' each is severally liable for, and enter a several judgment in conformity therewith. There is no allowance for payment to other creditors. Section 16 contains no provision of the kind, but, on the contrary, contains a provision authorizing the defendant or defendants 'in any such action, whether joint or several,' to show that they have paid their full share of personal liability, or some part of it, to other creditors, and directs the amount so paid to be allowed to the party paying. Said section 32 provides that, if any stockholder 'shall pay his proportion of any debt, he shall be released and discharged from any further individual or personal liability for such debt.' He is not to be discharged from paying his proportion of other debts, although he may pay the whole of some particular debt. Under section 16 it is quite different, for in a suit upon one debt he may show that he has paid the whole or a part of his liability to some other creditor or creditors, and 'judgment shall not be rendered against him for a sum exceeding the amount of his or their proportion of the debts and liabilities, * * * after deducting therefrom the sums proven to have been paid,' etc. Thus the two sections, as to the rights of the creditors as against the individual stockholders, go upon different theories. One is based upon the theory that each creditor shall be entitled to hold each stockholder personally liable to himself for a portion of each stockholder's entire liability, corresponding with the amount of the share of the whole debt due from the corporation held by such creditor; and the other upon the theory that the vigilant creditor may reap the reward of his vigilance, by obtaining his money from any party whose liability is sufficient to cover his demand. It cannot be supposed that this difference is accidental, or that the Legislature, by adopting provisions so entirely diverse, intended to express the same idea, or confer the same rights. These two acts were before the Legislature at the same time, and were passed on the same day. That body had no difficulty in finding language to express its intention clearly in section 32; and, if it had in contemplation a similar result in passing the amendment to section 16, it is reasonable to suppose it would have adopted similar language. When in two laws under consideration and passed at the same time theories so diverse have been adopted, it must be presumed that it was with a design, and

that the specific design in each section is in harmony with its own general theory. Why the Legislature applied a different rule to these different classes of corporations, they have not seen fit to inform us. Whether the policy is a wise one or not is no concern of ours. It is enough for us to know, if such be the fact, and so we think it to be that thus the law is written."

Larrabee v. Baldwin recognized two methods for carrying the existing constitutional provision into effect. When the new Constitution was adopted, practically re-enacting the old constitutional measure of liability, the Civil Code contained section 322 in substantially its present form, which is in its essence the same as section 32 of the old general incorporation act, and the law at that time furnished no analogue for section sixteen, the statute upon which Larrabee v. Baldwin was decided. Therefore that case is really authority against appellant's claim that the court's interpretation of section 16 of the special act was adopted with the Constitution. In Borland v. Haven, supra, the same Judge Sawyer, who, as Chief Justice of this court, wrote the opinion in Larrabee v. Baldwin, after quoting section 322 of the Civil Code, as amended in 1876, said: "Thus, taking the several provisions together, a stockholder is personally liable for his proportionate share of each debt of the corporation and of each debt only contracted while he is a stockholder. This section was in force at the time of the adoption of the amended Constitution in 1879, and it has never since been changed. Article 12, § 2, of the Constitution of 1879, is as follows: 'Dues from corporations shall be secured by such individual liability of the corporators, and other means as may be prescribed by law.' And section 3 of the same article provides that 'each stockholder of a corporation * * * shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder, as the amount of stock or shares owned by him, bears to the whole of the subscribed capital stock or shares of the corporation.' Thus, the section of the Civil Code, taking its provisions together, is precisely like this provision of the Constitution, except by express provision no one creditor can collect more than the share of his own particular debt of the stockholder, whether he has paid his share of the debts to other creditors or not; but the liability in the aggregate of the stockholders is precisely the same under each, since the aggregate of the stockholder's share of liabilities to each creditor is equal to his share of the liabilities upon the whole debt or liabilities of the corporation. It is urged that the Constitution on this subject is not self-executing, but that it requires legislation to give it effect; that section 322 of the Civil Code

is inconsistent with section 3 of article 12 of the Constitution of 1879, and is therefore, under section 1, art. 22, repealed by it, and, since there has been no other legislation on the subject, since the adoption of the new Constitution, to give the constitutional provision effect, that this right of creditors to enforce the personal liability of stockholders has lapsed. Section 1, art. 22, referred to, provides 'that all laws in force at the adoption of this Constitution, not inconsistent therewith, shall remain in full force and effect until altered or repealed by the Legislature.' If, therefore, the provisions of section 322 quoted are not inconsistent with the provisions of article 12, § 3, they are, in express terms, continued in force. As we have already seen, they are clearly not inconsistent, but in all respects in harmony. Under both, the stockholder is liable in the aggregate for his proportion of all debts and liabilities of the corporation contracted while he was a stockholder, and no more. The Constitution does not provide how the liability shall be enforced, whether against each stockholder separately, or all jointly, while the statute goes further, and does so provide for its enforcement, and that provision is not inconsistent with the provision of the Constitution, but in the end it reaches the same result. *Larrabee v. Baldwin*, 35 Cal. 156, and other cases affirming it, establish this point. Were section 322 to be formally re-enacted now by the Legislature, would anybody pretend that it would be inconsistent with the constitutional provision now in question in such sense as to render it unconstitutional and void? I apprehend not. If it would not be inconsistent, and therefore unconstitutional and void, if formally re-enacted, it cannot be inconsistent, and therefore repealed now. If it could stand with the Constitution upon re-enactment, it can stand with it now. Not being inconsistent, as we have seen, it is in express terms continued in force. Section 36 of the old Constitution provided that 'each stockholder of a corporation shall * * * be individually and personally liable for his proportion of all its debts and liabilities.' This, as construed in *Larrabee v. Baldwin*, supra, and other cases affirming it, although couched in somewhat different language from that of section 3, art. 12, of the new Constitution, is in effect identical with the old, except that the new in terms limits the liability of the stockholder to those debts contracted while he is a stockholder, and the old does not. Yet in the case cited and in other cases the courts so construed the old, although there were no such express terms of limitation. Section 322 of the Civil Code was certainly not in conflict with section 36 of the old Constitution. If its provisions are not in conflict with the old Constitution on this point, they certainly are not inconsistent with those of the new. They simply provide for carrying

the constitutional provisions into effect—for executing them. The defendants are therefore liable personally for their respective shares of the indebtedness unless exonerated or discharged therefrom on some other ground. It is insisted, that the only remedy in this case is necessarily in equity, as all the stockholders are interested and personally liable for their respective shares, and are necessary parties, and numerous authorities are cited on the point. But the cases cited arose where there was no statute expressly giving a remedy at law. Section 322 of the Civil Code of California, still in force, as we have seen, provides 'that any creditor of the corporation may institute joint or several actions against any of its stockholders for the proportion of his claim, payable by each, and in such action the court must ascertain the proportion of the claim or debt for which each defendant is liable, and a several judgment must be entered against each in conformity therewith.' This is mere procedure, in an action at law, especially given by the statute."

The opinion in *Larrabee v. Baldwin* does contain some general language to the effect that the part of the Constitution there considered, and repeated in substance in the statute, might justify the interpretation which appellant here seeks; but in *Morrow v. Superior Court*, 64 Cal. 385, 1 Pac. 355, the court indicated as follows that the decision was based upon an entirely different theory: "The first clause of section 16 of the act of April 14, 1853, as amended by the act of April 27, 1863, read as follows: 'Each stockholder shall be individually personally liable for his proportion of all the debts and liabilities of the company contracted or incurred during the time that he was a stockholder, for the recovery of which joint or several actions may be prosecuted.' In *Larrabee v. Baldwin*, 35 Cal. 155, it was said it would not be a strained construction of that clause, standing alone, to hold that a creditor of the company might maintain an action against an individual stockholder on his personal liability, although it 'might be open to some doubt, whether it was contemplated that each creditor should be compelled to pursue each stockholder for his individual share of his debt, or whether he might make his money out of the first one he could find, whose liability is sufficient to recover the indebtedness.' But, after throwing out this intimation, the court decided the case before it, mainly, if not wholly, on other provisions of the same section."

Appellant's counsel, with much learning and force, have discussed the rules upon the subject of stockholder's liability in operation in certain other states, citing authorities; and respondent's attorneys, with equal ability and vigor, have sought to demonstrate that the statutes and Constitutions of those states differ so radically from ours that the cited cases furnish no aid to us in

the solution of the present problem. Strongly as we are tempted to follow them into this interesting field, we are so certain of the rule long established in California that we refrain from further scrutiny or analysis of cases in other jurisdictions. Neither will we concern ourselves with the comparative desirability of the various methods whereby creditors are enabled to collect their claims from stockholders. Authors of text-books differ somewhat in their ideas upon this subject; but, when we admit the power of the Legislature to make laws for the enforcement of the claims of creditors of corporations against stockholders, we are not at liberty to uphold or overthrow such laws according to our opinions of their fairness or propriety. We are not even called upon to discover whether we can justify, if we may, any given act of the Legislature. It is enough for us to know that, "ita est scripta lex." Therefore we will resist the temptation to review the interesting discussion of counsel on both sides, regarding the reasons for the adoption by the framers of Constitutions, and by Legislatures, of various methods for making effective the rights of creditors in cases like this. The comparative advantages of one method over another do not concern us.

It follows from the foregoing that the judgment from which this appeal is taken must be affirmed, and it is so ordered.

We concur: SLOSS, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

160 Cal. 574

In re ROHRER'S ESTATE. (L. A. 2,720.) (Supreme Court of California. Aug. 24, 1911.)

1. EXECUTORS AND ADMINISTRATORS (§ 221*)
—CLAIMS—SERVICES CARING FOR DECEDENT
—IMPLIED PROMISE—EVIDENCE.

Evidence on exceptions to the allowance in settlement of an executor's account of a certain sum allowed to his wife for caring for the testator during his last illness held sufficient to show that there was an implied promise of compensation.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 221.*]

2. EXECUTORS AND ADMINISTRATORS (§ 221*)
—CLAIMS—CARE OF DECEASED BY NEPHEW'S WIFE—PRESUMPTION AS TO GRATUITOUS SERVICES.

The relationship between a testator and his nephew's wife who cared for him during his last illness, and the fact that she and her husband resided in testator's home, raise no presumption that she took care of him gratuitously.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 901-903½, 1858-1876; Dec. Dig. § 221.*]

3. APPEAL AND ERROR (§ 181*)—OBJECTIONS NOT RAISED ON TRIAL.

An objection raised for the first time on appeal cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1141-1160; Dec. Dig. § 181.*]

Department 2. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Appeal by the heirs at law of John B. Rohrer, deceased, from an order settling the first account of R. I. Follmer, executor of decedent's last will. Affirmed.

Porter & Sutton, for appellants. A. J. Copp, Jr., and Jones & Weller, for respondents.

MELVIN, J. This is an appeal by the heirs at law of J. H. Rohrer, deceased, from an order settling the first account of R. I. Follmer, executor of the last will of said deceased. Two exceptions were made to the account, one based upon the alleged failure of the executor to include in the inventory certain real property of the value of \$8,000 and the other relating to an allowed claim for \$1,000 paid by the executor to his wife for nursing Rohrer during his last illness; but, as the first exception was evidently abandoned by appellants, we have only to consider that directed to the allowance of Mrs. Follmer's claim.

[1] The court allowed the claim not for \$1,000, but for \$600. No objection was made to the value of the services. Indeed, the testimony showed that for a period of nearly 19 months before his death the sick man required almost the constant attention of his nurse. The contention of the appellant is that Mrs. Follmer, whose husband was a nephew of the deceased, never expected any compensation for her services, and that, as she and her husband were living at the home of Mr. Rohrer without cost to them, her care of the sick man was prompted by motives of generosity alone. The evidence of Mrs. Follmer which was uncontradicted shows, however, that she had been promised compensation for the care of her husband's kinsman. She testified in part as follows: "No compensation was ever fixed for such services, and I never intended to charge him anything for such services, but he stated that I would be well paid for same. He at no time agreed to pay me any fixed sum for services rendered by me. I was prompted to perform such services out of kindness for Mr. Rohrer. I never kept any account whatever for such services. * * * I expected for such services a legacy or other remembrance. Mr. Rohrer never paid me anything for my services and I never asked him for anything for such services, and I never expected any compensation for such services in his lifetime." That an understanding between her and Mr. Rohrer existed with reference to her compensation is borne out by the fact that by his will he left her a legacy of \$1,000. This was void because she was a subscribing witness to the will. She testified that she never intended to file a claim against the estate of Rohrer, but that she determin-

ed to do so when her attorney told her that the legacy was void. Appellants' attorneys argue that Mrs. Follmer cannot offer a claim founded on an implied contract, simply because an expected legacy failed, because the contract must have contemplated payment for the services to be rendered at the time the agreement was made. In this behalf they cite *Andrus v. Foster*, 17 Vt. 560; *Murdock v. Murdock*, 7 Cal. 513-514; *Moulin v. Columbet*, 22 Cal. 509; *Estate of Hanson*, 133 Cal. 38, 65 Pac. 14, and *Crane, Adm'r. v. Derrick*, 157 Cal. 667, 109 Pac. 31. But we fail to see why payment for services rendered should be denied merely because the contemplated method of compensation failed. Mr. Scarborough who drafted the will testified that the testator desired to make claimant a legacy of \$1,000 as a reward for services rendered by her.

[2] This clearly shows that Mr. Rohrer intended to pay the claimant for her work as his nurse, and, taken in connection with the will itself and the testimony of Mrs. Follmer, it is amply sufficient to establish the contract. It has been held in New York that, even when a legacy has been left to a person seeking payment from the estate of one deceased for nursing him during his last illness, compensation should be allowed where the legacy was clearly insufficient to compensate for the services rendered. *Porter v. Dunn*, 131 N. Y. 314, 30 N. E. 122. There was no such relationship between Mr. Rohrer and Mrs. Follmer as would raise any presumption that the services were gratuitous. The facts that she was the wife of Mr. Rohrer's nephew, and that she and her husband resided in Mr. Rohrer's home, do not raise any presumption that she nursed the sick man without expectation of reward.

[3] Appellants also object to an allowance to A. J. Cook of an item of \$100 on account of attorney's fees, but, as this objection is raised for the first time on appeal, we cannot consider it here.

It follows that the judgment should be affirmed, and it is so ordered.

We concur: LORIGAN, J.; HENSHAW, J.

160 Cal. 551

In re LOUCKS' ESTATE. (S. F. 5,625.)

(Supreme Court of California. Aug. 23, 1911.
Rehearing Denied Sept. 22, 1911.)

1. DEATH (§ 6*)—SURVIVORSHIP—EVIDENCE—SUFFICIENCY.

The survivorship of one of two perishing in a wreck must be established by a preponderance of the evidence in a contest between the heirs of both decedents; it being the court's duty to determine the question of survival and heirship, irrespective of any contest.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 8, 9; Dec. Dig. § 6.*]

2. DEATH (§ 5*)—SURVIVORSHIP—APPLICATION OF STATUTE.

Code Civ. Proc. § 1963, subd. 40, providing that when two persons perish in the same calamity, and it is not shown from the circumstances or otherwise who died first, if one be under 15 or over 60 years of age and the other between those ages, the latter is presumed to have survived, would only apply where the times of death cannot be shown by direct or circumstantial evidence.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 7; Dec. Dig. § 5.*]

3. APPEAL AND ERROR (§ 1001*)—FINDINGS—CONCLUSIVENESS.

Unless no rational view of the evidence upon the question of survivorship of one of two dying in a common disaster would sustain the trial court's finding that a daughter survived her father, such finding must be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

4. DEATH (§ 6*)—SURVIVORSHIP—SUFFICIENCY OF EVIDENCE.

Evidence in a contest between the heirs of a father and those of his daughter, both of whom perished in a railroad accident, held to sustain a finding that the daughter survived her father.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 8, 9; Dec. Dig. § 6.*]

5. NEW TRIAL (§ 104*)—NEWLY DISCOVERED EVIDENCE.

In a contest between the heirs of a father and those of his daughter, both of whom perished in a railroad accident, in which the principal question was as to which survived, there was evidence that the girl was alive when witness started to town with her in a buggy after the accident, and that the father was placed upon the train at about the same time, and was then apparently dead. Two of the affiants on the motion for a new trial for newly discovered evidence were witnesses at the trial, and testified fully as to the time consumed by the various occurrences immediately after the accident. Held, that alleged newly discovered evidence as to the time that elapsed between the departure from the place of accident of the body of the girl and the placing of her father on the train was merely cumulative, and not ground for a new trial, though it would tend to contradict the opinions of several witnesses; it not showing that the father did not die shortly after being injured.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 218-220; Dec. Dig. § 104.*]

6. WITNESSES (§ 280*)—CROSS-EXAMINATION—ARGUMENTATIVE QUESTIONS.

In a contest between the heirs of a father and those of his daughter, both of whom perished in a railroad wreck, in which the question of survival was at issue, and there was evidence that the daughter was alive when her body was placed in a buggy, while her father was apparently dead when placed in a car, on cross-examination of a witness, who had testified that less than five minutes had elapsed between placing the girl's body in the buggy and that of her father in the car, a question calling his attention to an affidavit in which he had stated that five minutes had elapsed between those acts, and asking whether he could reconcile those two statements, was properly excluded, as tending to merely draw the witness into an argument.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 988, 990, 993; Dec. Dig. § 280.*]

7. EVIDENCE (§ 477*)—OPINION EVIDENCE—NONEXPERT WITNESS.

A nonexpert witness should not be asked whether it appeared to him that a man was alive at a certain time, not being qualified to answer the question.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2237-2241; Dec. Dig. § 477.*]

8. EVIDENCE (§ 314*)—OPINION EVIDENCE.

In a contest between the heirs of a father and those of his daughter, both of whom were killed in a railroad accident, a witness who had testified as to what he noticed when the father was placed in a car which would lead him to believe that life was not extinct was asked whether he knew why the father was placed on the stretcher while the girl was not. *Held*, that the question was properly excluded, its only purpose being to have witness testify that those placing the father's body on the stretcher believed he was alive, when their belief in that respect was not competent; only a statement of the physical facts supporting it being admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1168-1173; Dec. Dig. § 314.*]

9. TRIAL (§ 91*)—EVIDENCE.

A motion to strike testimony which was admitted without objection was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 242-244; Dec. Dig. § 91.*]

Department 2. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

In the matter of the estate of Wallace E. Loucks, deceased. From a decree of distribution decreeing a decedent's estate to his deceased child, and from an order denying a motion for a new trial, an appeal was taken. Affirmed.

J. M. Walthall and L. L. Dennett (L. L. Cory and E. E. Shepard, of counsel), for appellants. Frank Kauke and Ernest Klette, for respondents.

MELVIN, J. The brothers and sisters of Wallace E. Loucks, deceased, prosecute an appeal from a decree of distribution whereby the entire estate of said Wallace E. Loucks was given to the estate of his deceased child, Thelma G. Loucks, for the benefit of her heirs at law, her maternal grandparents. There is also an appeal from the order denying the motion of said brothers and sisters of Wallace E. Loucks for a new trial.

Wallace E. Loucks, his wife, Elsie May Loucks, and their infant daughter, Thelma G. Loucks, were killed in a collision between a railway train and the automobile in which they were passengers. The instantaneous death of Mrs. Loucks is unquestioned. The principal controversy, therefore, is upon the question whether or not Wallace E. Loucks survived his daughter, who was his only child. If he did outlive her, these appeals should be successful; if Thelma G. Loucks survived her father, the decree and order from which appeals are taken should be affirmed. The question of fact was tried by the court, a jury having been waived by all

interested parties, and the court found that Wallace E. Loucks died leaving his daughter Thelma as his only heir at law.

The appellants contend that from the evidence received in the trial of the issues of fact it was impossible to determine with any satisfactory degree of accuracy whether the father or the child died first, and that, therefore, the presumption of our statute (subdivision 40 of section 1963, Code Civ. Proc.) should prevail in their favor. That subdivision is as follows: "When two persons perish in the same calamity, such as a wreck, a battle, or a conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age, and sex, according to the following rules: * * * Fifth. If one be under fifteen, or over sixty, and the other between those ages, the latter is presumed to have survived."

Appellants also assert that the burden of proving the survival of the child beyond the life of her father was upon respondents, and that the evidence is so unsatisfactory as to compel the conclusion that they failed to meet the obligation of this rule. Appellants advance the argument that the respondents having failed to establish by a preponderance of evidence the death of Mr. Loucks prior to that of his daughter, even if no resort be had to our statute of presumptions, the decision should have been made in accordance with the rule of the common law whereby the courts refused to determine who of two persons so related, killed by the same calamity, survived the other, but distributed the estates as if the deaths occurred at the same instant. *Joseph v. Seward*, 91 Ala. 597, 8 South. 682; *Taylor v. Diploch*, 2 Phillim. Eccl. Rep. 261; *Mason v. Mason*, 1 Meriv. 308; *Underwood v. King*, 19 Beav. 459, and on review 4 De G. M. & G. 633; *Wing v. Angrave*, 8 H. L. Cas. 183; *Coye v. Leach*, 8 Metc. (Mass.) 371, 41 Am. Dec. 518; *Newell v. Nichols*, 12 Hun (N. Y.) 604; *Id.*, 75 N. Y. 78, 31 Am. Rep. 424. That this requirement of proof of survival by a preponderance of evidence was the rule at common law is not seriously doubted by respondents, although they deny its application under our probate system.

[1, 2] We think that the fact of survivorship must be established by a preponderance of evidence, not because the heirs of one decedent or of another begin a contest, but because it is the duty of the court to determine the matter of heirship and survival. This duty would still exist whether any one instituted any proceeding or not. Nor do we doubt that, if preponderating evidence were wanting to satisfy the court regarding this matter, the statute of presumptions would then be applicable to the

solution of the problem to be determined; but the provisions of subdivision 40 of section 1963, Code of Civil Procedure, are only applicable when it is not shown "who died first and there are no particular circumstances from which it can be inferred." This is only another way of saying that the above presumption is to be applied only where the relative times of the death of persons perishing by the same disaster cannot be shown by direct or circumstantial evidence or both. *Grand Lodge A. O. U. W. v. Miller*, 8 Cal. App. 28, 96 Pac. 22. In the case at bar there was a conflict of evidence, and the court, after hearing all of the testimony, found the essential fact to be that the child Thelma survived her father.

[3] We do not see that this differs from the ordinary case wherein conflicting testimony has been given; and unless we find, upon a study of the record, that in no rational view of the evidence was the court below justified in the conclusion reached, we must sustain the findings of that court.

The accident occurred a short distance from the town of Reedley, in Fresno county, and the hour, according to the testimony of the train conductor, was 10:45 a. m. After striking the automobile the train proceeded but a short distance, and then backed to the scene of the accident. Mr. Loucks was still in the automobile. His head had been so crushed that the bones of one side of the skull were comminuted, and there was a hole in the side of his head. The baby lay on the ground. There was only a red spot on the top of her head, and, according to the testimony of at least one witness, there appeared to be no fracture of her skull. Different witnesses testified to the signs of life in Mr. Loucks and the baby when the train backed to the scene of the disaster. Of the child, one witness, Mr. Chambers, said: "I saw the baby wriggling on the ground. It seemed to be very active, wriggling back and forth. I went up pretty close to it. It was breathing, but not whining, crying, or anything—no noise. Some one came along with a buggy, and we decided to load it in the buggy. They thought probably they would save the life, thought it would be quicker to take it in the buggy than to delay for the train." The same witness said with reference to Mr. Loucks: "Mr. Loucks was sitting on the floor of the automobile with his hands over the dash board. His body was wedged in. On the side of his head he had an injury. It was a kind of blood clot or something like that, a lot of blood coming out, kind of pouring out. I didn't notice any brains or anything of that kind, but it just bled a big clot of blood on the side of his head. He coughed up something, I don't know what it was. * * * Q. Well, what did you see with reference to any movements, muscular or otherwise, about him? A. Well, he gasped, simply—that is my idea of it, simply gasped

and that was all there was about it. I concluded at that time that he was dead. I didn't know that he was. Q. Anything afterwards at any time to make you change your mind? A. No. * * * This final gasp seemed to me like a contraction of the muscles more than anything else. Just simply that ended it. After he was put in the baggage car I saw him there. I saw nothing further that indicated life. As near as I can determine it the time from the time of the accident to the time the train started back to Reedley was about 15 minutes."

Mr. Chambers also said: "To the best of my recollection they were getting Mrs. Loucks in the car when they started off with the baby. It seems it all came around together. My recollection is she was practically in the car when they started to take the baby. Taking into consideration everything, I should think the train and buggy would get back to Reedley about the same time. Ordinarily the train would back a little faster." Mr. Golden, the baggageman, noticed a muscular relaxation just as Mr. Loucks was placed upon the stretcher before the body was lifted into the baggage car, but saw no movement afterwards. With reference to this matter he said: "Relaxation of the muscles is what I supposed I saw. I saw no other indications of life after that." No witness testified to any movement or other indication of life in Mr. Loucks after the train started for Reedley. Mr. Andrews testified that the baby Thelma was alive when he started with her in his buggy for Reedley, but she was apparently dead when he reached the hotel in town. She was breathing, however, when he arrived at a point one block from the hotel. If, as Golden testified, the train and the buggy reached Reedley about the same time, then the court was justified in concluding that Mr. Loucks expired first, because he last showed signs of life before the train started back to the town from the scene of the accident, while the child was alive after the buggy was in Reedley. It is true that the opposite theory may be sustained upon other portions of the evidence, and particularly by taking the estimates of the passage of time given by different witnesses. Mr. Andrews said he drove to town in four minutes after the baby was placed in his care. The conductor estimated that this was two or three minutes after the train returned to the place where the bodies were lying. The same witness stated that probably ten minutes elapsed between the time the train struck the automobile and the time the bodies of Mr. and Mrs. Loucks were lifted into the baggage car, and counsel for appellants argue that, therefore, the father survived the child by three minutes. This computation fails to take into consideration the time consumed by backing the train; but, aside from

that, conclusions based upon mere estimates of time are very rarely satisfactory. There are few things about which witnesses differ so greatly as questions of time. There was testimony tending to corroborate Golden's statement that the train and the buggy must have reached Reedley at about the same time. Mr. Andrews, after delivering the body of Thelma Loucks to Miss Works at the hotel in Reedley, hurried back in an automobile to the scene of the accident, and found that the train had gone. He said the train must have been at or at least near the station before he started from Reedley in the automobile; otherwise he would have seen it as it backed toward the town.

[4] Although the conclusion that Mr. Loucks survived his daughter might be deducible from certain selected portions of the testimony, there was also abundant evidence to justify the finding that Thelma outlived her father. The learned judge who tried the case, experienced as he is in weighing evidence, was satisfied upon this point. We cannot disturb his analysis of the conflicting evidence which he actually heard. If he had found it impossible to reach a satisfactory result from the evidence offered, doubtless he would have thrown the weight of the statutory presumption into the balance; but this he evidently found unnecessary.

[5] On the motion for a new trial appellants introduced certain affidavits reciting alleged newly discovered evidence to be offered for the purpose of showing the time that elapsed between the departure of Mr. Andrews with the baby and the placing of Mr. Loucks in the baggage car. This offered evidence was cumulative. Indeed, two of the affiants were witnesses at the trial and testified fully with reference to the time consumed by the various occurrences immediately after the accident. The affidavits of Drs. Pendergrass and Williams, who examined the body of Mr. Loucks upon its being exhumed after the hearing, were to the effect that the neck and jaw were not broken, and that death resulted from injuries to the head. While this testimony would have a tendency to contradict the opinions of certain witnesses, we do not see that it would detract from the conclusion that death must have resulted very soon after the injuries to the head of Mr. Loucks.

[6] Upon the cross-examination of Ed Dice, he was confronted with an affidavit in which he had deposed that five minutes elapsed between the placing of the baby in the buggy and the deposit of Mr. Loucks' body in the car. At the trial he said this period was, he thought, less than five minutes. Counsel asked this question: "Well, now, can you reconcile the two statements?" A general objection to the question was sustained, and this is assigned as error. The question was

argumentative, and the objection to it was properly sustained. The two statements were clearly not reconcilable, and the question was doubtless asked for the purpose of involving the witness in an argument. "The question did not call for a fact, but for an argument in answer to the argument contained in the question." *People v. Harlan*, 133 Cal. 21, 65 Pac. 11. This question was propounded to Dr. Steinwand: "Just describe, not necessarily in doctor's terms, but so we will understand them, what the extent of the injuries were." Objection was made on the ground that it was not shown that the head was in the same condition when the doctor examined it as it was immediately after the injuries were received. There was no force in this objection. True, the evidence showed some manipulation of the broken bones by the undertakers, but there was nothing to show any material change which could have been wrought by such mere handling of the head. The same may be said of a like objection made to a question regarding the immediate effect of such an injury. It was without merit.

[7] To the question propounded to witness Burgan, "Did it appear to you that the man was alive when he was placed in the car?" a general objection was sustained. The witness was not an expert. The ruling was proper, and the court suggested to counsel the correct method to be pursued, the judge saying: "The court did not rule that you cannot show those facts. It is simply to the form of the question—simply because it asks for an opinion on a matter he don't seem competent on."

[8] Thereafter the witness was permitted to state what he noticed at the time Mr. Loucks was placed in the car which would cause him to believe that life was not extinct. The objection to the question, "Well, do you know why he was placed on the stretcher and she was not placed on the stretcher?" was properly sustained. The only purpose of such a question would be to elicit a statement from the witness that those placing the body on the stretcher believed Mr. Loucks was alive. Their belief was not pertinent, but only a statement of the physical facts supporting such belief was admissible in evidence.

[9] A motion was made to strike out certain testimony of Dr. Booker. As the doctor testified without objection, there was no basis for such motion. *People v. Samario*, 84 Cal. 485, 24 Pac. 283; *Evans v. Johnston*, 115 Cal. 183, 46 Pac. 906.

From the foregoing it follows that the decree and order from which appeals are taken should be affirmed, and it is so ordered.

We concur: LORIGAN, J.; HENSHAW, J.

(160 Cal. 559)

BERRYMAN v. HOTEL SAVOY CO.

(L. A. 2,591.)

(Supreme Court of California. Aug. 23, 1911.)

1. COVENANTS (§ 30*)—PERSONS LIABLE ON PERSONAL COVENANTS.

All personal covenants are not enforceable in equity against the grantee of the covenantor.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 30; Dec. Dig. § 30.*]

2. TRIAL (§ 404*)—FINDINGS—CONSTRUCTION.

In an action to enjoin defendant from violating a building restriction contained in a deed from the common grantor of the predecessors in interest of both parties, a finding that the parties thereto intended the covenant to be "for the benefit of the entire tract of land of which the land in controversy was a part," immediately following a finding that the parties did not intend to create an assignment for the benefit of the land subsequently acquired by the plaintiff "or of any land whatever," construed as an entirety as to that matter, is not a finding giving to the plaintiff a right to enforce the covenant made for the benefit of his land which was included in the grantor's original tract.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957-962; Dec. Dig. § 404.*]

3. COVENANTS (§ 70*)—COVENANTS—RUNNING WITH THE LAND—CREATING EASEMENT.

A covenant not running with the land may be for the benefit of property owned by the persons who may enforce it, but that does not take it out of the category of personal covenants, and make it an easement.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 70, 71; Dec. Dig. § 70.*]

4. COVENANTS (§ 69*)—RUNNING WITH THE LAND—COVENANT IMPOSED—BURDEN.

Where the owners of land conveyed a parcel of it by deed reciting that it was made "with a covenant running with the land herein conveyed that a building * * * shall be erected upon the premises to be maintained as a first-class hotel, * * * the main part of which shall be located not less than seven feet from the front line and twelve feet from the southwest side line of the lot, the spaces between buildings and side lines to be maintained as flower gardens," with a provision that, on removal or destruction of the hotel, the grantee should rebuild, or upon failure to rebuild within one year, should convey the premises to the grantor, and there was nothing in the deed to show that the grantor had other adjacent land, a purchaser from his grantee was not charged with knowledge that the original grantor had other property to be benefited, and was entitled to read the covenant as one creating no servitude that would pass with the land, unless there was a privity of estate between the covenantor and his grantor at the time when the covenant was made.

[Ed. Note.—For other cases, see Covenants, Dec. Dig. § 69.*]

5. COVENANTS (§ 61*)—RUNNING WITH THE LAND—COVENANT CONFERRING BENEFIT.

A covenant conferring a benefit will pass with the land to which it is incident.

[Ed. Note.—For other cases, see Covenants, Dec. Dig. § 61.*]

6. COVENANTS (§ 57*)—RUNNING WITH THE LAND—PRIVITY OF ESTATE BETWEEN COVENANTOR AND COVENANTEE.

Where the same instrument containing a covenant imposing a burden on the land conveyed conveys the fee therein to the covenantor,

there is no privity of estate between the parties, and the burden will adhere exclusively to the original covenantor.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 54; Dec. Dig. § 57.*]

7. COVENANTS (§ 70*)—CONSTRUCTION—INTENT OF COVENANTOR.

Whether a covenant contained in a deed creates an easement or is only a personal covenant should be determined by a fair interpretation of the grant or reservation creating the right.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 70, 71; Dec. Dig. § 70.*]

8. COVENANTS (§ 69*)—RUNNING WITH THE LAND—COVENANT CONFERRING BENEFIT—PERSONAL COVENANT.

The owners of land conveyed a parcel of it adjacent to other land owned by them by a deed which "covenanted with a covenant running with the land herein conveyed" that a building should be erected upon the premises to be maintained as a first-class hotel, the main part of which should be located not less than seven feet from the front line and twelve feet from the southwest side line, the spaces between the buildings and side lines to be used for flower gardens, with a provision for a reconveyance on destruction of the hotel and failure to rebuild within a year. The hotel was constructed in accordance with the covenant, and the grantors afterwards conveyed the land adjacent to the 12-foot space by deed containing a restriction against placing any building nearer than seven feet to the front line, and by mesne conveyances title to this property, on which stood a dwelling house with lights on the northeast side, vested in the plaintiff. *Held*, in an action to enjoin the defendant from violating the covenant in the common grantor's deed of the first parcel, that the covenant was a personal one, not running with the land, and not capable of enforcement by the plaintiff.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. 67, 69; Dec. Dig. § 69.*]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by John H. Berryman against the Hotel Savoy Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Cryer & Tuttle, for appellant. Frank G. Finlayson, for respondent.

MELVIN, J. Plaintiff sought an injunction to restrain the defendant corporation from violating a certain building restriction contained in a deed from the common grantors of the predecessors in interest of both parties. Judgment was given in favor of defendant, and we are called upon to consider appeals from said judgment and from an order denying plaintiff's motion for a new trial.

There is very little, if any, material difference between the parties respecting the facts of the case; the only serious subject of controversy being the proper interpretation of the building restriction contained in the original deed, and the effect of a subsequent quitclaim deed whereby the original grantors sought to release the present defendant from any binding force of such restriction. In July, 1901, Abbott Kinney and Matilda Dudley were the owners of the Bay

View tract in Santa Monica. Three lots and part of a fourth (all adjoining and forming one parcel) were sold to Abner L. Ross, defendant's predecessor, in title. The deed of conveyance from Kinney and Dudley, parties of the first part, to Ross, contained in addition to the usual covenants in a deed of grant, bargain, and sale, the following: "It is provided and covenanted with a covenant running with the land herein conveyed that a building and improvements shall be erected upon these premises to be maintained as a first-class hotel, to cost not less than five thousand (\$5,000.00) dollars, and the main part thereof shall be located not less than seven (7) feet from the front line and eight (8) feet from the N. E. side line and twelve (12) feet from the S. W. side line of said lot, which spaces between buildings and side lines are to be maintained as flower gardens, and all front porches shall be kept open and unobstructed on the front and ends thereof; said hotel to be erected and opened within sixty (60) days from date hereof. * * *

And, it is hereby covenanted that if the hotel should be removed from said grounds or should be destroyed by fire or other elements, that parties of the second part shall rebuild said hotel or make other improvements on said lots to the full value as heretofore agreed upon and on failure so to do within one year, the said party of the second part, his heirs or assigns, shall reconvey the said premises to the parties of the first part, their heirs or assigns, on payment of twelve hundred and fifty dollars."

The hotel was constructed in accordance with the covenant above quoted. In September, 1902, one Junipher purchased from Kinney and Dudley's grantees of her interest in Bay View tract, property adjoining that previously conveyed to Ross. The deed to Junipher contained a restriction against placing any building nearer than seven feet to the front line of the property conveyed. By mesne conveyances the title to this property was vested in Mary A. Berryman in 1903. She erected a three-story building, one wall of which was on the line between her land and that of defendant. There are many windows for the admission of light and air to this building overlooking the 12-foot space on defendant's property. Mary A. Berryman on May 15, 1906, conveyed this last-mentioned property to her husband, the plaintiff, who owned it at the time when it is alleged defendant threatened to build on the 12-foot strip above mentioned in such a manner as to shut off light and air from the windows on that side of the building adjacent to defendant's land. In May, 1908, Kinney and Dudley quitclaimed to the Hotel Savoy Company all of the property previously conveyed by them to Ross; such conveyance being "given especially for the purpose of quitclaiming and releasing the covenants and restrictions contained in and provided by" their deed to Ross.

After a trial of the issues, the court found that the covenant providing for the maintenance of an open space next to the land afterwards acquired by plaintiff was not inserted in the deed for the benefit of "any particular property whatsoever," that it was not the intention of any of the parties to the deed to create an easement for the benefit of the land now owned by plaintiff, and that it "was the intention of the parties that said covenant should be for the benefit of the entire tract of land, of which the land in controversy was a part." The court also found that the title did not pass to defendant subject to the covenants contained in the deed to Ross; that such covenants created a mere personal right in favor of Kinney and Dudley; that this right was surrendered by the quitclaim deed; and that the covenants in the deed to Ross did not run with the land. It was also found that the wall of plaintiff's building encroached slightly on defendant's land.

Appellant contends that the deed to Ross and that to Junipher, each containing a restriction against building nearer the front line of the property than seven feet, creates reciprocal obligations enforceable in equity, either as covenants that run with the land or as personal covenants with which a court of chancery will compel compliance by persons taking the respective parcels with due notice of the mutual agreements. We cannot accept this view of the law.

[1] As was said in *Los Angeles Terminal Land Co. v. Southern Pacific R. R. Co.*, 136 Cal. 42, 68 Pac. 310: "That there are personal covenants enforceable in equity against the grantee of the covenantor is conceded; but that proposition is far from being applicable in all cases, for, if it were, it would result that all purely personal covenants in any manner relating to land would have the same effect as those which do run with the land." The covenant in the deed to Ross is affirmative. By it the covenantor agrees, in the future, to erect a building at a certain cost and in a certain manner. On the other hand, the deed to Junipher contains a negative covenant, a typical building restriction whereby the covenantor agrees to place no building nearer the front line of his property than seven feet. There is no mention of adjoining property in the deed to Ross. Indeed, there is nothing in that deed to show that Kinney and Dudley, the grantors of Ross, had any interest in any property other than that described in the said deed. In other words, no dominant tenement is described to which the restriction in the deed to Ross might make his land a servient tenement.

[2] Appellant insists that judgment should have been entered upon the findings, because the court found that the parties intended the covenant in question to be "for the benefit of the entire tract of land of which the land in controversy was a part." Since the whole includes a part, we are asked to interpret

this finding as giving to the plaintiff the right to enforce the covenant made for the benefit of his land which was included in the original Bay View tract. The finding upon this matter, however, must be read in its entirety. That part of it which declares that Ross and his grantors intended the covenant to operate for the benefit of the whole tract of land immediately follows a finding that the parties did not intend to create an easement for the benefit of the land subsequently acquired by Berryman "or of any land whatever." Read as a whole the finding is neither ambiguous nor in opposition to respondent's theory of the case.

[3] A covenant not running with the land may be for the benefit of property owned by the persons who may enforce it, but that fact does not take it out of the category of personal covenants and make it an easement. Examining the words of the covenant itself, we cannot see that it creates an easement running with plaintiff's land.

[4, 5] It purports to be a covenant running with the "land conveyed," and there is nothing in the deed itself to show that the grantors owned another foot of land in that vicinity. Defendant, therefore, as a subsequent purchaser of the land could not be charged with knowledge, derived from the record, that Kinney and Dudley owned other property to be benefited and the evidence adduced at the trial showed no such knowledge. He had the right to read the covenant in the deed to Ross, imposing as it did a burden on his property, as one creating no servitude that would pass with the land. To that covenant the language of this court in *Los Angeles Terminal Land Co. v. Southern Pacific R. R. Co.*, supra, is entirely applicable:

"It was not made for the benefit of the lot conveyed, but purported to impose a burden thereon by restricting its use; and while a benefit will pass with the land to which it is incident, a burden will adhere exclusively to the original covenantor, unless a privity of estate or tenure subsist or be created between the covenantor and covenantee at the time when the covenant is made. *Webb v. Russell*, 3 Term Rep. 393, 402; *Hurd v. Curtis*, 19 Pick. (Mass.) 459; *Bally v. Wells*, 3 Wils. 25, 29."

[6] "Here there was no privity of estate between the parties, for by the same instrument which contained the covenant the fee was conveyed to the covenantor. Under the feudal system the transfer of every estate created privity of tenure between the parties, and hence both the burden and the benefit of all covenants made by either bound and profited the assignee of either as an incident to the land. 'But, when the statute of quia emptores abolished subinfeudation, this privity no longer existed in cases where a fee was transferred and no reversion was left in the donor, and it became a rule that covenants which imposed any charge, burden, or

obligation upon the land were held not to be incident to it, and therefore incapable of passing with it to an assignee. * * *

But, on the other hand, if the covenant were one intended to benefit the land, it was considered to be incident to and run with the land, and therefore whoever might become the owner of the land would also become entitled to the benefit of the covenant.' *Rawle on Covenants for Title*, p. 314. So our Civil Code (section 1462) provides: 'Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property, or some part of it then in existence, runs with the land'; and section 1461 of the Civil Code provides that 'the only covenants which run with the land are those specified in this title, and those which are incidental thereto.'"

Appellant says that the judgment enables Kinney and Dudley to profit by their own wrong; that, after selling their property at high prices because of the improvements on the lots now owned by respondent, they quitclaim for a consideration to the hotel company that restriction upon which appellant had depended as insuring the free admission of light and air to one side of his building. But they are not parties to this action, nor are they seeking equitable relief. Respondent in purchasing the land in question had a right to depend upon the title as conveyed to his predecessors and to him. In the deed to Ross he found a provision which possessed all of the characteristics of a personal covenant. The deed provided that in the event of the destruction of the hotel by fire it must be rebuilt or improvements on the land must be made "to the full value as heretofore agreed upon," or otherwise the vendors or their assigns might repurchase at a stipulated price. There was no provision that the building restriction should apply to such new structure or improvements. True, as appellant says, this contingency never arose, but nevertheless the provision with reference to rebuilding in case of fire is very illuminating. It indicates that the parties did not intend the building restriction theretofore expressed in the deed to be perpetual and to pass as an easement, for, if such had been their intention, there would have been some effort to require the reconstruction of the building, in case of fire, upon the same lines and for the same uses as the original structure.

[7] The intention of the parties should be "determined by a fair interpretation of the grant or reserve creating the easement." *Peck v. Conway*, 119 Mass. 549. As was said in *Clapp v. Wilder*, 176 Mass. 341, 57 N. E. 695 (50 L. R. A. 120): "It seems to us that in all these cases it is better to get at the intention of the grantor from the language of the deed, interpreted in the light of the attending circumstances, than to conjecture the intent from the circumstances, and then to make the language of the deed bend to that."

[8] Authority is not lacking to support the interpretation given by the trial court to the deed which was the basis of this action. In *Badger v. Boardman*, 16 Gray (Mass.) 559, the facts were as follows: One Downing, the owner of a tract of land, conveyed to the defendant a certain lot, "subject to the following restriction: that no outbuildings or shed shall ever be erected westerly of the main building of a greater height than those now standing thereon." Downing subsequently conveyed the adjoining lot to another person, and plaintiff through various mesne conveyances acquired title to it. The bill whereby the plaintiff sought to enforce the restriction in the deed was dismissed, and in upholding this course the Supreme Court of Massachusetts said: "The infirmity of the plaintiff's case is that there is nothing from which the court can infer that the restriction in the deed from Downing to Boardman was inserted for the benefit of the estate now owned by the plaintiff. If it appeared that the parties to that conveyance intended to create or reserve a right in the nature of a servitude or easement in the estate granted, which should be attached to and be deemed an appurtenance of the whole of the remaining parcel belonging to the grantor, of which the plaintiff's land forms a part, then it is clear, on the principles declared in the recent decision of *Whitney v. Union Railway*, 11 Gray (Mass.) 359, 71 Am. Dec. 715, that the plaintiff would be entitled to insist on its enjoyment, and to enforce his rights by a remedy in equity. But there is an entire absence of any language in the deeds under which the parties claim, from which it can be fairly inferred that the restriction in the deed to the defendant against erecting his building above a certain height was intended to enure to the benefit of the estate now owned by the plaintiff. The restriction is in the most general terms, and no words are used which indicate the object of the grantor in inserting it in the deed. Nor is there any language in the deeds under which the plaintiff claims title which refers specifically to this restriction, or from which any intent is shown to annex the benefit of this particular restriction to the plaintiff's estate. Generally, when such a right or privilege is reserved, the purpose intended to be accomplished by it is stated in the conveyance or can be gathered from a plan referred to therein, or from the situation of the property with reference to other land of the grantor. All parties then take with notice of the right reserved, and the burden or easement imposed. But the conveyances in the present case contain no such clause, nor is there anything in the terms of the grant, or in the circumstances surrounding the parties when it was made, to lead to an inference in favor of the claim set up by the plaintiff. For aught that appears, it might have been intended by the parties for the benefit of the grantor only so long as he re-

mained the owner of any of the land of which that conveyed to the plaintiff originally formed a part. However this may be, it is certain that the defendant took his grant without any notice, either express or constructive, that this restriction was intended for the benefit of the plaintiff's estate. This is the material distinction between the case at bar and that of *Whitney v. Union Railway*, above cited. And it is vital to the rights of the parties, because, as the case stands, the plaintiff is not entitled to avail himself of the equitable principle, that the defendant has taken his estate with notice of a stipulation for the benefit of the estate now owned by the plaintiff, which in equity by accepting the grant the defendant would be bound to observe. We are therefore of opinion that the clause in the deed to the defendant, creating the restriction on the enjoyment of his estate, must be construed as a personal covenant merely with the original grantor, which the plaintiff cannot ask to have enforced in this suit."

Jewell v. Lee, 14 Allen (Mass.) 145, 92 Am. Dec. 744, has many features resembling the case at bar. One Bates, who was the owner of land lying on both sides of Orient street, Swampscott, conveyed a portion on the southerly side, bordering upon the ocean, "upon condition that the granted premises shall be used for no other purpose or purposes than those for which they are now used, namely, for bathing and boating upon the beach, excepting only that low bathing-houses may be built thereon; it being understood and agreed that the grantee, his heirs or assigns, may ornament the granted premises in such manner as shall not be inconsistent with the foregoing condition." Subsequently Stephen Wardwell released his interest to Eben, and the latter conveyed the westerly part thereof to plaintiff subject to the condition expressed in the deed from Bates. In the following year Wardwell conveyed to Gray the lot adjoining plaintiff's property on the east, subject also to the aforementioned condition, and Gray quit-claimed to defendant. The property on the north side of Orient street was also conveyed by Bates to the Wardwells, and through mesne conveyances Jewell and Lee obtained title to lots immediately opposite their respective holdings on the south side of the street. Defendant with full knowledge of the restrictions in the deed from Bates to Wardwell prepared in violation thereof to move a house onto his lot. Plaintiff sued to enjoin him from so doing. After the suit was instituted, defendant procured and caused to be recorded instruments releasing all the owners of land on the south side of the street from the condition in the deed to the Wardwells. Plaintiff's bill was dismissed, the court saying, among other things: "So far as we are able to see, there is nothing to indicate that the original grantor of the premises, in annexing the condition, had any in-

tent to regulate or control the possession or enjoyment of the premises for the benefit of subsequent owners or grantees of the estate, or any part of it, but that it was imposed by him solely for his own private and personal benefit, as the owner of other lots in the vicinity, in which the present plaintiff has no interest whatever."

Sharp v. Ropes, 110 Mass. 381, was a case in which the owner of a tract of land subdivided it into lots for sale. Two adjoining parcels were sold subject for the term of 15 years to certain restrictions, one of which was that no building should be erected within 20 feet of the street. Plaintiff and defendant were subsequent grantees, and the former sought to enjoin the latter from building within 20 feet of the street. In discussing the bill the court used the following language: "It is not claimed that in regard to any of the lots there was any written covenant by the grantor, and it does not appear that there was any express stipulation or direct assurance on his part that any person who should purchase a lot on the north side of that street should have the benefit of a restriction binding all the other purchasers to leave an open space between their dwelling houses and the street. The only ground upon which the plaintiff can rest her claim that the restriction in question was intended to operate for the benefit of all the purchasers, and to establish a general plan of building, by which each one would acquire a right in the nature of an easement in the land purchased by the others, is to be found in the fact that in his transactions with two separate and independent purchasers the grantor conveyed a portion of the land in each case, subject to the terms and conditions set forth in the bill of complaint. * * * It is undoubtedly true, and has often been decided, that where a tract of land is subdivided into lots, and those lots are conveyed to separate purchasers, subject to conditions that are of a nature to operate as inducements to the purchase, and to give to each purchaser the benefit of a general plan of building or occupation, so that each shall have attached to his own lot a right in the nature of an easement or incorporeal hereditament in the lots of the others, a right is thereby acquired by each grantee which he may enforce against any other grantee. *Whitney v. Union Railway Co.*, 11 Gray (Mass.) 359, 71 Am. Dec. 715; *Parker v. Nightingale*, 6 Allen (Mass.) 341, 83 Am. Dec. 632; *Linzee v. Mixer*, 101 Mass. 512; *Tulk v. Moxhay*, 2 Phil. Ch. 774. But in the case at bar there is nothing from which the court can infer that the restriction contained in the deed from Heath to the defendant was intended for the benefit of the estate now owned by the plaintiff. No such purpose can be gathered from the plan, or from the situation of the property with reference to other land of the grantor. It purports to be a condition imposed by the gran-

tor, and the deed points out the mode in which he, his heirs, or devisees may enforce it. Neither of the deeds under which these parties respectively claim purports to give the grantee any such right against any other grantee. For aught that appears, the condition may have been intended for the benefit of the grantor or his family, as long as they continued to own the dwelling house. The burden of proof is upon the plaintiff, if she insists upon giving to that condition any wider application, and this burden we do not find that she has sustained."

Of a similar restriction the same court said in *Skinner v. Shepard*, 130 Mass. 181: "Undoubtedly Willis Bucknam might have enforced the first restriction while he lived; but there is nothing in the deed which shows that the parties intended that the restriction as to building within 25 feet of Green street should create a servitude or easement in the granted land, which should attach to and be an appurtenance to any neighboring land. The mere fact which the plaintiffs offered to prove that Willis Bucknam at the time he conveyed to Munroe and others was the owner of land separated from the estate granted by the Woburn Branch Railroad is not sufficient to show that the object of the restriction was to benefit this land. In the absence of any words in the deed to this effect, or any reference to a plan showing a general scheme of improvement, the grantees took their estate without any notice, express or constructive, that the restriction was intended for the benefit of the adjoining estate. For anything that appears, it may have been intended only for the benefit of the grantor and for his personal convenience. *Jeffries v. Jeffries*, 117 Mass. 184; *Jewell v. Lee*, 14 Allen (Mass.) 145, 92 Am. Dec. 744; *Badger v. Boardman*, 16 Gray (Mass.) 559. We are therefore of opinion that the restriction as to building must be construed, not as a condition which the heirs of the grantor can enforce, but as a personal covenant merely with the grantor; and that, after his death, it created no incumbrance or servitude upon the estate for which the plaintiffs can maintain this action." See also, *Lowell Institution for Savings v. City of Lowell*, 153 Mass. 530, 27 N. E. 518, which holds that the burden of proof is on the plaintiff to show from the terms of the grant or from the situation and circumstances that the grantor intended to create a servitude enuring to the land itself. *Beals v. Case*, 138 Mass. 138; *Clapp v. Wilder*, *supra*; *Krekeler v. Aulbach*, 51 App. Div. 591, 64 N. Y. Supp. 908.

The case of *Judd v. Robinson*, 41 Colo. 222, 92 Pac. 724, 124 Am. St. Rep. 128, was one in which an owner of property in Colorado Springs sought to enforce a condition against the sale of intoxicating liquors contained in an original deed to defendant's grantor. Plaintiff had secured his title by mesne conveyances from the same original source. The deed provided that no intoxi-

cating liquor should ever be sold or disposed of at a place of public resort on the premises thereby granted, and the Supreme Court held that the condition was valid and enforceable as between the grantor and its grantees (citing *Cowell v. Colo. Springs Co.*, 3 Colo. 82, and *Cowell v. Springs Co.*, 100 U. S. 55, 25 L. Ed. 547), but that it by no means followed that any owner of a lot in Colorado Springs might enforce the clause against any other lot owner. In pointing out the distinction between a personal covenant and one inuring to the benefit of neighboring land, the court said: "*De Gray v. Monmouth Beach Clubhouse*, 50 N. J. Eq. 329, 24 Atl. 388, is one of the numerous authorities relied upon by appellants to sustain their right to maintain this action. The covenant in the deed in this action was: 'And the said party of the second part, for himself, his heirs and assigns, doth hereby covenant to and with the said Daniel Dodd and Francis Mackin, their heirs, executors and administrators, that he, the said party of the second part, his heirs or assigns, will not at any time hereafter erect or permit upon any part of the said lot any hotel, drinking saloon, gaming house, slaughter house, furnace, manufactory, brewery, distillery, or building for the curing of fish, or for any other uses or purposes that shall depreciate the value of the neighboring property for dwelling houses.' The opinion reviews the English and American authorities upon the subject here under discussion and sums up the conclusions of the court as follows at page 340 of 50 N. J. Eq., at page 392 of 24 Atl.: 'The law, deducible from these principles and the authorities applicable to this case, is that where there is a general scheme or plan, adopted and made public by the owner of a tract, for the development and improvement of the property, by which it is divided into streets, avenues and lots, and contemplating a restriction as to the uses to which buildings or lots may be put, to be secured by a covenant embodying the restriction, to be inserted in each deed to a purchaser, and it appears by writings or by the circumstances that such covenants are intended for the benefit of all the lands, and that each purchaser is to be subject to and to have the benefit thereof, and the covenants are actually inserted in all deeds for lots sold in pursuance of the plan, one purchaser and his assigns may enforce the covenant against any other purchaser and his assigns, if he has bought with knowledge of the scheme, and the covenant has been part of the subject-matter of his purchase.' It affirmatively appears from the amended complaint that appellants were not parties to the original covenant contained in the deed under which appellee Robinson derives title to her property. In such cases it is held that an action is not maintainable (1) in which it does not appear that the covenant was entered into for the benefit of the land of which plaintiff has become the owner, and

(2) in which it appears that the covenant has not entered into the consideration of plaintiff's purchase. From the very nature of the case, a covenant restricting the use of land will not be enforced against a subsequent purchaser without notice, actual or constructive, of the covenant. * * * By its terms the covenant is limited to the land 'hereby granted.' In this respect it differs widely from covenants which in express terms or by reasonable or necessary implication give notice that they are intended for the development or improvement of premises within a designated area, or for adjacent lots or neighboring property, as was the case in the New Jersey case, above cited, as indicated by that portion of the covenant which we have italicized."

Without further citation we may say that we think the great weight of authority is in favor of the conclusion reached by the trial court that the covenant in question was a personal one, not running with the land, and not capable of enforcement by the owner of adjoining property who was a subsequent grantee deriving title from the grantors in the deed to Ross.

We have examined the authorities cited by appellant, and find that they are all readily distinguishable in their facts from the case at bar. We have already shown how one of these (*De Gray v. Monmouth Beach Company*) has been analyzed by the Supreme Court of Colorado and found not applicable to a case like this. *Peck v. Conway*, 119 Mass. 546, and *Clark v. Martin*, 49 Pa. 289, were cases in each of which the covenant was made in favor of the owner of adjoining property occupied as a homestead at the time the covenant was made. In each case the immediately adjacent property was the only land possessed by the grantor, while in the case at bar the original grantors owned many lots in Bay View tract and elsewhere in Santa Monica, any one of which might have been benefited in some degree by the restriction set forth in the deed. In each of the cases last cited the grantor, who was the covenantor, owned but one lot of land in the vicinity of that taken by the grantee, who was the covenantor, and in each case the covenantor's land not only adjoined that of the covenantor, but was occupied by him at the time of the execution of the deed as a homestead. *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. 190, is not in point as the deed itself by its terms provided that the covenant should be for the benefit of the land retained by the grantor. The court said: "The covenant, it will be remembered, expressly declares that it shall be lawful for any person who shall become the owner of any of the land described in the ten deeds recited in the conveyance to the complainant, to maintain an action for a violation of the covenant against such person as may be the owner of complainant's land when the violation is committed. The lan-

guage of the covenant makes it certain, beyond all doubt, that the parties mutually intended that the restrictions put upon the land conveyed should have the effect to confer an important benefit on the grantor's adjacent land." In *Hills v. Miller*, 3 Paige (N. Y.) 254, 24 Am. Dec. 218, the covenant was one by the grantor for the direct benefit of the land and the plaintiff bought directly from the covenantee, the covenant itself operating as an inducement for him to make the purchase. *Muzzarelli v. Hulshizer et al.*, 163 Pa. 643, 30 Atl. 291, was a case in which from the language of the grant itself it was evident that the common grantor intended the restrictions to apply to all of the lots granted. In *Whitney v. Union Railway Co.*, 11 Gray (Mass.) 359, 71 Am. Dec. 715, and in *Parker v. Nightingale et al.*, 6 Allen (Mass.) 341, 83 Am. Dec. 632, the very language of the instruments creating the covenants showed that they were for the benefit of all of the grantor's lots and that the restrictions might be enforced by subsequent owners. *Hemsley v. Marlborough House Co.*, 68 N. J. Eq. 596, 61 Atl. 455, was like *Clark v. Martin and Peck v. Conway*, supra, a case in which the owner of a homestead granted certain property with a building restriction obviously for the benefit of her property reserving to herself and heirs the right to consent to a different plan of building.

Owing to the conclusion which we have reached with reference to the covenant which we have been discussing, it will be unnecessary to examine respondent's point that appellant is a trespasser upon its property, having built slightly over its line as found by the court, and that as such trespasser appellant has no standing in a court of equity without first doing equity himself.

There are no other points that require special notice.

The judgment and order are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

16 Cal. App. 560

BARTLEY et al. v. FRASER et al.
(Civ. 823.)

(District Court of Appeal, First District,
California. July 6, 1911.)

1. VENUE (§ 46*)—CHANGE OF VENUE—ACTION NOT BROUGHT IN PROPER COUNTY—ACTION AS TO REAL ESTATE.

An action, if one for determination of a right or interest in real property, being required by Code Civ. Proc. § 392, to be tried in the county where the real estate is situated, except that section 396 allows an action commenced in an improper county to be there tried, unless defendant demands a trial in the proper county, change to the proper county is required on demand of a defendant.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. § 68; Dec. Dig. § 46.*]

2. VENUE (§ 62*)—CHANGE OF VENUE—ACTION NOT BROUGHT IN PROPER COUNTY—PERSONAL ACTION.

An action, if personal, being required by Code Civ. Proc. § 395, to be tried in the county in which defendants or some of them reside, except that section 396 allows an action commenced in an improper county to be there tried, unless defendant demands a trial in the proper county, only one of the defendants being a necessary party on the facts pleaded, his demand alone for change of venue to the county of his residence is enough.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. §§ 100-103; Dec. Dig. § 62.*]

3. PLEADING (§ 49*)—CHARACTER OF ACTION—DETERMINATION.

The character of an action is determined by its substance, and generally this must be ascertained by a reference to the allegations of the complaint, without regard to the nature of the relief demanded.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 107-111; Dec. Dig. § 49.*]

4. VENUE (§ 62*)—CHANGE OF VENUE—PARTIES.

The complaint in an action against F. and a bank, alleging a sale by F. to plaintiff of an interest in a mine, the execution by F. to plaintiff of a deed thereof, the deposit of the deed with the bank in escrow to deliver to plaintiff on his making all the payments, plaintiff's discovery, before completing the payments, of fraudulent representations of F., plaintiff's then demand on F., refused by him, for delivery of the deed without further payments, threats of F. to cause the bank to deliver the deed to F. if plaintiff fails to make the payments, and threats of the bank to so deliver it, states no cause of action against the bank, so that it is not a necessary party, as, being agent of both plaintiff and defendant, it can without being made a party be restrained from delivering the deed to F. pending the action; and therefore, the action having been brought in an improper county, F. can have the venue changed as though he were the only defendant.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. §§ 100-103; Dec. Dig. § 62.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by W. R. Bartley and another against P. W. Fraser and another. From an order changing the venue, plaintiffs appeal. Affirmed.

Bourdette & Bacon, for appellants. R. B. Stolder and Bert Schlesinger, for respondents.

LENNON, P. J. This is an appeal from an order of the superior court of the city and county of San Francisco transferring the above-entitled action to the superior court of Mariposa county for trial.

The plaintiffs' complaint alleges substantially the following facts: In the month of April, 1909, the defendant P. W. Fraser offered to sell to the plaintiffs an undivided one-half interest in certain mining claims and water rights situate in Mariposa county, Cal. In the month of May following, the plaintiffs, relying upon certain representations of defendant Fraser, purchased an undivided one-half interest in the property referred to, and

agreed to pay therefor the sum of \$5,000 in installments, as evidenced by a written contract entered into by the plaintiffs and defendant Fraser, wherein the latter agreed to execute to the plaintiffs a deed for his interest in the property, and place the same, together with the contract of sale and an assignment thereof to plaintiffs, in the custody of the defendant City and County Bank of San Francisco, to be held in escrow. The terms and conditions of the deposit of the deed in escrow were that upon the payment by the plaintiffs to the bank for the use and benefit of the defendant Fraser of \$1,000 cash in hand and \$4,000 in three deferred payments of \$1,500, \$1,000, and \$1,500, respectively, the bank was to deliver the deed, the contract, and its assignment to plaintiffs. Upon the making of the contract of sale, the defendant Fraser executed a deed to the plaintiffs of the property in question, and made an assignment of the contract to plaintiffs, and placed the same in escrow with the defendant bank upon the conditions stated. Thereupon the plaintiff paid to the defendant Fraser the sum of \$1,000 in cash as per the contract of sale, and thereafter paid into the bank for the use and benefit of defendant Fraser the sum of \$1,500, but, before the maturity of the second deferred payment of \$1,000, the plaintiffs, as they alleged, discovered that they had been induced to purchase the mine by the deceit and fraud of the defendant Fraser who, prior to the execution of the contract of sale, had "salted" the property, and had grossly misrepresented to plaintiffs its value.

Upon the execution of the deed, the contract of sale, and the agreement of escrow, and in pursuance of the terms of the sale, the defendant Fraser placed the plaintiffs in possession of the property and the water rights appurtenant thereto. The plaintiffs thereafter in the working and development of the mine expended a sum in excess of \$4,000, and it was during the progress of this work that they discovered that the defendant Fraser had "salted" the mine by mixing high grade ore with low grade ore, and that none of the ore originally in place in said mine was, as has been previously represented by defendant Fraser, of the value of \$300 per ton, or of any value in excess of \$20 per ton. Immediately following this discovery the plaintiffs demanded of the defendant Fraser that he deliver to them the escrow deed, the contract of sale and its assignment, and forego all further payments previously provided and agreed upon in the contract of purchase.

It is further alleged in the plaintiffs' complaint that the defendant Fraser threatens to and will, upon the expiration of the time in the escrow agreement fixed for the final payment on the purchase price of the mine, and in the event of plaintiffs' refusal to pay the same, cause the defendant bank to deliver

all of the papers held in escrow to the defendant Fraser, and that the said defendant bank threatens to and will, in the event of plaintiffs' failure to comply with the terms and conditions of the escrow agreement, deliver the said papers to the defendant Fraser, to the irreparable damage of plaintiffs in the sum of \$6,500.

The prayer of the plaintiffs' complaint is that pendente lite the defendant bank be restrained from delivering the escrow papers to the defendant Fraser, and that he likewise be enjoined from receiving or accepting the said papers from the defendant bank; that, upon the final hearing of the cause, the temporary restraining order prayed for be made a permanent injunction; that plaintiffs have judgment against the defendant Fraser in the sum of \$6,500 for the damages which, it is alleged, will accrue to the plaintiffs if the escrow papers be delivered to the defendant Fraser, and, finally, for a decree, requiring and directing the defendant bank to deliver to the plaintiffs the escrow deed, the contract of sale, and its assignment. The defendant City and County Bank defaulted, and the defendant Fraser, after demurring to plaintiffs' complaint, requested a change of venue upon the grounds: (1) That the defendant Fraser was at all times mentioned in the complaint and up to the time of the hearing of the motion to change, a resident of Mariposa county. (2) That the City and County Bank is only a nominal party to the action, and has no interest whatsoever in the final result, and that Fraser is the only real party defendant in the action. (3) That the subject of the action was and is real property, all of which is in Mariposa county. In support of this motion for a change of venue the defendant Fraser filed, and read in evidence upon the hearing of the motion, an affidavit of merits in due form, wherein he deposed that then and for a long time prior to and at the time of the commencement of the action he was and had been a resident of the county of Mariposa. The motion was heard and determined solely upon the moving papers and the defendant's affidavit of merits.

[1] If this be an action for the determination, in any form, of a right or interest in real property, the cause of the controversy is local, and the action should have been commenced, and it must be tried in the county where the land lies. Const. art. 6, § 5; Code Civ. Proc. §§ 392, 396; *Sloss v. De Toro*, 77 Cal. 129, 19 Pac. 233.

[2] On the other hand, conceding the cause of action to be personal and transitory in its nature, the case was nevertheless properly transferred for trial to the county of defendant Fraser's residence if it be true, as he asserts, that he is the only party necessary and proper, on the facts pleaded, to be made a defendant in the action. Code Civ. Proc. § 395; *McKenzie v. Barling*, 101 Cal. 459, 36 Pac. 8.

[3] The relief demanded in a complaint does not indicate the character of an action. The substance of an action determines its character. And generally this must be ascertained by a reference to the allegations of the complaint, without regard to the nature of the relief prayed for. 1 Sutherland on Pleadings, § 186; *Strain v. Babb*, 30 S. C. 342, 9 S. E. 271, 14 Am. St. Rep. 905; *Southern Pacific Co. v. Hyatt*, 132 Cal. 240, 64 Pac. 272, 54 L. R. A. 522; *Murphy v. Crowley*, 140 Cal. 144, 73 Pac. 820; 1 Ency. Pl. & Pr. 146.

[4] "Every complaint in an action should be founded upon a theory under which the plaintiff is entitled to recover" (*Buena Vista, etc., Co. v. Tuohy*, 107 Cal. 243, 40 Pac. 386), and ordinarily the plaintiff is entitled to and will be given only such relief as the facts constituting the cause of action will warrant. The theory of the plaintiffs' cause of action in the case at bar is not readily discoverable. It is clear that the facts stated in the complaint would not support a judgment against the defendant bank for the delivery at this time of the escrow papers to the plaintiffs, and we are unable to perceive upon what theory the plaintiffs pray for this specific relief. The bank, as the depository of the escrow papers, was under the escrow agreement the agent of both parties to the sale. 1 *Devlin on Deeds*, § 237; *Cannon v. Handley*, 72 Cal. 140, 13 Pac. 315.

The plaintiffs' remedy, upon the performance of the conditions precedent to the delivery of the escrow papers and the failure of the bank to deliver the same to the plaintiffs, would have been an action against the bank to compel such delivery. *Devlin on Deeds*, § 327; *Stanton v. Miller*, 65 Barb. (N. Y.) 72. In such an action, however, the bank would be compelled to deliver the papers in controversy to the plaintiffs only upon the showing of a full and strict performance by them of the terms and conditions of the escrow agreement. *Beem v. McKusick*, 10 Cal. 538; *Dyson v. Bradshaw*, 23 Cal. 528. In this case it appears from the allegations of the complaint that the conditions upon which the deed and its accompanying papers were to be delivered to the plaintiffs have not been complied with; and it is evident, therefore, that the complaint will neither warrant nor support a decree requiring the defendant bank to deliver the papers in question to the plaintiffs. It is but fair to the pleader to infer that the procurement of such a decree was not the primary purpose of the action, and that the bank was joined as a defendant therein merely for the purpose of holding the escrow agreement in statu quo pending the litigation of the plaintiffs' grievance against the defendant Fraser. This result could have been accomplished, however, without making the bank a party defendant, for, assuming that the plaintiffs'

complaint stated a cause of action, involving in any wise the validity of the original contract of sale and the subsequent agreement of escrow, the bank, as the agent of both parties, might have been rightfully restrained from delivering the escrow papers to the defendant Fraser pending the hearing and determination of the action.

It is apparent that the complaint does not state a cause of action against the City and County Bank, and, this being so, the bank was at least not a necessary party defendant to the action, and therefore the right of the defendant Fraser to have the cause transferred to the county of his residence was not affected by making the bank a defendant. *Remington v. Cole*, 62 Cal. 311; *Sayward v. Houghton*, 82 Cal. 628, 23 Pac. 120. If the plaintiffs' complaint states a cause of action at all, it must be considered as founded upon the theory that plaintiffs were entitled to a judgment rescinding the original contract of sale coupled with damages, and perhaps a lien upon the property sold for the portion of the purchase price already paid.

In this view of the case, and with the defendant bank eliminated from the controversy, it is clear that the action is for the determination in some form of a right or interest in real property; or else it is in its results purely personal to the defendant; and in either event it was properly transferred to Mariposa county for trial.

The order appealed from is affirmed.

We concur: KERRIGAN, J.; HALL, J.

16 Cal. App. 594

MITCHELL v. MOSES (MITCHELL,
Intervener.) (Civ. 858.)

(District Court of Appeal, First District,
California. July 15, 1911.)

1. HUSBAND AND WIFE (§ 131*)—SEPARATE ESTATE—PRESUMPTIONS—REBUTTING PRESUMPTIONS.

The presumption arising under Civ. Code, § 164, that property conveyed to a married woman is her separate estate, may be overcome by parol testimony.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 131.*]

2. EJECTMENT (§ 69*)—PLEADING—EQUITABLE TITLE.

Defendant, relying upon an equitable title in ejectment, must specially plead the facts upon which his equitable defense rests.

[Ed. Note.—For other cases, see *Ejectment*, Dec. Dig. § 69.*]

3. HUSBAND AND WIFE (§ 249*)—COMMUNITY PROPERTY—NATURE.

Property acquired by either spouse during marriage, save by gift, devise, or descent, belongs to the community estate, regardless of which spouse took the conveyance.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 249.*]

4. HUSBAND AND WIFE (§ 270*)—COMMUNITY PROPERTY—TITLE OF HUSBAND.

As a husband may maintain against his wife an action to quiet title to community property, the title to which had been taken in the wife's name, the title of the husband is not a mere equitable one, as an equitable owner cannot maintain such action against the holder of the legal title, and he need not plead the facts on which his title rests.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 270.*]

5. HUSBAND AND WIFE (§ 254*)—COMMUNITY PROPERTY—WIFE AS TRUSTEE.

Where a deed expressly conveys property to a wife as her separate property, she may be held to have taken the legal title in trust for the community, where the consideration is paid from community funds.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 897–899; Dec. Dig. § 254.*]

Appeal from Superior Court, Marin County; Thos. J. Lennon, Judge.

Action by Marguerite Lee Mitchell against Maud B. Moses, in which J. W. Mitchell intervened, filing petition to quiet title against plaintiff. From a judgment for plaintiff and an order denying his motion for new trial, intervenor appeals. Reversed and remanded.

Jos. P. Lucey and Jas. P. Sweeney, for appellant. Thos. F. Barry, Sullivan & Sullivan, and Theo. J. Roche, for respondent. Thos. P. Boyd, for defendant.

HALL, J. Plaintiff brought an action in ejectment against Maud B. Moses to recover the possession of certain premises situate in Marin county. The defendant Moses was in possession of the premises under a lease from J. W. Mitchell, the husband of plaintiff. Plaintiff in her separate complaint alleged the locus in quo to be her separate property. The defendant Moses answered, denying the material allegations of the complaint.

The appellant, J. W. Mitchell, by leave of the court, filed a complaint in intervention to quiet title as against plaintiff. The complaint of the intervenor was in the ordinary form of a complaint to quiet title, and alleged that the intervenor was seised in fee of the premises in dispute, and that plaintiff claimed some interest in the premises adverse to the right of said intervenor. Plaintiff answered the complaint in intervention, and denied the allegations as to the seisin of the intervenor, and alleged that she was the owner and seized in fee of said property. Plaintiff recovered judgment both against defendant Moses and the intervenor. The intervenor moved for a new trial, which, being denied, he in due time appealed from the judgment and order.

The only grounds urged for a reversal concern the action of the trial court in sustaining objections to testimony offered by appellant. It was admitted by the intervenor at the outset of the trial that the title to the premises in suit on the 10th day of December, 1903, was vested in H. H. Wainwright

and Emily C. Wainwright. Plaintiff thereupon, in support of her title to the premises, introduced in evidence a deed of grant, bargain, and sale, in the usual form, reciting a consideration of \$10, executed by the said Wainwrights on said 10th day of December, 1903, and conveying the said premises to said plaintiff, described therein as the wife of appellant. The deed did not recite that the property was granted to the grantee as or for her separate property, but granted to her the premises "in fee simple absolute." Plaintiff introduced no testimony as to the consideration paid for the premises or the like, but relied simply on the deed and the presumptions now arising from a conveyance to a married woman under section 164, Civ. Code.

The intervenor was called as a witness on his own behalf, and without objection testified that he paid the consideration for the property, but upon the objection of plaintiff was not allowed to state a conversation which he had with his wife, the plaintiff, about the purchase of the property prior to its purchase. Upon the objection of plaintiff he was not permitted to answer questions which would have elicited an explanation as to why the title to the property was taken in the name of his wife. It is manifest that, if the witness had been allowed to answer the questions objected to, he might have shown that it was not intended, as between him and his wife, that the property should be her separate property, or that by allowing the conveyance to be made to her he intended any gift of the property to her. In other words, the rejected testimony might have overcome the presumption now arising, under section 164, Civ. Code, that by the conveyance to her the title was vested in her as her separate property, and might have clearly shown the property to be community property.

[1] We do not understand respondent to dispute that the presumption arising from a conveyance to a married woman that the property conveyed is her separate property may be overcome by parol testimony in a proper case; for of this there can be no question. *Fanning v. Green*, 156 Cal. 279, 104 Pac. 308. Her contention is, however, as we understand it, that, where title to community property is taken in the name of the wife, the title of the husband is but an equitable title, and that the husband will not be allowed to prove such equitable title without specially pleading the facts upon which his equitable title rests.

[2] It cannot be denied that one relying upon an equitable title as a defense in an action in ejectment must specially plead the facts upon which his equitable defense rests.

[3] But this rule has never been held to apply in actions to quiet title as between husband and wife where title to community

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

property has been taken in the name of the wife. In such case the title of the husband is more than a mere equitable title. Property acquired by either husband or wife during marriage, unless it be acquired by gift, devise, or descent, belongs to the marital community, and of this property the husband has absolute control, except that he may not without the consent of his wife make a gift thereof. The character of the ownership in community property was early discussed by Justice Field in *Meyer v. Kinzer*, 12 Cal. 248, 73 Am. Dec. 538. The court was discussing the effect of a conveyance made to the wife, and our statutes concerning separate and community property of married people. It said: "The statute proceeded upon the theory that the marriage, in respect to property acquired during its existence, is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution, in case of surviving the other. To the community all acquisitions by either, whether made jointly or separately, belong. No form of transfer or mere intent of parties can overcome this positive rule of law. All property is common property, except that owned previous to marriage or subsequently acquired in a particular way."

In *Gwynn v. Dierssen*, 101 Cal. 564, 36 Pac. 103, an action to quiet title, it was said: "The deed from Taylor to Cornelia S. Gwynn [a married woman] vested the title in the marital community." The title to property may be vested in the marital community by a conveyance to either spouse. *Nilson v. Sarmant*, 153 Cal. 524, 96 Pac. 315, 126 Am. St. Rep. 91; *Dimmick v. Dimmick*, 95 Cal. 323, 30 Pac. 547; *Morgan v. Lones*, 78 Cal. 53, 20 Pac. 248; *Fanning v. Green*, 156 Cal. 279, 104 Pac. 308; *Bollinger v. Wright*, 143 Cal. 292, 76 Pac. 1108; *Hammond v. McCullough*, 115 Pac. 216, decided April 7, 1911; *Lewis v. Burns*, 122 Cal. 358, 55 Pac. 132. The law places the ownership of community property in the husband. *Fulkerson v. Stiles*, 156 Cal. 704, 105 Pac. 966, 26 L. R. A. (N. S.) 181.

[4] All of the cases above cited involved the effect of a deed to a married woman, and all were actions to quiet title. In none was it sought to obtain a decree to compel a conveyance of the title acquired by the wife to the husband or his successor in interest, which would have been the more appropriate remedy if the conveyance to a wife vested in the husband an equitable title only. In some of said cases the facts were specially pleaded, while in others the allegations were in the usual form of a complaint to quiet title. This was so in *Bollinger v. Wright*, supra, and *Hammond v. McCullough*, supra, in each of which the property involved was acquired in the name of the wife and subsequent to the amendment of 1889 to section

164, Civ. Code, and in each of which the title of the husband—that is, of the marital community—was upheld upon parol evidence overcoming the presumption arising from the conveyance being to the wife.

The cases above cited certainly establish the rule that the husband, or one claiming under him, may maintain an action to quiet title against the wife, or one claiming under her, where title to community property has been taken in her name. This being true, it must follow that in such cases the title taken by the husband is not merely an equitable title, for it is well established that the holder of an equitable title only cannot maintain action to quiet title against the holder of the legal title. His action must be one to compel a reconveyance or to otherwise enforce a trust. *Von Drachenfels v. Doolittle*, 77 Cal. 296, 19 Pac. 518; *Nidever v. Ayres*, 83 Cal. 39, 23 Pac. 192; *Bryan v. Tormey*, 84 Cal. 126, 24 Pac. 319; *Harrigan v. Mowry*, 84 Cal. 456, 22 Pac. 658, 24 Pac. 48; *Chase v. Cameron*, 133 Cal. 231, 65 Pac. 460.

That the husband takes the whole title, both legal and equitable, under a deed to the wife of community property, is also supported by *Peiser v. Griffin*, 125 Cal. 9, 57 Pac. 690. It is there said of property claimed to have been purchased with community funds, "if the property was community property, the legal title remained in the husband, notwithstanding that the deed was taken in the name of the wife, and the wife could not pass title to it."

The court also quotes with approval from *Pomeroy on Community Property* the following: "If land being community property is conveyed to the wife during marriage, she takes no real title to it. The whole title, both legal and equitable, at once vests in the husband by means of the deed to the wife." See, also, *In re Burdick*, 112 Cal. 387, 44 Pac. 734.

[5] It is only where the deed expressly conveys the property to the wife "as her separate property" that it may be said that she takes the legal title in trust for the community, where the consideration is paid from community funds. Such was the case in *Shanahan v. Crampton*, 92 Cal. 9, 28 Pac. 50. See, also, *Swain v. Duane*, 48 Cal. 359. In the case at bar the conveyance was not in terms to the wife as her separate property, but was in the usual form of a grant, bargain and sale deed.

The court erred in refusing to allow appellant to prove by parol testimony that the property conveyed by the deed to plaintiff did not become her separate property, but was the property of the marital community.

For this reason, the judgment and order are reversed.

We concur: LENNON, P. J.; KERRIGAN, J.

16 Cal. App. 583; 17 Cal. App. 27

PEOPLE v. DRESSER. (Cr. 322.)

(District Court of Appeal, First District, California. July 13, 1911. On the Merits, Aug. 24, 1911.)

1. CRIMINAL LAW (§ 1110*)—APPEAL—RECORD—REMISSION TO LOWER COURT FOR CORRECTION.

An appeal from a judgment of conviction, allowed by Pen. Code, § 1237, is required by section 1239 to be taken by oral announcement in open court when the judgment is rendered, and the clerk is required by section 1241 to immediately enter such announcement on the minutes, but his failure to do so does not invalidate the appeal. Section 1246 requires the clerk to transmit a copy of the minutes of the trial and the proceedings for new trial. *Held* that, where the papers sent up did not show any announcement of defendant's appeal, although the probability of such appeal was apparent, defendant would be given an opportunity to apply to the trial court for a correction of the minutes; the corrected record to be supplied upon a suggestion of diminution of the record.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1110.*]

2. CRIMINAL LAW (§ 424*)—EVIDENCE—DECLARATIONS OF CODEFENDANT—ABSENCE OF DEFENDANT.

Statements made by an accomplice or codefendant, after the completion of the offense, and which are simply narratives of the events concerning the accomplished crime, are not admissible against the defendant on trial, unless made in his presence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1002-1010; Dec. Dig. § 424.*]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

George W. Dresser was convicted of forgery, and he appeals. Motion to dismiss the appeal denied, judgment reversed, and cause remanded for new trial.

Philip C. Boardman and Joseph L. Taaffe, for appellant. Attorney General Webb, for the People.

HALL, J. This case was upon the calendar for argument on May 8th last, and, the only brief on file at that time being the opening brief of appellant, an order was made allowing respondent 15 days to file its brief and appellant 15 days to reply. The Attorney General subsequently filed, on behalf of respondent, a brief in which he asks that the appeal be dismissed and the judgment affirmed, because the record fails to show that an appeal has ever been taken by defendant to this court.

[1] The statute allows a defendant to appeal from a final judgment of conviction, from an order denying a motion for a new trial, and from an order, made after judgment, affecting the substantial rights of the defendant. Pen. Code, § 1237. The appeal from the judgment and from an order made after judgment must be taken by oral announcement in open court, made at the time

of the rendition of the judgment or making of the order respectively. Pen. Code, § 1239. The fact of such announcement "must be by the clerk immediately entered in the minutes of the court. But the failure of the clerk to so enter the same in the minutes shall in no way affect or invalidate the appeal." Pen. Code, § 1241. Section 1246, Pen. Code, provides that, upon the appeal being taken, the clerk must within 20 days transmit to the clerk of the appellate court copies of certain papers, among which are "a copy of the minutes of the trial" and "a copy of other minutes of the action, including the proceedings on motion for arrest of judgment or new trial."

In accordance with this section, the clerk of the trial court did transmit to this court copies of the papers designated; but the minutes of the court nowhere show that the defendant took any appeal. The minutes of the clerk under date of January 30, 1911, show the rendition of judgment, and after reciting the judgment conclude with the statement that "the defendant was then remanded to the custody of the sheriff" etc., but make no mention of any appeal or of any announcement in open court of any appeal. If in fact the defendant did in open court take an appeal, as required by section 1239, Pen. Code, the clerk should immediately have made an entry thereof in the minutes, following the statement of the judgment, to the effect, substantially, that the defendant thereupon in open court personally, or through his attorney, orally announced that he appealed from such judgment.

The failure to immediately make such entry does not invalidate such appeal, if in fact taken (Pen. Code, § 1241); but we think the record before us should show that such appeal was taken. The orderly and proper way to do this is by the copy of the minutes transmitted by the clerk under section 1246, Pen. Code. When it is discovered that the clerk has failed to make the proper entry in his minutes of the taking of the appeal, the party aggrieved may and should apply to the trial court, upon due notice to the other party, for an order to require the clerk to correct and amend his minutes in accordance with the fact.

In this case appellant in his reply brief claims that his appeal was in fact taken, and asks to be allowed to supply the record thereof. There has been transmitted to this court the record provided for in section 1246, and also the reporter's transcript of the proceedings provided for in sections 1247 and 1247a. It is thus apparent that there is a strong probability that the appeal was in fact taken, but that the clerk inadvertently failed to make the proper entry thereof in his minutes. It was never intended that a defendant should lose his right to be heard on his appeal through such neglect of the clerk.

Section 1241, Pen. Code. Under the circumstances of this case we think that justice requires that appellant be allowed an opportunity to apply to the trial court for a correction of the minutes of such court. If such correction be obtained, he may, upon suggestion of diminution of the record, upon motion duly made, supply this court with the proper record of his appeal.

In order that appellant may take the necessary steps to perfect his record, we think the submission in this case should be set aside and vacated, and the cause placed upon the next calendar of this court for oral argument, and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

On the Merits.

HALL, J. Upon the first calling of this case the Attorney General made the point that the record did not show that any appeal had been taken. Appellant has since filed with this court a certified copy of the minute entry from the clerk's record, showing that the appeal was taken by oral announcement in open court as the law prescribes. Appellant was jointly charged with one Bjerke with forging and uttering, with knowledge of the forgery, a Wells-Fargo money order. He was separately tried and convicted, and upon judgment being pronounced took an appeal from the judgment to this court.

[2] The principal point urged for a reversal is based upon the action of the court in permitting the prosecution to prove, by the officer who arrested the appellant's codefendant, Bjerke, certain statements, made to the officer by said Bjerke, tending to implicate defendant in the commission of the offense with which he was charged. These statements by Bjerke were not made in the presence of the defendant on trial. They were made after the completion of the offense for which appellant was being tried, and were in no wise made in furtherance of any common design or in or about the forgery or uttering of any writing whatever. The statements in question were simply narratives of past and completed events, and, not being made in the presence of the defendant upon trial, were clearly inadmissible as against him. Nothing is better established than that statements made by an accomplice or co-conspirator, after the completion of the offense, and which are simply narratives of the events concerning the accomplished crime, are not admissible against the defendant on trial, unless made in his presence. *People v. Moore*, 45 Cal. 19; *People v. Stanley*, 47 Cal. 113, 17 Am. Rep. 401; *People v. Aleck*, 61 Cal. 136; *People v. Gonzales*, 71 Cal. 571, 12 Pac. 783.

The testimony thus erroneously admitted tended strongly to prove appellant guilty of

the offense of which he was convicted. The ruling of the court in admitting it over the objection of appellant was thus extremely prejudicial to him, and compels the overruling of the judgment. We find no other error in the record.

The judgment is reversed, and the cause remanded for a new trial.

We concur: LENNON, P. J.; KERRIGAN, J.

16 Cal. App. 586

WALSH v. BRADSHAW (Civ. 831.)

(District Court of Appeal, First District, California. July 13, 1911. Rehearing Denied Aug. 12, 1911. Denied by Supreme Court Sept. 11, 1911.)

1. APPEAL AND ERROR (§ 1002*)—VERDICTS—CONFLICTING EVIDENCE.

In reviewing a verdict based on conflicting evidence, that of the prevailing party must be taken as true as well as all reasonable inferences deducible from such evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR—EXCLUSION OF IMPEACHING EVIDENCE.

The exclusion of a verified complaint, introduced to discredit a witness, was not erroneous; the witness having admitted substantially everything contained in the complaint.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4194-4199, Dec. Dig. § 1057.*]

3. APPEAL AND ERROR (§ 1056*)—REVIEW—HARMLESS ERROR.

In an action by a carpenter against a lessor for improvements placed in the lessor's building for the use of the lessee, evidence that the lessor did not own the fixtures upon the leased premises, and was not to become the owner thereof at the end of the term being collateral to the issue, which was whether the lessor agreed to pay for them, the exclusion of such evidence was harmless error where both lessee and lessor had testified as to the agreement, as to ownership.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Thomas Walsh against N. E. Bradshaw. From a judgment for plaintiff and an order denying defendant's motion for a new trial, defendant appeals. Affirmed.

E. T. Manwell and F. H. Dam, for appellant. F. V. Meyers, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, in an action for the reasonable value of work and labor performed and materials furnished.

The assignors of plaintiff, Bailey Bros., a corporation, at the instance of the defendant, erected for her a two-story frame building

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

on Folsom street, in San Francisco. At about the time of the completion of the building one Fred Roy, having made arrangements with the defendant for a lease of the lower floor of said building, requested Bailey Bros., through James Bailey, to do the necessary carpenter work to fit up that floor for a restaurant. This work was done, and the main question in the case is, Who was to pay for it, the defendant or Roy?

Several witnesses introduced by the plaintiff testified that the defendant told the assignors to proceed with the work for Roy, and that she would pay for it. Roy, who subsequently married the defendant, testified that he was to settle for the work with Bailey Bros. Defendant in her testimony said that she told Bailey Bros. that the proposed work was a matter wholly between Bailey Bros. and Roy; that she would have nothing to do with it. Robert Turpin, a witness called by the defendant, corroborated the testimony given by her and by Roy.

[1] Defendant's counsel have filed a painstaking brief, and they have made ingenious points indicating that Roy, and not the defendant, is liable for the reasonable value of the work done and materials furnished, but there is a plain conflict in the evidence, and when this is true, as has been said numberless times, appellate courts must consider all the evidence in favor of the prevailing party as true, as well as all reasonable inferences deducible therefrom. *Woody v. Bennett*, 88 Cal. 243, 26 Pac. 117; *Meyer v. Gt. Western Ins. Co.*, 104 Cal. 381, 38 Pac. 82. So considering the testimony here, it abundantly supports the finding of the court that the defendant was to pay for the work. What has just been said applies as well to defendant's contention that the evidence does not sustain the finding of the court as to the reasonable value of the materials furnished and work done. As to these matters, there was a conflict in the evidence, and under the rule the finding cannot be disturbed on appeal.

[2] Prior to the commencement of this suit, E. J. Bailey, in his individual capacity, brought an action against the defendant to recover for the same work and labor and materials furnished forming the subject-matter of this suit. In the present action E. J. Bailey having testified that Bailey Bros. did the work and furnished the materials, the defendant sought on cross-examination of the witness to introduce his verified complaint in the former action for the purpose of discrediting and impeaching his present testimony. No error was committed by the trial court in sustaining the objection to this testimony interposed by the plaintiff, for the simple reason that the witness had already in his cross-examination admitted substantially everything sought to be shown by the offered complaint.

[3] By a ruling of the court defendant was prevented from showing that she never owned the fixtures put in the restaurant by Bailey Bros. She argues that if she did not own the fixtures, or was not to become the owner thereof at the end of the lease to Roy, this is a circumstance tending to show that she did not agree to pay Bailey Bros. for the making and installation of them, and that therefore the rejection of the testimony was error.

The proposed testimony called for an arrangement between the defendant and her husband collateral to any of the issues in the case. The husband claimed to own the fixtures, and he and his wife testified that he and not she was to pay for them, and under all the circumstances of the case we believe that the rejection of this testimony was a matter too inconsequential to merit serious consideration.

A careful examination of the record reveals no error. The judgment and order are therefore affirmed.

We concur: LENNON, P. J.; HALL, J.

16 Cal. App. 589

JOHN BOLLMAN CO. v. S. BACHMAN & CO. et al. (Civ. 819.)

(District Court of Appeal, First District, California. July 15, 1911. Rehearing Denied Aug. 12, 1911.)

1. LIMITATION OF ACTIONS (§ 124*)—ACTIONS AGAINST FIRMS—BRINGING IN NEW DEFENDANTS.

Under Code Civ. Proc. § 388, providing that, when two or more persons are associated in any business transacted under a common name, the associates may be sued by such common name, summons being served upon one or more of them, the judgment binding the joint property of all, as if all had been named defendants and had been sued upon their joint liability, the filing of a complaint against a partnership as sole defendant does not stop the running of limitations upon the cause of action against the partners individually, and an amendment to a complaint against the partnership alone, which brings in the partners, adds new parties defendant.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 541; Dec. Dig. § 124.*]

2. APPEAL AND ERROR (§ 864*)—RESERVATION OF GROUNDS OF REVIEW—QUESTIONS PRESENTED.

Where two different judgments were rendered in the same action, a party appealing from only one of them may not have review of matters decided by the other.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 864.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by the John Bollman Company against S. Bachman & Co., a partnership, and against S. Bachman and another. From a judgment that plaintiff take nothing as

against the last-named defendants, plaintiff appeals. Affirmed.

Houghton & Houghton, for appellant. Heller, Powers & Ehrman, for respondents.

HALL, J. Plaintiff on the 4th day of January, 1907, filed a complaint in an action for goods sold and delivered, against "S. Bachman & Company." It was alleged in the complaint that "the defendant S. Bachman and Company was a copartnership," but no attempt was made in the original complaint to allege who comprised the copartnership. The prayer was for judgment against "the defendant." In other words, the action was brought under section 388, Code Civ. Proc., which provides that persons associated in business and transacting such business under a common name may be sued by such common name. Subsequently, and after the statute of limitations had run against the action, the plaintiff amended its complaint so as to make the title read: "The John Bollman Company, a Corporation, Plaintiff, vs. S. Bachman & Company, a Copartnership, Simon Bachman and Arthur Bachman, Copartners Doing Business Under the Firm Name of S. Bachman & Company, Defendants," instead of: "The John Bollman Company, a Corporation, Plaintiff, vs. S. Bachman & Company, a Copartnership, Defendant." The amended complaint also contains appropriate allegations to charge Simon Bachman and Arthur Bachman, and the prayer is for judgment against "the defendants." The defendants "Simon Bachman and Arthur Bachman, Copartners Doing Business Under the Firm Name of S. Bachman & Company," filed a demurrer to the amended complaint, pleading the bar of the statute of limitations. This demurrer was sustained without leave to amend. Thereafter plaintiff amended its complaint by eliminating from the title the words "Simon Bachman and Arthur Bachman, Copartners Doing Business Under the Firm Name of S. Bachman & Company." The defendant S. Bachman & Co. filed its answer thereto, and, after trial and verdict rendered, judgment was entered against S. Bachman & Co., a copartnership, on May 7, 1909. Subsequently, on May 17, 1909, a judgment was also entered upon demurrer sustained to the effect that plaintiff take nothing as against S. Bachman and Arthur Bachman. It is from this latter judgment only that any appeal was taken, the notice of appeal explicitly referring to and describing the latter judgment, both by the date of its entry and reciting the substance thereof.

The appellant contends that the court erred in sustaining the demurrer and also in entering two different judgments in one action.

[1] Both questions are to be determined, we think, by the answer to the question, Did the amendment bring in new defendants? Respondents concede that no new cause of action was stated by the amended complaint, but contend that by the addition of Simon

Bachman and Arthur Bachman as parties defendant new parties were brought in, and that for the first time a cause of action was stated against them, to which they were entitled to plead the statute of limitations. The contention of the appellant, on the other hand, is that suit brought against a copartnership by the copartnership name only is a suit against all the members of the copartnership, in which the judgment can only be enforced under the section (388, Code Civ. Proc.) as it existed when this action was commenced, against the partnership property; and that consequently an amendment, adding as parties defendant the members of the firm, only enlarges the remedy by authorizing a judgment under which the individual property of the copartners may be taken in execution. He thus contends that this case comes within the rule of *Frost v. Witter*, 132 Cal. 421, 64 Pac. 705, 84 Am. St. Rep. 53.

In this contention we cannot agree. While it is true that in most respects a partnership is but a relation with no legal being as distinct from the members who comprise it, yet in many respects it is treated as a legal entity both as regards its rights and obligations. 30 Cyc. 423.

For the purposes of bringing suit under section 388, Code Civ. Proc., as it existed when this action was brought, a copartnership, we think, must be considered to be a legal entity distinct from its individual members. The section at that time read as follows: "When two or more persons, associated in any business, transact such business under a common name, whether it comprise the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, in the same manner as if all had been named defendants, and had been sued upon their joint liability." While it is true that the section says the *associates may be sued* by such common name, the whole section indicates that the action in substance is an action against the associates as such, and not against the individuals. The section recognizes the association, or, as in this case, the copartnership, as a distinct entity, against which the partnership obligation may be enforced. In an action brought, as this was, the partnership is the only defendant.

This is the view taken by the court in *Davidson v. Knox*, 67 Cal. 143, 7 Pac. 413. Referring to section 388, Code Civ. Proc., the court there said: "In an action brought under this section it is not necessary to name all of the associates as defendants. In fact, the association designated by its common name is the only defendant, and the judgment authorized is one binding only the joint property of the association." While this language is obiter, and the case is not authori-

tatively binding, it is persuasive as expressing the views of the court as to the effect of the section. Where similar statutes exist, it has been held that a suit against a copartnership by its common name is not a suit against the individuals comprising the copartnership, and that under such statutes the copartnership is regarded as a legal entity distinct from its members. *Hallowell v. McLaughlin Bros.* (Iowa) 121 N. W. 1039; *Brumwell v. Stebbins*, 83 Iowa, 425, 49 N. W. 1020; *Ruthven v. Beckwith*, 84 Iowa, 715, 45 N. W. 1073, 51 N. W. 153; *Sketchley v. Smith*, 78 Iowa, 542, 43 N. W. 524; *Baxter v. Rollins*, 110 Iowa, 310, 81 N. W. 586; *Good v. Red River Valley Co.*, 12 N. M. 245, 78 Pac. 46. It is true that the statute referred to in the above cases authorized a suit in terms against the copartnership as such, but it further provided for the enforcement of the judgment against the individual property of any member served with summons. On the contrary, our statute (section 388, Code Civ. Proc.) as it existed when this action was brought provided that the judgment was only binding on the joint property of the associates. Under our statute the action is in substance and effect an action against the association or copartnership as such, and not one against the individual members thereof. This is made manifest by the fact that the judgment can only be enforced against the joint property of all, and that jurisdiction is obtained to render judgment against the copartnership by service of summons on any member thereof. For this reason we think that, when plaintiff amended his complaint by adding as parties defendant the individual members of the copartnership, he brought in new defendants. Certainly he thus, at least, brought in defendants sued in a new and different capacity. As to such defendants the running of the statute was not tolled until the filing of the amended complaint. The court therefore did not err in sustaining the demurrer, nor in entering the judgment appealed from.

[2] Appellant in its brief asks that we modify the judgment entered against the copartnership so as to make it a judgment against the member of the firm served with summons in the action. Whether or not the amendment to section 388, Code Civ. Proc., adopted since this action was commenced, authorizes such a judgment, need not be determined. We are precluded from modifying the judgment by the fact that appellant did not appeal from such judgment. As before indicated, he limited his appeal to the judgment entered on the 17th day of May, 1909, and took no appeal from the judgment against the copartnership, which was entered on May 7, 1909.

The judgment appealed from is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

160 Cal. 611

SMITH et al. v. CUCAMONGA WATER CO.
et al. (L. A. 2,612.)

(Supreme Court of California. Aug. 29, 1911.)

1. CONTRACTS (§ 170*)—CONSTRUCTION—CONSTRUCTION OF PARTIES—INDEFINITENESS.

Any indefiniteness in a contract may be made definite by the practical construction which the parties placed upon it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. § 170.*]

2. WATERS AND WATER COURSES (§ 249*)—IRRIGATION—ABANDONMENT OF WATER RIGHTS.

Since grantees of land with appurtenant water rights could not demand that water be furnished from a particular one of several sources of supply from which they were entitled to water, so long as they were conveniently furnished the amount to which they were entitled, their failure to demand a supply from a source included in their deed would not be a waiver of their right to such supply, when the source from which water was formerly furnished them became inadequate.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 249.*]

3. APPEAL AND ERROR (§ 187*)—OBJECTIONS—PRESENTATION BELOW—ABSENCE OF PARTIES.

If in a suit to determine water rights, defendant's interest might be injuriously affected by failure to make other owners entitled to water from the same source parties, defendant should have requested that they be brought in, and, not having done so, cannot first raise the question of their absence on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1184-1189; Dec. Dig. § 187.*]

4. APPEAL AND ERROR (§ 867*)—ORDER GRANTING NEW TRIAL—QUESTIONS REVIEWABLE—ABSENCE OF PARTIES.

The absence of necessary parties plaintiff cannot be reviewed on an appeal from an order denying defendant's motion for a new trial, but only on appeal from the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476-3486; Dec. Dig. § 867.*]

5. PARTIES (§ 80*)—ABSENCE OF PARTIES—OBJECTIONS WAIVED.

Under Code Civ. Proc. § 434, providing that, if no objection be taken by demurrer or answer, defendant must be deemed to have waived them, excepting only the objection to jurisdiction, and that the complaint does not state facts to constitute a cause of action, an objection for failure to join necessary parties plaintiff was waived by failure to set it up by demurrer or answer.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 123-131; Dec. Dig. § 80.*]

In Bank. Appeal from Superior Court, San Bernardino County; J. S. Noyes, Judge.

Action by Carrie F. Smith and others against the Cucamonga Water Company and others. From an order denying a motion for a new trial after judgment for plaintiffs, defendants appeal. Affirmed.

Henry Goodcell and F. A. Leonard, for appellant Cucamonga Water Co. J. W. McKinley, for respondents.

HENSHAW, J. Plaintiffs brought this action against the Cucamonga Water Company and numerous other defendants, claiming rights to water owned or distributed by the Cucamonga Water Company, to determine plaintiffs' and defendants' respective rights to these waters, and to enjoin the defendants from interference with the plaintiffs' asserted rights. The defendants, severally or in groups, answered, setting up their respective rights and priorities. The court found the quantity of water to which each party plaintiff or defendant was entitled, fixed the relative priorities, and found that all the parties plaintiff and defendant were prior to the Cucamonga Water Company in their rights to the use of the allotted portions of the water. The defendant Cucamonga Water Company moved for a new trial upon the ground that the decision was not justified by the evidence and was against law. The motion was granted as to the defendant Jewett H. Cocke, administrator, and denied in all other respects. The defendant Cucamonga Water Company then appealed from this order, excepting that part of it granting its motion for a new trial against Cocke, administrator.

The water in controversy is that flowing in, found in, or developed in certain springs, streams, and tunnels upon the Cucamonga ranch. The predecessor of all the parties in interest is I. W. Hellman, who formerly owned the ranch and all the waters or sources of waters thereon. Upon the ranch is a short chain of hills known as Red Hills, whose trend is in a northerly and southerly direction. The sources of the water supply are both upon the east and the west side of these hills. The Cucamonga Company and the Cucamonga Fruit Land Company succeeded to the rights of Hellman in some of the lands of the Cucamonga ranch and in the Cucamonga creek and the "springs on the Cucamonga Ranch, subject to one-half of the waters of the east side belonging to the Cucamonga Vineyard Company and the Cucamonga Land & Irrigation Company." The right of the Cucamonga Vineyard Company and the Cucamonga Land & Irrigation Company to this reserved one-half of the waters of the east side are not in controversy. The Cucamonga Company and the Cucamonga Fruit Land Company proceeded to sell to individual owners tracts and parcels of their lands of the Cucamonga ranch, with appurtenant water

rights from the water supply of the Cucamonga ranch which they had thus acquired from Hellman. These companies thus in time sold 456.89 miner's inches of water, and, speaking generally but with sufficient accuracy for the purposes of this consideration, there became appurtenant to each ten acres of land which they so sold one miner's inch of water. The Cucamonga Fruit Land Company succeeded to all the rights of the Cucamonga Company. In time the Cucamonga Fruit Land Company conveyed to this defendant, the Cucamonga Water Company, certain of its properties and rights and duties, all in subordination to and in full recognition of the Fruit Land Company's duty to supply water to the private owners, its grantees, and the grantees of its predecessor in interest. This deed recited that it was made in consideration of "the better performance of the supplying and distributing of water hereby directed to be conveyed and the water hereafter by the Cucamonga Fruit Land Company conveyed to the said Cucamonga Water Company, and the better supplying and distributing of the water to the following property: First, 456.89 inches of water to be applied by grantee in satisfaction of the following deeds and contracts heretofore made by grantee to sundry parties, to wit." Then are set forth the deeds to the land of the individual grantees with the quantity of water to which these lands are entitled. This deed contemplated the further development of water by the Cucamonga Fruit Land Company and by the Cucamonga Water Company, and contained an agreement by the former to convey to the latter within 20 years "the right to develop water on all lands on which the said 456.89 inches of water are now being obtained, so far as the same now belong to said Cucamonga Fruit Land Company, * * * and thereupon and thereafter the said Cucamonga Fruit Land Company shall be relieved from the duties and obligations in regard to the development or supply of the said water, other than as stockholders of the Cucamonga Water Company." As an added consideration for this grant, it is provided that the Cucamonga Water Company is to convey certain of its stock to the Cucamonga Fruit Land Company, and it is understood that the rights to water represented by that stock are subordinate to the 456.89 inches referred to. The Cucamonga Water Company accepted this deed, substituted itself for the Cucamonga Fruit Land Company, as the purveyor and distributor of the waters, undertook the performance of and became charged with the duty of supplying the water in accordance with the individual rights of the grantees. It also proceeded to do development work upon the west side to increase the water supply. Similar development work had been done by the predecessor of the Cucamonga Water Company on both the east and west sides. This development work consisted principally in the driving of tunnels to tap the secret and

subterranean sources of the supply which showed in springs or ciénegas, and thus to increase the natural flow. The practice of the water company, speaking generally, was to supply the east side lands from waters of the east side springs, and the west side lands from waters of the west side springs. Of the east side waters it is to be remembered that one-half of the supply was reserved to the Cucamonga Vineyard Company and the Cucamonga Land & Irrigation Company, and was not available therefore for the purposes of the Cucamonga Water Company. Furthermore, a controversy had arisen between the Cucamonga Fruit Land Company and certain of the defendants represented by Mr. Waters (who may be designated as Mr. Waters' clients), which controversy was ended by a deed of settlement by which Mr. Waters' clients were given and took one inch of water to each eight acres of their land, this water to be taken from the east side source only. This settlement conveyed to Mr. Waters' clients 33.84 inches of water from the east side supply.

No difficulties arose between any of these parties while water remained abundant. A shortage occurred and the effects of it were first felt by those landowners who had been supplied from the east side sources. The Cucamonga Water Company, being entitled to the use of but one-half of the east side supply, this half being diminished by the quantity specifically conveyed to Waters' clients, the time came when the others who drew from the east side supply were not given their quantum of water. Upon demand for it they were told, in effect, that the Cucamonga Water Company recognized their rights as being limited to the east side supply, as against the contention of the landowners that they were entitled to their supply wherever and however developed from the springs of the Cucamonga ranch, which springs included the west side springs with the water developed from them by the tunnels, as well as the east side springs whose supply was inadequate.

These differences led to this action, and the principal question upon this appeal is that indicated: Whether the individual grantees are entitled by virtue of their deeds to call upon the Cucamonga Water Company, the distributing agent, to supply them with water from the west side springs as well as the east side, or whether their right is limited to the east side water alone.

The court found in favor of the plaintiffs' contention, and the findings are abundantly supported. These findings award to the Cucamonga Vineyard Company and the Cucamonga Land & Irrigation Company certain waters above referred to, and over these findings there is no complaint. Also there is no complaint over the findings which award to the Waters' clients the 33.84 inches of water to be taken from the east side. The attack is on the findings awarding to the remaining consumers of water the water developed

from the east or the west side. The testimony supporting these findings as to the individual claimants is substantially the same in each case. It may be illustrated by the case of the plaintiff Carrie F. Smith. The facts in this connection are that the Cucamonga Company conveyed to Lewis Smith, her predecessor in interest, lands "with the same proportion of water from the springs belonging to the company that his land bears to all the land which can reasonably be irrigated for tropical culture with said water." This quantum of water, here somewhat indefinitely expressed, is made certain by the agreement of the parties that it shall be one miner's inch of water for every ten acres of land. The springs belonging to the company are made certain by all of the instruments as being "the springs on the Cucamonga ranch." The springs on the Cucamonga ranch include the west side springs as well as the east side, and the springs on both sides were known as the Cucamonga springs. No word of evidence shows an abandonment by these landowners of any of the rights which their deeds gave them to the west side waters, and in some instances purchasers were told by the agent of the Cucamonga Company that the springs on the west side belonged to the Cucamonga Company, and that the waters could be fumed over to the east side at any time they were needed. Throughout the whole case it is apparent that while, ordinarily, the east side users were supplied with water from the east side springs, there was no abandonment upon their part of a right to demand other water should the east side supply fail. And for this reason the contention of the appellants that the practical construction of the parties to these contracts—the practical construction of use—was such as to show an intent contrary to the findings and to estop the respondents from claiming the right to the use of the west side waters, is without substantial foundation.

[1] Of course, the cases are numerous where an indefiniteness in term or description is made definite and binding upon the parties by the practical construction which they put upon it. Typical of this is the case quoted from by appellants. *Jennison v. Walker*, 11 Gray (Mass.) 423. In that case an easement in land was granted in general terms without fixing its location. The right to the easement was exercised with the full consent and approval of the parties, and it was properly held that this selection so exercised fixed the location and description of the easement, since it was a practical construction put upon it. But that and the like cases are very different from the practical construction here sought to be upheld as defining the rights of the parties. Here was no exercise of any election by respondents.

[2] So long as they were being conveniently supplied with the water to which they were entitled, they had no right to demand that it should come from one or another source

of supply. And, as they could not have insisted upon this, so their failure to insist cannot be construed as any waiver or abandonment of their right to a supply from another source covered by their grant should the source used for them prove inadequate. True it is that the contract and conveyance between the Cucamonga Fruit Land Company and the Cucamonga Water Company did not create new titles in these respondents, but it was a complete recognition upon the part of the water company of the rights and titles which actually existed, and it imposed upon the water company, as a substitute for the fruit land company, the duty of supplying that water in accordance with the rights of respondents and the duty of using reasonable endeavor in the maintenance and development of the supply in the execution of its trust. We are not by this to be understood as saying that any given amount of development work was necessary to be done, but the development work when done must have resulted in one of two things, either in increasing the natural supply of the springs and ciénegas, or, by the tunnels intercepting the supplies of these springs and ciénegas, in artificially increasing the supply at the sacrifice of the natural flow of the springs and ciénegas. Either was legitimate development work, but the water thus obtained was always subject to the rights of the respondents, since it was work done in and about and concerning springs and ciénegas of the ranch, to whose waters respondents were entitled.

Four hundred and fifty-six and eighty-nine hundredths inches is the amount of water which, under the deed of the Cucamonga Fruit Land Company to the Cucamonga Water Company, it is contemplated that the latter shall distribute to the private consumers. Of this water it is said that only 86 inches are represented by the parties litigant before the court, leaving 370 inches unrepresented, and it is contended that the judgment fixing the priorities of the owners of this 86 inches amongst themselves and decreeing to them a priority over the defendant water company is not justified by the evidence, and is injurious to the water company, in this: that it is the duty of the water company to distribute this 370 inches as well as the 86 in accordance with the priorities fixed by the times and the sequences of the deeds, and that this judgment, while binding upon the water company, is not binding upon the owners of the unrepresented 370 inches, who may be justly entitled to priority over the owners of the 86 inches, and that in obeying this judgment in injunction it may, upon the other hand, subject itself to damage suits at the instance of these unrepresented owners.

[3] But to this the answer is that, if the appellants' rights under this judgment could be injuriously affected by reason of the ab-

sence of other necessary parties. It was its duty appropriately to have called the court's attention to this fact, with a request that they be brought in. This it did not do.

[4] Moreover, the question which it raises is not one open to it upon an appeal such as this, from the order refusing to grant a new trial. There is no appeal from the judgment, under which alone this question if made properly to appear of record, could be reviewed. *Great Western Co. v. Chambers*, 153 Cal. 307, 95 Pac. 151; *Younger v. Moore*, 155 Cal. 767, 103 Pac. 221.

[5] Not only is this question one that cannot properly be raised upon motion for new trial, but the defect, if there be one, was waived by the failure to set up same by demurrer or answer, as held by *Ashton v. Zella M. Co.*, 134 Cal. 408, 66 Pac. 494, *Tingley v. Times-Mirror Co.*, 151 Cal. 1, 89 Pac. 1097, and *Bell v. Solomon*, 142 Cal. 62, 75 Pac. 649; *Code of Civil Procedure*, § 434.

The defendant corporation and its predecessors in interest are such corporations as are contemplated by section 552 of the Civil Code, and to the controversy here the case of *Hewitt v. San Jacinto Irrigation District*, 124 Cal. 188, 56 Pac. 893, is apposite.

The findings are sustained as to all of the respondents saving C. H. Babcock. He was not a party to the action. The judgment awarding him water necessarily falls, but this determination does not affect the rights of any of the other parties respondent, as to whom the order appealed from is affirmed.

We concur: MELVIN, J.; ANGELLOTT J.; LORIGAN, J.; SHAW, J.; SLOSS, J.

160 Cal. 601
CALIFORNIA RAISIN GROWERS' ASS'N
v. ABBOTT et al. (S. F. 5,215.)

(Supreme Court of California. Aug. 25, 1911.)

1. CORPORATIONS (§ 513*)—PLEADING CORPORATE EXISTENCE—ADMISSION BY ANSWER.

Where defendants in an action by an incorporated association admit by answer that the plaintiff is duly incorporated, they cannot question its capacity to bring the action.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 513.*]

2. PARTIES (§ 26*)—DEFENDANTS—JOINDER OF PARTIES.

Under Code Civ. Proc. § 379, which provides that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination, and sections 578 and 579, relating to judgments, an incorporated association, which was to pack, advertise, and sell raisins to be delivered by the growers, and which has entered into separate contracts with about 2,800 raisin growers, each of whom consented to a commingling of his raisins with those purchased from other growers, and agreed to accept in payment the average price per pound paid for all of a like grade, may properly join all the growers as defendants in an action for an accounting and recovery from those growers who had received sums in excess of their

ratable proportion for the benefit of those who had received less than their share and for a distribution of funds in its hands to those entitled to it and also creditors who had commenced actions against it, since all were equitably interested in the fund which had been derived from the sale of the season's product, and was held by plaintiff for distribution.

[Ed. Note.—For other cases, see Parties, Dec. Dig. § 26.*]

3. ACTION (§ 50*)—JOINDER OF CAUSES OF ACTION—PARTIES AND INTERESTS INVOLVED.

A raisin growers' association which had entered into separate contracts with about 2,800 raisin growers for the purpose of receiving, packing, and selling their product and accounting for the proceeds joined all the growers as parties defendant in a single action for an accounting by those of the growers who had received sums in excess of their share for the benefit of those who had received less than their share, and for the distribution of a fund in its hands. *Held*, that there was no misjoinder of causes of action, since the object of the action was the accounting and distribution to the parties who had interests in the fund growing out of their contractual relations with the association.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 50.*]

4. CONTRACTS (§ 227*)—CONDITIONS PRECEDENT—WAIVER.

A provision in contracts between a raisin growers' association and a large number of growers that the contracts were delivered to the association in escrow, and were not to become operative until 85 per cent. of the raisin growing acreage of the state was secured by contract, was waived by the growers' acceptance of the terms of the contract, their delivery of raisins, and their acceptance of payments under the contracts.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1038-1041; Dec. Dig. § 227.*]

5. PRINCIPAL AND AGENT (§ 89*)—ACCOUNTING—PERSONS ENTITLED—AGENT.

The general rule is that in equity an agent cannot demand an accounting from his principal, where an accounting is the principal purpose of the action.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 229; Dec. Dig. § 89.*]

6. EQUITY (§ 39*)—COMPLETE RELIEF—TAKING AND STATING ACCOUNT.

An association incorporated to act as an agent and factor in the handling and disposing of raisins for individuals and partnerships, and having power to contract, brought an action in equity against all the parties with whom it had contracted for an accounting from certain of them who had received from it more than they were entitled to, so that the excess might be recovered and returned to those who had not received their full share, and also for an equitable distribution of a fund in its hands, and for the adjustment of certain claims of creditors. *Held*, that, as an accounting was necessary to ascertain how much money each defendant was entitled to receive, equity, having taken jurisdiction, would proceed to administer full relief, and would order an accounting, and settle the whole controversy.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-114; Dec. Dig. § 39.*]

7. ACCOUNT (§ 1*)—EQUITABLE ACTION—DEMAND NOT NECESSARY.

Where an association in its action for the adjustment of claims against it and for an accounting by certain defendants who had been overpaid by it for the benefit of other defendants who had received less than their share under

contracts with it, and for the equitable distribution of a fund in its hands, does not ask any money judgment for itself, no demand is necessary.

[Ed. Note.—For other cases, see Account, Dec. Dig. § 1.*]

8. ACCOUNT (§ 17*)—PLEADINGS—ISSUES, PROOF, AND VARIANCE.

In an action in equity by plaintiff, an association incorporated for the purpose of acting as agent in the handling and disposing of raisins for individuals and copartnerships, and which had entered into contracts with a large number of growers to receive and sell their crops, for an accounting and recovery from parties contracting with it who had been overpaid and for the distribution of a fund in its hands, part of the defendants answered specially, but did not aver that the defendants or any of them participated in any unlawful design, although it was averred that the association was determined to secure contracts for 85 per cent. of the entire product of raisins for the year. *Held* that, under the plea, evidence that the association was organized for the purpose of creating a monopoly of the raisin business of the United States, and that its contracts made in pursuance of its unlawful scheme were unenforceable, was inadmissible.

[Ed. Note.—For other cases, see Account, Dec. Dig. § 17.*]

9. SALES (§ 48*)—ILLEGALITY—RELIEF OF PARTIES.

It is no defense to an action for the price of goods sold that the seller knew that the goods were bought for an illegal purpose, if it is not made a part of the contract that they shall be used for that purpose, and if the seller has done nothing in aid or furtherance of the unlawful design; but the principle does not apply to cases where the offense intended is of such enormity that no man having knowledge of the design can escape incrimination.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 48.*]

10. PLEADING (§ 8*)—FACTS OR CONCLUSIONS OF LAW.

The complaint in an action in equity by an association incorporated to receive and sell raisins for accounting of moneys paid by it to certain growers who had contracts with it, and for a distribution among all of such growers of a fund then in its hands, averred that some defendants had received more of the proceeds from the sale of the raisins than the amount to which they were entitled, and that others had received less than their shares. *Held* that, as the averments must have been based in part upon plaintiff's knowledge of the net amount derived from the sale of raisins, and number of persons entitled to the benefit of such fund, the averments were statements of fact, and not conclusions of law.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

11. APPEAL AND ERROR (§ 1170*)—HARMLESS ERROR—FAILURE TO RULE ON OBJECTIONS TO EVIDENCE.

Under Code Civ. Proc. § 475, which provides that no error shall be regarded unless it affects substantial rights, the failure of the trial court to rule upon reserved objections to evidence offered in support of a special defense is harmless, in view of the court's conclusion that the special defense was not so pleaded as to be available.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1170.*]

Department 2. Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by the California Raisin Growers' Association, a corporation, against Andrew Abbott and others. Judgment for plaintiff, and Abbott and a part of the other defendants appeal. Affirmed.

Everts & Ewing, L. L. Cory, Cartwright & Cashin, Snow & Freeman, Johnston & Jones, Jas. Gallagher, M. F. McCormick, J. O. Traber, W. A. Conn, Lewis H. Smith, Geo. B. Graham, A. M. Drew, J. A. Allen, Maurice E. Power, Frank Kauke, El. E. Shepard, Stanton L. Carter, H. C. Tupper, W. D. Foote, and Sutherland & Barbour, for appellants. M. K. Harris and M. B. Harris, for respondent.

MELVIN, J. Certain defendants appeal from a judgment and from an order denying their motion for a new trial.

Plaintiff is an association, incorporated under the laws of California for the purpose, among others, as stated in the complaint, of "acting as an agent and factor in the handling and disposal of raisins for individuals, corporations, associations and copartnerships, and having power to contract," as thereafter alleged. It appears that in the year 1903 plaintiff entered into contracts with some 2,800 persons, owners and growers of raisins, to pack and sell their crops. These contracts were all just alike, and each provided: (1) That the grower thereby assigned to the association an undivided one-fifth part of his raisins produced that year; (2) that the association agreed to undertake the inspection, packing and sale of said entire crops, to establish and maintain uniform grades of raisins, and to procure such packing to be done in conformity therewith, also to make sales under its own trade-mark and guaranty of quality, and to make said sales as speedily as possible and for the highest obtainable prices; (3) that the growers should cultivate the crops and deliver at packing houses designated by the association; (4) that the association would advance money necessary for the packing, storing, and insuring of the raisins; (5) that at any time after the delivery of the crop the association would make advances upon the raisins so delivered to the amount of at least one cent per pound; (6) that all raisins as delivered should be mingled and sold with other raisins of a like grade and accounted for at the average of prices at which raisins of such grade should have been sold by the association; (7) that the association might hypothecate the interests of the growers as security for the repayment of moneys to be borrowed from third persons; (8) and that the association should turn over to the grower on certain conditions three-fourths of the net proceeds of its one-fifth interest in the crop.

Under these contracts vast quantities of raisins were delivered to plaintiff. These

were intermingled, packed, and sold, and sums of money were advanced to certain growers, some of them receiving as high as three cents per pound, others less than that, and others nothing at all. Large sums of money were borrowed and repaid as authorized by the contracts. When the entire crop had been sold at the average price of less than three cents per pound, the association had in its possession a large sum of money which by this action it seeks to have distributed to the growers entitled to share in the funds. It also desires to compel those growers who have been paid more than their ratable proportion of the proceeds of the sales for the season to return the excess in order that all of those who contracted with the association to deliver their raisins to it may be treated alike, each receiving the same allowance per pound as that paid to purchasers of the same grade of raisins. The bill also asks for an accounting, and it includes as defendants, not only the growers who were parties to the contracts above mentioned, but also certain persons who had commenced actions against the association and secured attachments against its property. There is also included as a defendant one of the association's alleged debtors, owing it according to the averments of the bill, a large sum of money. But the court found that this had been paid.

The action was tried, after issue joined, an accounting was had, and this appeal is prosecuted by some 600 of the growers, who had received from the association more than the share of money to which the court held that they were entitled, and against whom the judgment runs for the excessive amounts paid to them severally.

[1] There is nothing in the first point made by appellants that the association is without standing to bring this action, because it never filed with the county clerk a copy of its by-laws as required by statute, for they admitted by answer that plaintiff was duly incorporated.

[2] The next contention of appellants is that their demurrer for misjoinder of causes of action and of parties defendant should have been sustained. Appellants maintain that, as plaintiff entered into separate contracts with the growers, there is no basis for a joinder of actions against them; but the answer to this contention is that, although each grower separately contracted with the association, each consented to a commingling of his raisins with those purchased from other producers, and each agreed to accept in payment for his raisins the average price per pound paid for all raisins of a like grade, and each is therefore equitably interested in the fund derived from the sale of the season's product and held by plaintiff for distribution. Section 379, Code Civ. Proc., provides that: "Any person may be made a defendant who has or claims an interest in the contro-

versy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein." See, also, sections 578, 579, Code Civ. Proc.; *Shakespear v. Smith*, 77 Cal. 638-641, 20 Pac. 294, 11 Am. St. Rep. 327; *Wickersham v. Crittenden*, 93 Cal. 17-32, 28 Pac. 788.

The rule above announced applies with equal force to all the growers and to the debtor, and the attaching creditors included as defendants, because the latter parties claim interests in funds, parts of which at least are involved in the obligation of the plaintiff to the persons who delivered their raisins to the association, and which, therefore, should be subjected to a proper distribution. It may be said as truly in this case as in *People v. Morrill*, 26 Cal. 361: "The parties are all interested in the principal question raised by the complaint. The issues tendered are simple, and foreshadow no embarrassment to a convenient and orderly trial; and by the joinder objected to a multiplicity of suits has been avoided." See, also, *Daly v. Ruddell*, 137 Cal. 674, 70 Pac. 784, and cases there cited.

[3] That which has been said with reference to alleged misjoinder of parties applies with equal force to the issue of misjoinder of causes of action raised by the demurrer. The vital matter in this action was the distribution of the fund held by plaintiff. The material consideration is not how the different defendants acquired their respective interests in the trust fund to be distributed, but that they do actually have such interests growing out of the contractual relations between plaintiff and defendants, and between the defendants themselves. The demurrers were properly overruled.

[4] By their answers appellants aver that the contracts were delivered to plaintiff in escrow, and were not to become operative until 85 per cent. of the raisin-bearing acreage of the state was secured by contract; that such percentage was never brought within the control of plaintiff; and that, therefore, the contracts could not be enforced. A complete answer to this contention is that the growers did deliver their raisins under the contracts, and accepted money from the plaintiff. Even if delivery of the contracts in escrow, with the proviso alleged, were tolerated (and it is not—Civ. Code, 1056, 1626, 1627), the acceptance of the terms of the contracts by the producers of raisins waived the escrow agreement.

[5] Appellants contend very forcibly that the complaint fails to disclose a state of facts entitling plaintiff to an accounting; that, occupying as it did the fiduciary relation toward the appellants of a factor, it was bound to keep proper books of account containing correct entries of all of its transactions. They cite numerous authorities to

the effect that, while a principal having reposed confidence in his agent may compel the latter to account where the matters for which an accounting is sought are peculiarly within the knowledge of the agent, the reverse of the rule is not enforced in equity, and that, generally speaking, an agent may not demand an accounting from his principal.

[6] There can be no doubt that this is the rule where an accounting is the principal purpose of the action, but here an accounting was only ancillary to the main purpose of the action, which was to have the moneys in the hands of the plaintiff equitably distributed. This was not for a money judgment in favor of plaintiff against defendants. The only judgment for money was that requiring contribution by the defendants who have been overpaid, not to respondent, but to other codefendants. This action obviously was brought to avoid a multiplicity of suits, although there is no formal allegation to that effect. Equity having once taken jurisdiction, it was within the power of the chancellor to grant full relief. The interests of the raisin growers were not mere matters of bookkeeping to be determined from plaintiff's accounts, because there were certain claims against the fund held by the association, which had not been adjusted. An accounting was necessary, therefore, not to establish any claim of money due from the growers to the association, because plaintiff asserted none, but to ascertain correctly how much money each grower was entitled to receive.

[7] For this reason, no demand upon the defendants was necessary as the association was asking nothing for itself, but merely sought such accounting as would fix the proper distribution of the money held by it for its clients. The rule to be applied in cases of this kind is well stated in 1 *Encyclopedia of Law and Procedure*, 418, as follows: "When a court of equity once acquires jurisdiction upon equitable grounds, it will proceed to do complete justice and administer full relief. To this end it will order an accounting, and will settle the whole controversy even to the extent of adjudicating matters of purely legal cognizance." See, also, *Pomeroy*, Eq. Jur. § 255.

[8] We now come to the consideration of the special defense that the plaintiff association was organized for the purpose of creating a monopoly of the raisin business of the United States, and that, therefore, its contracts made in pursuance of this unlawful scheme were not enforceable. Much evidence was offered on this issue and rejected by the court. Without going into the details of these offers to prove matters pertinent to a showing that the plaintiff was engaged in the upbuilding of a monopoly, it is sufficient to say that nearly all of the rejected testimony, according to the theory of appellants, "tended to show that the plan and scheme of plain-

tiff was to create a monopoly in the handling and selling of raisins during that season, and that the natural consequence of the acts of the plaintiff was to create an unlawful combination in restraint of trade." If appellants were entitled to establish their thesis, doubtless much of this offered evidence was admissible, but an examination of their pleadings shows that they did not attribute to the defendants, or to any of them, guilty complicity in the alleged scheme for the arbitrary fixing of the price of raisins, not in accordance with the law of supply and demand, and for the exclusion of all raisins from the packing houses except those delivered to plaintiff under contract. The direct objects of the contracts between the association and the growers were the packing, advertising, and sale of the raisins to be delivered by the producers. These were not illegal purposes, as disclosed by the contracts themselves, and we do not understand the appellants to contend that the growers were parties to the monopolistic scheme. The answer does not contain any averment that the defendants, or any of them, participated in any unlawful design, but the appellants invoke that rule of equity which leaves the parties to an unlawful agreement in exactly the position in which it finds them, without tendering aid to either or any of them. In support of the assertion that this is an action to enforce contracts in restraint of trade, appellants cite section 1673 of the Civil Code, and, among other authorities, *Santa Clara Valley Milling & Lumber Co. v. Hayes et al.*, 76 Cal. 387, 18 Pac. 391, 9 Am. St. Rep. 211; *Pacific Factor Co. v. Adler*, 90 Cal. 110, 27 Pac. 36, 25 Am. St. Rep. 102; *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Pac. 581, 31 Am. St. Rep. 242; *Getz Bros. & Co. v. Federal Salt Co.*, 147 Cal. 115, 81 Pac. 416, 109 Am. St. Rep. 114. All of these cases arose upon efforts to enforce contracts in restraint of trade by and against parties in pari delicto, and in each it was made a part of the contract that the property to be delivered was to be used for an unlawful purpose. From the answers in this case the most that can be claimed with reference to the guilty knowledge of the raisin growers that plaintiff was trying to form a monopoly was the published statement that the association was determined to secure contracts for 85 per cent. of the entire production of raisins for the year. The answer averred such publication.

[9] But, granting that those who delivered raisins knew of this design, that fact alone would not prevent them from recovering the full value of their merchandise, or from participating in the distribution of money received from the sale of it. Even granting that the producers knew of the unlawful design in restraint of trade, which, it was alleged, plaintiff was endeavoring to accomplish, that fact would not of itself be sufficient to defeat this action. The true rule is

clearly stated by Selden, J., in *Tracy v. Talmage*, 14 N. Y. 176, 67 Am. Dec. 132: "I consider it, therefore, as entirely settled by the authorities to which I have referred, that it is no defense to an action brought to recover the price of goods sold that the vendor knew that they were bought for an illegal purpose, provided it is not made a part of the contract that they shall be used for that purpose, and, provided, also, that the vendor has done nothing in aid or furtherance of the unlawful design." This rule was properly qualified in the opinion of Comstock, J., on a motion for reargument, wherein it was held that the principle did not apply to cases where the offense intended is of such enormity that no man having knowledge of the design can remain neutral without being in a just sense a criminal himself, as in the case of poison or a deadly weapon purchased for the purpose of murder. The special defense failed to allege facts sufficient to bring defendants within the rule denying relief to participants in illegal contracts, and therefore the court did not err in refusing to admit evidence upon this issue.

[10] The complaint contained averments in effect that some defendants had received more of the proceeds from the sale of the raisins than the amount to which they were entitled, and that others had received less than their shares. Appellants take the position that these are statements of conclusions of law, and need not be traversed. Plaintiff's reply to this is that these allegations might have been omitted from the complaint without impairing its statement of a good cause of action, but, assuming that their omission would have been fatal to the pleading, we cannot agree with appellants that they present mere conclusions of law, founded, as they must have been in part, upon plaintiff's knowledge of the net amount derived from the sale of raisins, the number of persons entitled to the benefit of such fund, and the quantity and quality of raisins delivered by each. In the case at bar we may appropriately quote the language of this court in *Lataillade v. Orena*, 91 Cal. 578, 27 Pac. 927 (25 Am. St. Rep. 219): "It is true that pleadings should state the ultimate facts, and not the probative facts or conclusions of law. But what are ultimate facts and what conclusions of law are often mixed and uncertain questions. *Levins v. Rovegno*, 71 Cal. 273, 12 Pac. 161; *Turner v. White*, 73 Cal. 299, 14 Pac. 794. The same averment may be of a fact or of a conclusion of law, according to the context. We think the averments here complained of should be held sufficient as statements of fact."

[11] The trial court failed to rule upon certain reserved objections to offered evidence. This is assigned by appellants as error, and the case of *Raymond v. Glover*, 122 Cal. 475, 55 Pac. 398, is cited as authority. The reservations of rulings were all with reference to

evidence offered in support of the special defense that the contracts were part of a conspiracy in restraint of trade. Plaintiff's attorneys objected to all of this evidence, but by agreement it was received subject to the court's later ruling. The court plainly intimated that the ruling, if made at that time, would be against the admission of the proffered evidence, saying: "I certainly do not wish to rule hastily. The questions that strike me very strongly at this time are as to whether you, as a party to the contract, have a right to make that objection at all; and, secondly, as to whether the pleadings in the case justify it." There was no later ruling relative to this matter, but, in view of our conclusion that the defense resting upon an alleged conspiracy in restraint of trade was not so pleaded as to be available, this error was immaterial. Section 475, Code Civ. Proc.

We find no other matters in the record requiring particular attention. From the above discussion, it follows that the judgment and order from which these appeals are taken must be affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

160 Cal. 626

LAW CREDIT CO. v. TIBBITTS.
(L. A. 2,681.)

(Supreme Court of California. Aug. 31, 1911.)

1. VENDOR AND PURCHASER (§ 334*)—RESCISSI—RIGHTS OF PARTIES.

In absence of agreement as to the terms of rescission, upon rescission of a contract to purchase land for the purchaser's default in payments, the purchaser may recover partial payments made, less the damage suffered by his breach.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 961; Dec. Dig. § 334.*]

2. EVIDENCE (§ 417*)—PAROL EVIDENCE—VARYING CONTRACT.

Where an agreement between the vendor and purchaser for rescission upon default in payment only required the vendor to release the purchaser from her obligation to purchase, and did not require the vendor to refund payments made on the price or taxes, or require the purchaser to pay for the use of the premises or damages arising from her breach, it will be assumed that such claims were mutually waived, and it cannot be shown by parol that any of such acts were to be done by the parties.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1899; Dec. Dig. § 417.*]

In Bank. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by the Law Credit Company against Arthur G. Tibbitts. From a judgment for defendant and an order denying a motion for new trial, plaintiff appeals. Affirmed.

Tanner, Taft & Odell, for appellant. Oscar C. Mueller and Wm. M. Hiatt, for respondent.

BEATTY, C. J. In May, 1907, by contract in writing, the defendant agreed to sell and convey, and plaintiff's assignor, Julia S. Wildey, agreed to purchase, for the sum of \$2,500, a town lot with the dwelling thereon. Five hundred dollars was to be paid at the date of the agreement, \$1,000 in January, 1908, and the balance in May, 1908. Time was declared to be of the essence of the contract, and default in either of the deferred payments was to free the defendant of all obligation to convey, and to work a forfeiture of all previous payments. Mrs. Wildey made the cash payment of \$500, and in pursuance of the contract entered into possession of the premises early in October, 1907, and so remained until late in November, 1908, a period of nearly 14 months, at the end of which time she was in default as to both of the deferred payments stipulated in the contract, but she had paid, pursuant to the contract, taxes and street assessment amounting in the aggregate to about \$33. The value of the use and occupation of the premises was \$25 per month, aggregating for the time Mrs. Wildey was in possession \$350.

In this situation the parties agreed to rescind the contract of sale and purchase and reduced their agreement to writing, wherein, after reciting the making of the contract, the possession of Mrs. Wildey under it, her default in the stipulated payments and the desire of the defendant to regain possession, it was "mutually agreed that said contract and agreement of sale of May 21st, 1907, be, and the same is hereby, rescinded, and the said Julia S. Wildey agrees upon the execution of this memorandum by Arthur G. Tibbitts and herself that she will within ten (10) days thereafter deliver up possession of the said premises to the said Arthur G. Tibbitts with the furniture received from the said Tibbitts when the possession of the said premises passed to the said Wildey. In case of failure of either party to this agreement to perform same in accordance with the terms thereof, the same shall be void and without prejudice to the rights of either party thereto. The said Julia S. Wildey also agrees to deliver said property to the said Tibbitts without cloud of title or lien thereon by her imposed. Dated this 20th day of November, 1908. Arthur C. Tibbitts. Mrs. Julia S. Wildey."

In compliance with the terms of this agreement, Mrs. Wildey delivered the possession of the premises to the defendant, and executed and delivered a quitclaim deed for the purpose of removing the cloud upon his title resulting from the record of his agreement to convey. She thereupon demanded repayment of the \$500 paid by her on account of the purchase price of the property, together with the sums paid by her for taxes and street assessments during her occupancy of the premises with interest, amounting

in all to \$598.75, offering at the same time to remit \$180 of this amount as compensation for the use of the premises during her occupancy. Upon the refusal of this demand the plaintiff, her assignee, commenced this action. By way of defense the defendant pleaded the written agreement to rescind, alleging that by mutual mistake one of the terms of the agreement had been omitted by which he was to be released from all obligations under the original contract, and Mrs. Wildey was to waive any and all claim to that portion of the purchase price which she had paid, in consideration of her release from any claim for compensation for the use of the premises. He also alleged that he had been damaged to the extent of \$500 by Mrs. Wildey's breach of her contract on account of the depreciation in value of the property. Both of these defenses were sustained by the superior court, where the defendant recovered a judgment for his costs. From this judgment, and from an order denying its motion for a new trial, the plaintiff appealed to the District Court of Appeal, where the judgment and order were reversed. An order was subsequently made transferring the cause to this court for hearing and decision.

In their printed argument counsel have discussed two questions: First, whether a case was made for reforming the agreement to rescind; and, second, whether the defendant was damaged to the extent of \$500, or at all, by Mrs. Wildey's breach of her contract to purchase.

In the view we take of the case, we shall not have occasion to consider the first question. With regard to the second, it may be stated that both parties rely upon a line of decisions of which *Cleary v. Folger*, 84 Cal. 316, 24 Pac. 280, 18 Am. St. Rep. 187, and *Drew v. Pedlar*, 87 Cal. 443, 25 Pac. 749, 22 Am. St. Rep. 257, are typical. In the first of these cases the contract of purchase and sale had been brought to an end by the default of both parties; in the second, a mutual rescission of a similar contract was implied from the acts and admissions of the parties.

[1] In each was presented the case of a naked rescission without any agreement between the parties as to terms, in consequence of which it remained for the law to supply, and the courts to enforce, equitable terms of restoration and compensation, and it was held to be equitable that the purchaser, notwithstanding his default, should recover the amount of his partial payments less the damage suffered by the vendor by reason of the vendee's breach of the contract. This has been the rule of decision in a number of similar cases since decided and would govern the disposition of this case except for an important distinction to which counsel have not adverted.

[2] Here was a mutual agreement to rescind—express and reduced to writing—containing express terms of settlement and, it must be presumed, all the terms upon which the parties had agreed for the settlement of their controversy—an agreement not to be varied or added to by parol. The parties have here done for themselves what, in the absence of express agreement, the court must have done for them. They have adjusted their reciprocal rights by defining their respective obligations. What Mrs. Wildey was to do she has done. The defendant was to do nothing except to release her from the obligation she incurred by her agreement to purchase and that he has done. The contract contains no stipulation obliging him to refund payments made by her on account of purchase price or for taxes or assessments, or obliging her to compensate him for the use of the premises or for damages arising from her breach of the original contract. The inference is that there was a mutual waiver of all such claims—that it was not a partial, but a complete, settlement of their controversy—such as would have been decreed by a court under sections 3406, 3407, and 3408 of the Civil Code.

In this view it is—as above stated—unnecessary to consider whether the defendant made a case for the reformation of the contract; for he is as fully protected by the absence of any agreement to repay the \$598.75, as he would be by an express release of any claim for repayment. In the same view it also becomes unnecessary to inquire whether he made out his claim for damages.

The judgment and order of the superior court are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

160 Cal. 630

MOODEY v. CONNECTICUT FIRE INS.
CO. OF HARTFORD, CONN.
(S. F. 5,589.)

(Supreme Court of California. Sept. 1, 1911.)

INSURANCE (§ 324*)—FIRE INSURANCE—CONDITIONS OF POLICY—FALLING OF PART OF BUILDING.

Under the provisions of a fire policy that if any part of the building fall, except as a result of fire, all insurance shall immediately cease, the falling of a material part of the building before fire reaches it, though not increasing the fire risk, avoids the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 749; Dec. Dig. § 324.*]

In Bank. Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by R. C. Moodey against the Connecticut Fire Insurance Company of Hart-

ford, Conn. From an order denying a new trial, defendant appeals. Reversed.

A. B. Ware and T. C. Van Ness, for appellant. Thomas J. Geary, for respondent.

MELVIN, J. This is an appeal by defendant from an order denying its motion for a new trial. The policy was formally the same as those considered in *Fountain v. Connecticut Fire Insurance Company*, 158 Cal. 760, 112 Pac. 546, and *Davis v. Connecticut Fire Insurance Company*, 158 Cal. 766, 112 Pac. 549. As in those cases the defendant depended upon the "fallen building" clause in the policy, the entire defense being based upon the allegation and proof that a material portion of the building in which plaintiff's store was located had fallen as a result of earthquake before the fire attacked plaintiff's goods. There was no attempt made in this case as in *Davis v. Connecticut Fire Ins. Co.*, supra, to prove that the fire was in progress before any material portion of the building was shaken down. The uncontradicted testimony was that the fire did not reach the store owned by Moodey until long after the earthquake. This case is entirely analogous to the *Fountain Case*. The evidence showed without any important contradiction that a material portion of the building had fallen before the fire occurred. That a substantial portion of the structure was destroyed by the earthquake there can be no serious doubt. The testimony of defendant's witnesses clearly established that fact, and there was no contradiction of their statement by plaintiff's witnesses worthy of notice. Irving Brush, called by plaintiff, testified that, as far as he could see, the rear wall of the building in which Moodey's store was located was standing a few minutes after the earthquake. He admitted that he did not look at the front of the building, and that there might have been a small portion missing from the rear wall when he saw it. L. W. Burris testified that the top story of the Moodey Building was "pretty badly shaken up," but that the lower story seemed to be nearly intact. Virgil Hoffer, another witness for the plaintiff, said: "I think that the whole of the front of the building occupied by Mr. Moodey was out. That's true at the time I first went there." It will thus be seen that, as in the *Fountain Case*, there was really no conflict of testimony, and it was thoroughly proven that a portion of the building sufficient to establish defendant's case had fallen prior to the fire.

The following instruction was given: "It is not sufficient for the defendant, in order to avoid its policy, to establish the fact that the building described in the policy in suit had before it began to burn, if you find that it was burned, suffered some injury, or that any part of the walls of said building had fallen before the contents of the building

were destroyed by fire, to avoid its policy herein; but the defendant must establish by a preponderance of evidence that such material portion of the building had fallen before the fire started as would have increased the fire risk which defendant assumed by its policy on such building and its contents. And, if the evidence does not establish the falling of such a material portion of the building, then I instruct you to find for the plaintiff." This same instruction was carefully considered by the court in *Fountain v. Connecticut Fire Ins. Co.*, supra, and the giving of it declared to be error. It is not necessary to review any of the other points made, as the case cannot be tried again unless evidence decidedly different from that presented at the former trial may be secured.

The order from which this appeal is taken is reversed.

We concur: SLOSS, J.; HENSHAW, J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.

160 Cal. 618

In re MITCHELL'S ESTATE. (L. A. 2,882.)

(Supreme Court of California. Aug. 30, 1911.)

1. WILLS (§ 675*)—ESTATE IN TRUST—PRECATORY WORDS.

Where a testatrix devised and bequeathed practically all her estate to be absolutely owned by her daughter, and, after bequeathing \$5 to a granddaughter, stated that she relied upon her daughter to make further suitable provisions to the granddaughter, stating that it was her daughter's intention to adopt the granddaughter, no trust was created in the estate given to the daughter

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1587-1589; Dec. Dig. § 675.*]

2. COURTS (§ 97*)—RULES OF DECISION—DECISIONS OF UNITED STATES SUPREME COURT.

A decision by the United States Supreme Court interpreting the law of precatory trusts is not binding upon the state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 329-334; Dec. Dig. § 97.*]

3. WILLS (§ 675*)—PRECATORY TRUST.

Where a testatrix whose only descendants were her daughter and a granddaughter made a number of wills, in all of which save the last she made provisions for the granddaughter, in one of them creating a trust for the granddaughter, those circumstances, together with the fact that the granddaughter has had no estate and that her father had no estate, were insufficient to convert testatrix's expression of confidence that her daughter would suitably provide for the granddaughter into a direct demand raising a precatory trust.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1587-1589; Dec. Dig. § 675.*]

4. WILLS (§ 675*)—ESTATES IN TRUST—IMPLICATION OF TRUST.

The only descendants of testatrix were a daughter and a granddaughter. The fourth clause of the will bequeathed the sum of \$5 to the granddaughter, and stated that the testatrix relied upon her daughter to make suitable provisions for the granddaughter. The fifth clause devised and bequeathed the rest and residue of the estate to be held absolutely by the daughter.

Testatrix had made previous wills in which she had made other bequests to the granddaughter, and in this will there were specific bequests to the daughter. *Held*, that neither the use of the term "rest and residue," nor the placing of the clause expressing confidence and reliance before the residuary clause, raise a precatory trust by implication.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1587-1589; Dec. Dig. § 675.*]

Department 1. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Susan G. Mitchell, deceased. Lucille R. Bedford appealed from a decree distributing the entire residue of the estate to Lucie M. Lambourn. Affirmed.

McNutt & Hannon and George P. Adams, for appellant. Horace S. Wilson and Edwin A. Meserve, for respondent.

SHAW, J. This is an appeal from a decree of final distribution of the estate of Susan G. Mitchell, deceased.

The decree distributes the entire residue of the estate to Lucie M. Lambourn. The appellant claims that the will of the deceased creates a trust in the property in her favor to the extent of a suitable and adequate provision for her maintenance. Whether or not it does is the only question for determination.

The trust is not expressly declared, but is created, if at all, by a certain precatory clause in the will. The subject of precatory trusts was carefully considered by this court in *Estate of Marti*, 132 Cal. 666, 61 Pac. 964, 64 Pac. 1071, and *Kauffman v. Gries*, 141 Cal. 295, 74 Pac. 846, and certain principles governing such cases were thereby established. The primary rule is stated in both cases as follows: "The cardinal rule for the construction of all wills is to ascertain the intention of the testator; and this intention is to be ascertained from the words of his will, taking into view, when necessary or appropriate, the circumstances under which it was made, if there is an uncertainty in its language. Civ. Code, § 1318.

[1] The estate of the testatrix was of the value of about \$200,000. She left no descendants, except one daughter, the respondent, Lucie M. Lambourn, and the appellant, Lucille R. Bedford, who is the child of Eileen G. Bedford, a deceased daughter. The first three items in the will give to Lucie M. Lambourn, first, the residence of the testatrix; second, the furniture therein and the clothes and jewelry; and, third, certain shares in a corporation which the appraisement states to be of no value. The alleged trust arises, as it is contended, from the provisions of items 4 and 5, which are as follows:

"Item 4. I bequeath unto my granddaughter, Lucille Richmond Bedford (christened Lucille Toland Bedford), child of my deceased

daughter, Eileen G. Bedford (née Mitchell), the sum of \$5.00, and I rely upon my daughter, Lucie M. Lambourn, to make further and suitable necessary provision for my said granddaughter. It is the intention of my daughter to adopt my said granddaughter as her own child, in the event that the consent thereto of the father of my said granddaughter (Charles A. Bedford), can be obtained. In which event, as her own child, I am sure my daughter would adequately provide for my granddaughter Lucille. In the event that the consent of said Charles A. Bedford, father of my said granddaughter, cannot be obtained so that my daughter can legally adopt her as her own child my said granddaughter Lucille, I rely upon my daughter to make at all times suitable and adequate provision for my said granddaughter, believing that my daughter Lucie will give to Lucille the love and care of a mother, and that she will, both during Lucille's youth and upon her arriving at majority, amply and carefully make provision for her.

"Item 5. I devise and bequeath to my said daughter, Lucie M. Lambourn, all the rest, residue and remainder of my estate of whatsoever nature and wherever situated, to be held and owned by her in her own absolute right."

Taking up first the question of the effect of these provisions as found from the language alone, without aid from the attending circumstances, we find the general rules of interpretation laid down in the *Estate of Marti*, supra, after a full consideration. This case was followed in *Kauffman v. Gries*, supra, and we see no reason for departing therefrom. They are thus stated: "Precatory words may or may not create a trust, according as they are used, and whether, in any particular will, they have been used for this purpose, will depend upon the construction to be given to that will. The question for determination is whether the devisee or legatee is the beneficiary, or merely a trustee for others, of the gift bestowed upon him; whether the wish or desire or recommendation that is expressed by the testator is meant to govern the conduct of the party to whom it is addressed; or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of that party, leaving it, however, to the party to exercise his own discretion. In order to make him a trustee, it must appear that the testator intended to impose an imperative obligation upon him, and for that purpose has used words which exclude the exercise of discretion or option in reference to the act in question. Mr. Bispham says (*Principles of Equity*, § 71): 'The English rule now is that precatory words are not to be regarded as imperative, unless it is plain from the context that the testator so intended them.' 'When property is given absolute-

ly, and without restriction, a trust is not to be lightly imposed upon mere words of recommendation and confidence." Page 669. And again, on page 671 of 132 Cal., on page 965 of 61 Pac., the opinion in *Estate of Marti*, proceeds: "While the desire of a testator for the disposition of his estate will be construed as a command when addressed to his executor, it will not, when addressed to his legatee, be construed as a limitation upon the estate or interest which he has given to him in absolute terms. * * * 'Prima facie, a mere request, or an expression of hope or confidence or expectation, does not import a command.'"

Appellant's counsel rely upon the decision of the Supreme Court of the United States in *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138. If that decision was in any particular inconsistent with our own decisions on the subject, it would not be binding authority.

[2] The interpretation of wills is not a question upon which the federal courts control the state courts. But we do not find it inconsistent. The same rules are stated in that decision, as in our own. The court says: "It must appear that the words were intended by the testator to be imperative." And, quoting from *Warner v. Bates*, 98 Mass. 277, the court says that the difficulties of interpretation "can always be overcome by bearing in mind and rigidly applying in all such cases the test that to create a trust it must clearly appear that the testator intended to govern and control the conduct of the party to whom the language of the will is addressed and did not design it as an expression or indication of that which the testator thought would be a reasonable exercise of the discretion which he intended to repose in the legatee or devisee."

The language in this will cannot reasonably be understood to indicate an intention to create a trust or to direct or control the residuary devisee as to the manner of her use and enjoyment of the property devised to her. On the contrary, taking the provisions as a whole, there clearly appears an intention to leave everything concerning the welfare of Lucille to the judgment, discretion, and affection of the daughter Lucie. The words chosen indicate confidence and faith in her daughter's kindly disposition, rather than an intent to control and direct her. There is nothing which shows an intent to place a limitation or charge upon the estate given to her. She says, "I rely upon my daughter" to make suitable provision, believing that she will give to Lucille the love and care of a mother and amply and carefully provide for her. There is nothing imperative in any of the language used nor anything indicating more than a wish or desire, accompanied with a reliance, belief, and confidence that the daughter would fulfill such wish in such manner as her own judgment should dictate and without any restrictions. Hav-

ing thus expressed her confidence and reliance, she follows it with a devise of the entire residue to the daughter "to be held and owned by her in her absolute right." The provisions as a whole are utterly inconsistent with an intent to qualify the estate given to the daughter, or to impose any charge thereon in the nature of a trust.

[3] The surrounding circumstances do not require a different construction or indicate a different intent. The case was submitted and decided upon a demurrer to the contest or claim of the appellant, so that, for the purposes of this decision the facts alleged therein, must be considered as true. The will was made on October 9, 1907. Lucille was then about three years of age. Her mother had died the previous April. In 1901 the testatrix made a will giving to Eileen, appellant's mother, a certain tract of land, and the income of one-half of the residue of her estate. The testatrix at that time believed that she owned said tract of land in fee, and it is alleged, although the allegation appears to be without significance, that she held one-half thereof in trust for the use of Eileen. No facts are alleged which would be sufficient to create such a trust. In May, 1907, after Eileen's death, the testatrix made another will giving to the respondent, Lucie, the same specific legacies as in her final will, and the residue to Lucie and Lucille, in equal parts. On August 9, 1907, she made a third will, the same as that of May, 1907, excepting that the one-half of the residue, given in the former will to Lucille, was given to a trustee in trust for Lucille. After March, 1906, Lucille always remained in the custody of the testatrix, who desired to adopt her, but was prevented from doing so by her own illness and the absence from the state of Lucille's father. Before the death of Eileen, the testatrix had sold the whole of the land above mentioned as having been once devised to Eileen for the sum of \$51,000. It is alleged that on October 9, 1907, when she made the will here in controversy, the testatrix believed that she had owned said land in fee, and that she believed that one-half of the proceeds thereof "was a trust fund in her hands for said Lucille as the only child and heir at law of the said Eileen." No explanation whatever is given for the existence of these two inconsistent beliefs, nor is any reason given for the latter belief, which seems to have had no foundation in fact. It is alleged that Lucille has no property, except her alleged interest in the supposed trust fund, or in the land from which it was derived, and that her father had not, when said last will was made, any estate out of which to make suitable provision for her, all of which the testatrix at that time well knew.

The fact that the testatrix made so many wills, and that the one of August, 1907, disposed of one-half of the residue to a trustee in trust for Lucille, showed that she had some knowledge about wills, and understood

the nature of trusts and something of the forms of expression used in creating them. So far as these facts have any bearing, they would seem to point to a design not to establish a trust in favor of Lucille, since the testatrix must have been familiar with the proper form of words to create a trust, and could easily have done so if she had so desired. There is no attempt to allege an intention by the testatrix to make the provision which it is claimed constitutes a declaration of trust a substitute for the supposed trust fund aforesaid. So far as appears, the giving to Lucille of the trust which she claims under the will would not prevent or estop her from claiming the trust fund also. It does not appear that she had in fact any right to such trust fund and there is no equity shown in her, in the nature of a property right, which could in any way affect the interpretation of the will. The circumstances alleged are clearly insufficient to convert that which, upon its face, appears to be merely an expression of a preference and of confidence and reliance on the fidelity and affection of her daughter toward Lucille, into an express or implied command or direction to her with respect to the use by her of the property given to her by the will "in her own absolute right," as it declares.

[4] The appellant argues that item 5 gives to Lucie in terms only the "residue and remainder" of the estate, and that, as it does not precede, but follows, item 4 containing the alleged precatory trust, and as the specific legacies, except the \$5 to Lucille, are all given to Lucie, there is a necessary inference that the testatrix believed that the precatory clause did create a trust in the property in favor of Lucille, and that she used the words "residue and remainder" in item 5 to designate what would be left after making the adequate provision for Lucille, which she supposed was required by the precatory clause. There are two or three reasons against this view. In the first place, the language of item 4 cannot, by any reasonable stretch of construction, be held to be a gift or devise of any property or right, except of the \$5. Leaving that out, there is much of confidence and reliance upon Lucie that she will provide for and adopt Lucille, and love and care for her as a mother, but not a word which can be said to be a disposition of property, or a request, command, or direction as to what she shall do in that behalf. That portion of item 4 would not call for the designation of any part of the estate as "residue." This argument assumes that whatever provision Lucie is to make for Lucille is to be made out of property which somehow is given to Lucie by the

terms of the will. The specific legacies to Lucie are admitted to be insufficient, and it is not claimed that they were considered by the testatrix as subject to any provision in favor of Lucille. The only other disposition to Lucie is that in item 5, which gives her the "residue and remainder" in her own absolute right. Therefore the effect of the fifth item is to vest in Lucie the title to the whole of the estate except the property specifically devised, including that out of which Lucille is to be provided for, if her claim is correct. This would make it absolutely necessary that item 4 should be construed to create a charge upon the residue of the property, and not merely to indicate confidence in Lucie. It clearly does not bear that meaning, and, if it did, Lucie would not have the residue in absolute right. Furthermore, the circumstances alleged furnish a satisfactory explanation of the use of these words in item 5, without the suggested inference. She had shortly before made two other wills of the same general form as the last. In each she had given Lucie the same specific devise and legacies as in the last, and presumably in the same language. In each she had made provision for Lucille. In that of May, 1907, she gave her one-half the residue absolutely. That of August, 1907, gave the same one-half to a trustee for the use of Lucille. Evidently something must have occurred about that time to change her intentions concerning Lucille, and in consequence she made the last will. It follows the previous forms, and was apparently modeled thereon. The same specific dispositions to Lucie are repeated. Coming to the part relating to Lucille, she gives her only \$5, and makes the declaration that she relies on Lucie to provide for her and adopt her. Then in item 5, still using the former phraseology, she gives the "residue" to Lucie, evidently referring, as she did in the previous wills, to the residue after deducting the specific devise and the specific legacies. And, although the result was that everything was given to Lucie except the \$5, it is nevertheless technically accurate to describe that portion as the residue of the estate. From all this it is reasonable to conclude that the testatrix was following the form of the previous wills and using the same language so far as it was applicable, and that it was because of this that the clause expressing confidence and reliance was placed before the residuary clause, and not because the testatrix believed that she was creating a trust for Lucille to be taken from the residue.

The decree of distribution is affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

16 Cal. App. 632

BRODE et al. v. GOSSLIN et al. (Civ. 977.)

(District Court of Appeal, Second District, California. July 21, 1911.)

APPEAL AND ERROR (§ 270*) — EXCEPTIONS — REVIEW.

Where the purported bill of exceptions is not authenticated, but, on the contrary, contains an order sustaining appellee's objections to its settlement, because not presented in time, to which order no exception was taken, it will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1609; Dec. Dig. § 270.*]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by A. W. Brode and another against William G. Gosslin and others. From a judgment for plaintiffs, and an order denying a new trial, defendant John G. Ritter appeals. Affirmed.

Randall & Gaines, for appellant. George H. Moore, for respondents.

SHAW, J. Action to quiet title to real estate. In addition to the usual allegations in such cases, the complaint alleged that defendants Gosslin and wife theretofore signed and acknowledged an instrument purporting to convey to the United States of America the lands described in the complaint, which instrument was recorded in the office of the recorder of deeds of Los Angeles county; that the United States of America did not accept the delivery of the purported conveyance so alleged to have been made to it by said instrument, by reason whereof it was of no force or effect as a conveyance. The prayer of the complaint was for a judgment and decree canceling the purported conveyance and quieting plaintiffs' title. The defendant appealing, by his answer, denied the want of delivery to and acceptance by the government of said purported deed, denied that plaintiffs were the owners of the real estate described in the complaint, and alleged that he was in possession of the same under and by virtue of an agreement made between him and the government of the United States. All the issues were found in favor of plaintiffs, upon which judgment was entered as prayed for. Ritter appeals from the judgment and an order of court denying his motion for a new trial.

The transcript contains a purported bill of exceptions in support of his motion, but the same is not authenticated in any manner. On the contrary, it contains an order of court sustaining plaintiffs' objections to the settlement thereof upon the ground that the same was not presented within the time required by section 650 of the Code of Civil Procedure. No exception was taken to the ruling of the court in refusing to settle the bill of exceptions, and the same, lacking the authentication required by law, cannot be

considered for any purpose upon this appeal.

The sole question then remaining is whether or not the findings support the judgment. An examination thereof leaves no room for questioning their sufficiency. Nor does appellant call our attention to any ground upon which he claims the judgment should be reversed; his sole argument being directed to alleged errors illustrated by the purported bill of exceptions, which, as said before, cannot be considered upon this appeal.

At the hearing of the appeal, respondents, pursuant to notice, made a motion to dismiss the same upon the ground that the matters in controversy had been settled out of court, and in support of their motion presented a grant deed from appellant to the property involved. As the judgment and order must, for the reasons given, be affirmed, it is unnecessary to pass upon the motion.

Judgment and order affirmed.

We concur: **ALLEN, P. J.**; **JAMES, J.**

16 Cal. App. 600

COURTENNEY v. STANDARD BOX CO.
(Civ. 825.)

(District Court of Appeal, Third District, California. July 18, 1911.)

1. SALES (§ 52*)—CONSTRUCTION—PARTIES—EVIDENCE.

In an action for the price of goods sold, evidence held to sustain a finding that plaintiff acted for himself in making the sale, and not for another.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 52.*]

2. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In an action for the price of goods, in which defendant claimed that plaintiff was acting for another in making the sale, defendant's manager was asked whether he knew before the orders were given that plaintiff personally supplied the goods, which question was excluded as calling for a conclusion. Held, that, since the answer would at most have shown that, though defendant conducted the transaction with plaintiff personally, its manager merely supposed plaintiff was acting as agent, error in excluding the question could not have prejudiced defendant.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1056.*]

3. TRIAL (§ 194*)—INSTRUCTIONS—CHARGE ON FACTS.

In an action by C. for the price of goods, in which defendant claimed that plaintiff acted as agent for N. in making the sale, the court charged that plaintiff was a separate person from the claimed principal, and if the letters from it as to the contract were signed "N., by C., Manager," they were the letters of N., and not of plaintiff, and, if the letters as to the sale of the goods were merely signed by plaintiff's name without anything indicating that he signed for N., they were not the letters of N., but of plaintiff. Held, that the instruction was erroneous as being upon the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 439-441, 446-454; Dec. Dig. § 194.*]

4. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS ON FACTS.

The error in the instruction could not have prejudiced defendant; all of the evidence introduced on the question of agency, if believed, requiring a finding that plaintiff was not the agent of N. in making the sale.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228; Dec. Dig. § 1068.*]

5. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS.

Error in an instruction in charging as a matter of law what the uncontradicted evidence shows as a matter of fact is not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228; Dec. Dig. § 1068.*]

6. TRIAL (§ 194*)—INSTRUCTIONS—CHARGES ON FACTS.

In an action for the price of goods, in which defendant claimed that plaintiff was acting for N. in making the sale, the court charged that plaintiff was "a separate and distinct person from N.," and if the letters relating to the sale were signed by plaintiff alone, and not for N., they were letters of plaintiff, and not of N. *Held*, that the jury were not instructed by the quoted phrase that plaintiff was not acting for N. in writing the letters; it merely stating the evident fact that plaintiff as an individual was a separate person from N.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 194.*]

7. SALES (§ 364*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action for the price of goods sold, defendant claimed that plaintiff sold them as agent for N., and also alleged as a counterclaim that, before the sale, plaintiff and other corporations had formed N., and that it had executed a contract with defendant for the sale of certain cases, which it had refused to perform, to defendant's damage. The court instructed that, unless the jury found that plaintiff acted for N. in selling the goods, they should disregard all testimony as to dealings N. may have had with defendant and of any suit brought by defendant against it. *Held*, that the instruction was proper, since the evidence referred to therein was immaterial if plaintiff did not act for N. in selling the goods.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 364.*]

8. INTEREST (§ 19*)—UNLIQUIDATED DEMAND.

In an action on a contract for the price of goods as fixed by the contract, which required the freight charges to be paid by the buyer, and deducted from the gross price, the seller was entitled to interest on the amount awarded for the goods after the freight charges paid were deducted; a contention that the claim was unliquidated because defendant was only entitled to deduct reasonable freight charges irrespective of the amount paid being untenable, especially where the seller himself selected the route of shipment, thereby practically fixing the charges since the jury must necessarily have found that the amount paid was reasonable, and interest would be allowable even if the claim were strictly an unliquidated demand, the exact amount of the charges being known to the buyer.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 35-40; Dec. Dig. § 19.*]

9. INTEREST (§ 19*)—UNLIQUIDATED DEMAND.

While as a rule interest is not allowable on unliquidated claims, it may be allowed where

the person liable knows the exact amount of his indebtedness.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 35-40; Dec. Dig. § 19.*]

10. SALES (§ 364*)—ACTION FOR PRICE—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action for the price of goods sold in which defendant claimed that plaintiff acted for N. in making the sale, and set up a counterclaim against N., defendant requested an instruction that, if it intended the orders to be for N. which plaintiff knew when they were given, N. could not, in order to defeat defendant's counterclaim against it, turn the orders over to plaintiff or any one else without defendant's consent, and, if it did so, defendant could set off the price against any amount due it from N. in an action by plaintiff for the price. *Held*, that the instruction was properly refused as not supported by any evidence; the only evidence showing defendant's intention that the orders should be filled by N. being the possible inference from the fact that defendant had previously had similar transactions with N. through plaintiff as its manager.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 364.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by A. A. Courteney against the Standard Box Company. Judgment for plaintiff, and, from an order denying defendant's motion for a new trial, it appeals. Affirmed.

P. L. Benjamin, for appellant. R. M. Sims, for respondent.

HART, J. This is an action by plaintiff to recover the sum of \$3,509.82 alleged to be due and owing from defendant to plaintiff for certain goods sold and delivered to the former by the latter. The cause was tried by a jury by whom a verdict was returned in favor of plaintiff for the sum of \$2,808.08. Judgment was entered accordingly.

The defendant prosecutes this appeal from the order denying its motion for a new trial, and complains: (1) That the evidence is insufficient to justify the verdict. (2) That the court erred, to its prejudice, in certain rulings upon questions involving the admissibility of certain testimony. (3) That the court in its charge misdirected the jury upon matters of law.

The complaint is in two counts, viz.: The one declaring upon the contract, and the second setting up the indebtedness in the form of a common count.

After averring that the defendant, a corporation, is and was, at the time of the commencement of this action and for some time prior thereto, engaged in business in the city of San Francisco, the complaint alleges that "between the 31st day of August, 1906, and the 20th day of November, 1906, at the city and county of San Francisco, plaintiff sold and delivered to defendant, at defendant's special instance and request, certain goods," etc., and then follows an itemized statement of the goods so sold and delivered.

In order that certain averments of and the issues raised by the answer may be the better understood, it should be here stated that it appears that the plaintiff, on receiving from the defendant the order for the goods mentioned in the complaint, purchased the same from a concern known as the Multnomah Lumber & Box Company, and thereupon ordered the latter to ship said goods to defendant, at San Francisco, as direct from himself. The defendant does not deny or dispute its indebtedness to some one for the goods described in the complaint; but its contention is that plaintiff, in said transaction was acting only and solely for a corporation named and known as the Northern Box Manufacturers' Agency, and, consequently not for himself in his individual right. In consonance with this theory, the answer, besides specifically denying the averments of both counts of the complaint, sets up a counterclaim, alleging, in this connection, that the plaintiff and the said Multnomah Lumber & Box Company and a number of other corporations engaged in like business, all said corporations being specifically named in the answer, had prior to the time at which the transactions upon which this action is founded took place formed themselves into a corporation under the name of the "Northern Box Manufacturers' Agency," and under that name the plaintiff and all said corporations are and ever since have been associated together in the transaction of business. It is alleged that at the times that the goods mentioned in the complaint were ordered by and sold and delivered to defendant the plaintiff was secretary and business agent of said Northern Box Manufacturers' Agency, and that in such capacity sold and delivered, for and in behalf of said corporation, the goods described in the complaint.

With respect to the alleged counterclaim, the answer alleges that on the 1st day of March, 1906, at the city and county of San Francisco, "the said parties so as aforesaid associated in business together under the said name of the Northern Box Manufacturers' Agency, as said Northern, etc., Agency, entered into a contract in writing with defendant," by the terms of which said agency (for brevity we shall hereafter so refer to said last mentioned corporation) agreed to sell and deliver to defendant 200,000 standard 2½-pound cases at certain prices specified in said contract, that said agency failed and refused to execute the terms of said contract on its part, and that defendant was thereby damaged in the sum of \$14,000.

From the foregoing statement of the issues it is to be observed that the punctum saliens of the problem submitted by the pleadings for solution by the jury was whether the plaintiff in the sale and delivery to defendant of the goods referred to in the complaint was acting for himself or only as the agent of said agency.

In order to support its counterclaim, it was

obviously necessary for the defendant to establish its theory that plaintiff in the sale of the goods described in the complaint was acting for and as the representative of said agency, and not for himself individually, and in attempting to sustain such theory it seems to have confined its evidence almost solely to the proof of its claim, as alleged in the answer, that the Multnomah Lumber & Box Company, from which, as we have seen, plaintiff purchased the goods sold and delivered by him to defendant, was at the time of such sale and delivery a component part of and therefore associated with said agency in the business of manufacturing and selling the kind of goods described in the complaint. Manifestly the effect of such proof could only be to establish a fact from which a very strong inference might have been drawn that the plaintiff in the transaction of which this litigation is the outgrowth was not operating for himself in his individual capacity but merely representing as manager or agent said agency.

1. In considering whether there is sufficient evidence to support the verdict, it is not deemed requisite to do more than refer to the testimony in this opinion in a general way. The jury found, upon sufficient evidence, as we shall presently perceive, not only by their general verdict, but also by their answers to certain particular questions of fact submitted to them by the court, against the theory upon which the defendant undertook to resist the right of plaintiff to maintain this action in his own right. The particular questions of fact so submitted and the answers thereto are as follows:

"(1) Did defendant order the goods described in the complaint from A. A. Courteney? Answer: Yes.

"(2) Did A. A. Courteney order the goods described in the complaint from the Multnomah Lumber & Box Company? Answer: Yes.

"(3) Were the goods ordered from the Multnomah Lumber & Box Company charged by them to A. A. Courteney under the name of Western Veneer & Basket Agency? Answer: Yes.

"(4) Did A. A. Courteney pay the Multnomah Lumber & Box Company for the goods described in the complaint? Answer: Yes.

"(5) Was the Multnomah Lumber & Box Company associated in business with the Northern Box Manufacturers' Agency and a member of said Agency? Answer: No.

"(6) Did A. A. Courteney have any connection with the Northern Box Manufacturers' Agency other than as a salaried employé? Answer: No."

Thus it is to be noted that the jury made express findings negating all the issues of fact essential to the support of defendant's counterclaim.

The evidence, consisting partly of the letters which passed between the plaintiff and defendant, shows that the defendant

first addressed a letter to plaintiff, ostensibly not as manager of the agency, asking for quotations on the goods itemized in the complaint; that thereafter considerable correspondence, culminating in the giving of the orders to plaintiff by defendant, passed between the parties; that the letters addressed to defendant relative to the goods by plaintiff were signed by the latter in his own name; that at the time these orders were given and accepted by plaintiff the agency had ceased to do business, but that plaintiff, who had been its secretary and manager, remained with the concern until December, 1906, for the sole purpose of winding up its affairs. Plaintiff testified that said agency accepted no new business after July 1, 1906, and in this he was corroborated by the witness Taylor, who had up to July 1, 1906, acted as a clerk and bookkeeper for said agency under the direction of plaintiff. Plaintiff further testified that he had been engaged in the box shoo business for himself since July 1, 1906, and prior to that time had transacted business independently of the agency under the name of the Western Veneer & Basket Company. It was upon the letterheads of this company that he had carried on the correspondence with defendant relative to the sale of the goods described in the complaint.

Upon receiving the request for quotations on said goods from defendant, plaintiff negotiated with the Multnomah Lumber & Box Company for its prices for the class of goods ordered by defendant, and upon receiving a reply from said company, disclosing said prices, communicated the same to defendant. The latter accepted the quotations thus offered by plaintiff, and ordered the shipment of the goods, and the latter thereupon directed the Multnomah Company to ship the goods to defendant. Plaintiff declared that neither he nor the Multnomah Lumber & Box Company was ever a member of the agency. He further testified that he made payments to the Multnomah Company on account of the goods delivered to the defendant.

F. A. Douty, business manager of the Multnomah Company, testified that his company had had dealings with the agency, but only as one person with another; that the Multnomah Company was never at any time a member of the agency; that the account for the goods in question was kept on his company's books against the Western Veneer & Basket Company "because that is A. A. Courteney." He stated that Courteney made the following payments to his company on account of the goods sold and shipped to defendant: on December 20, 1906, \$1,000; January 17, 1907, \$53.30; January 23, 1907, \$1,000; March 13, 1907, \$750.

[1] There is other testimony which corroborates the plaintiff in the statement that the transaction in question was conducted for himself individually, but the foregoing

brief résumé of the evidence is regarded as sufficient to disclose that the conclusion reached by the jury, as evidenced by their general verdict as well as by their answers to the particular questions of fact which they were required to answer, is abundantly supported and clearly justified. As stated defendant sought to show that the transaction was with the agency principally by proof that the Multnomah Lumber & Box Company was a member of said agency at the time the goods were ordered, sold, and delivered. Some testimony was received on behalf of defendant disclosing defendant's prior dealings with plaintiff as the business manager of said agency and the customary manner in which such transactions were prosecuted. The object of such testimony was, of course, to thus prove circumstances tending to establish defendant's contention that in the transaction involved here plaintiff was still acting for said agency. But this proof, like that offered and received in support of the claim that the Multnomah Company was a part or member of said agency, appears from the record to be exceedingly frail, and evidently was so valued by the jury. At any rate, the situation as presented by the record with regard to the proofs is such as to bring the case clearly within the rule that must be invoked and applied where a substantial conflict arises in the evidence.

[2] 2. The rulings of the court excluding answers to certain questions propounded to the witness, Merillion, manager of defendant, by the latter's attorney, and which rulings are declared to be erroneous, are, in any event, without prejudice. Most of the questions asked were, in effect, whether the witness had any information or knowledge before or at the time the orders were given for the goods and the same were sold and delivered or until a certain letter was received by defendant from plaintiff, dated December 17, 1906, that plaintiff personally and for himself supplied defendant with the goods involved in the controversy. To each of the questions so asked an objection upon the ground that it called for the opinion and conclusion of the witness was sustained by the court. While none of these questions, with a single exception, is, upon its face, amenable to the objection that it called for either the opinion or conclusion of the witness, still, had the court allowed them to be answered, the most that could have been thereby shown was that, although the defendant conducted the transaction personally with plaintiff, its manager did not know that in the transaction the plaintiff was acting for himself in his individual right, but supposed that therein he was only representing, as agent, the Northern Box Manufacturers' Agency. It is plainly apparent that testimony disclosing what the manager of defendant did not himself know or had not learned until a certain time with respect to that matter would have very slight,

if, indeed, any, tendency to prove that Courteney was not operating in his own behalf, individually, in the sale of the goods to defendant. Therefore, even though it may rightly be said, in strictness, that the trial court should have allowed answers to some of the questions here referred to, it cannot be held that its refusal to do so could have had the effect of seriously affecting defendant's substantial rights.

3. The complaint urged against the action of the court in the giving, the rejection, and the modification of certain instructions is without substantial merit. We shall not attempt to give all the assignments under this head special consideration. It will be sufficient to say as to most of the objections involving the matter of instructions that a critical examination of the entire charge of the court justifies us in declaring that therein all the principles of law pertinent to the issues as tendered by the pleadings and brought out by the evidence and essential to an intelligent and just consideration by the jury of the whole case as made out by the proofs were, generally speaking, expounded correctly and in language of marked perspicuity.

We shall, however, particularly notice a few of the very many objections against the action of the court in this regard. The most serious of these in our opinion is the objection involving the attack upon the following instruction given by the court: "You are instructed that A. A. Courteney is a separate and distinct person from the Northern Box Manufacturers' Agency, and if you find that the letters from the Northern Box Manufacturers' Agency relative to the contract of March 1, 1906, were signed 'Northern Box Manufacturers' Agency, by A. A. Courteney, Manager,' they were the letters of the Northern Box Manufacturers' Agency, and not the letters of Mr. Courteney; and if you find that the letters relative to the sale of the goods described in the complaint were signed 'A. A. Courteney,' and there was nothing in the letters indicating that they were signed by A. A. Courteney for the Northern Box Manufacturers' Agency, such letters are the letters of A. A. Courteney, and not the letters of the Northern Box Manufacturers' Agency."

[3] The foregoing part of the court's charge is criticised as involving an instruction to the jury upon a question of fact, and, while the criticism is well founded, we think the error, in view of the evidence, is without prejudice.

[4] It cannot be said as a matter of law, because the letters passing from plaintiff to defendant relative to the sale of the goods were signed by him without indicating by express words that in said transaction he was representing said agency as its agent, that he was not so acting for that corporation, but that from such manner of signing his name he was conducting the transaction solely for himself or in his individual capacity. In other words, it does not necessarily follow, either as a matter of fact or as a matter of

law, that the plaintiff was in said transaction acting solely for himself merely because he signed his own instead of the name of the agency to the letters addressed by him to defendant relative to the sale of the goods. The letters referred to were as a matter of fact signed by Courteney apparently in his individual capacity—that is, they were signed by him apparently not as manager of the agency, nor in any other manner indicating that they were written by him as an official of that corporation—but the fact that they were so signed constituted only a circumstance supporting the theory upon which plaintiff instituted this action, and clearly it was for the jury, and not for the court, to determine its probative value. Neither, on the other hand, would it have been conclusive proof or true as a matter of law that plaintiff was acting for the agency had he signed his name to the letters as its agent or manager.

But, as stated, we cannot perceive how the instruction could, in view of the evidence, have exercised a substantial or any significant influence on the jury in their deliberations upon their verdict. As before shown, the efforts of the defendant to establish its claim that in the purchase of the goods described in the complaint it was not dealing with plaintiff, as an individual, were almost entirely directed to proof of the connection, as a business associate, of the Multnomah Company with said agency, and in this defendant signally failed to establish its contention. Indeed, the only testimony upon that vital point of the controversy worthy of characterization as testimony came from plaintiff's side, and thereby it seems to have been directly and positively shown that neither the Multnomah Company nor plaintiff himself was a member of the agency, but that the former had never had any connection therewith as a business associate. In short, apart from proof of the fact—in truth, of the admission of the plaintiff himself—that the latter was secretary and business agent of the agency, and the further fact that defendant had had dealings with the agency while plaintiff was its manager, there is not a circumstance or fact developed by defendant from which the jury would have been warranted in inferring that the plaintiff, in the sale of the goods, was acting for the agency.

The testimony of the plaintiff was, as we have seen, that the agency had absolutely nothing to do with the sale of the goods. The testimony of the manager of the Multnomah Company was, as likewise has been seen, that plaintiff bought the goods from his company, that they were charged against plaintiff, that the latter made certain payments thereon, and that said company had no connection at that or any other time with the agency. As stated, this testimony stands in the record without the slightest contradiction affirmatively. Thus it is to be seen that the manner of the signing of the letters by plaintiff is in

perfect harmony with the apparently uncontroverted testimony that the transaction, on plaintiff's part, was conducted by him for himself and not for the agency.

Upon the record as thus outlined, the question with the jury was not whether it had been shown that plaintiff did not act for himself, but for the agency, for, as seen there was no affirmative showing which would justify such inquiry, but whether the testimony directly showing that he was acting for himself and not as a representative of the agency was to be believed. If the jury believed plaintiff and the manager of the Multnomah Company, as manifestly they did, then there was no other verdict that they could have justly returned than the one to which exceptions are here interposed. In other words, the only evidence affirmatively brought to their attention upon the vital issue submitted here was that produced by plaintiff in support of his contention, and the verdict must necessarily have been for plaintiff on that evidence or for defendant because said evidence was lacking in the power of persuasion. As suggested, if that evidence disclosed the truth of the transaction, then the letters addressed by plaintiff to defendant were written as his (plaintiff's) individual letters. Under the foregoing analysis of the evidence, the instruction under review, though, strictly speaking, erroneous, could not in our opinion, have operated prejudicially against the defendant.

[5] Where, as here, the evidence supporting the verdict appears to stand without substantial contradiction, the verdict thus reached should not be set aside because of an instruction which, though erroneous for dealing with a question of fact, contrary to the mandates of the Constitution, accords perfectly with such evidence. In other words, where, as in the case in this instance, the instruction states as a matter of law what the evidence, without apparent contradiction, discloses as a matter of fact, it cannot be held by this court that, on such a state of the record, a different verdict would have been returned but for such erroneous instruction.

[6] The instruction is further condemned because it declares that "A. A. Courteney is a separate and distinct person from the Northern Box Manufacturers' Agency"; the claim being that thus the jury were in effect told that Courteney, in writing the letters to the defendant concerning the transaction, was not acting for said agency. We do not so understand that language of the instruction. By the instruction the court undoubtedly intended only to declare as a matter of law what is certainly true as a matter of fact that Courteney, as an individual, is a separate and distinct person from the agency, a corporation, and that, as an individual, had a right to do business for himself, notwithstanding his official connection with said corporation. The antithesis of this proposition would obviously not be true or correct either as a matter of law or of fact. If the

court had said that "A. A. Courteney, as agent or manager of said agency and said agency were separate and distinct persons," the criticism of the instruction would then have been just and well founded; but the instruction does not so declare and could not have been so understood by the jury.

[7] The court very properly instructed the jury that, unless they found that the plaintiff in the sale of the goods acted for the agency, they should "disregard all testimony with respect to any dealings it may have had with defendant and of any suit defendant may have brought and maintained against said agency." Said instruction had particular reference to the counterclaim set up by defendant. The only theory admittedly upon which the counterclaim could have been sustained was, as seen, that the plaintiff conducted the transactions involved here as agent and on behalf of said Box Manufacturers' Agency, and, unless that fact could be shown, evidence addressed to the proof of the counterclaim pleaded by defendant was very clearly entitled to no consideration whatever by the jury in the determination of what their verdict should be. There was and is no claim that plaintiff, as an individual, had any connection with the transactions from which the alleged counterclaim arose. Of course, it was for the jury to first ascertain and determine whether the real party in interest in the action was said agency or plaintiff himself, and if, as obviously they did, they found that the agency had nothing to do with the transactions on which this action is based, why should they give consideration to an irrelevant and immaterial issue? The court did not take from the jury by this or the instruction just previously considered the right and the duty of determining the question of fact whether the agency or the plaintiff was the party with whom defendant had the dealings which constitute the subject of this action.

[8] It is further contended with seeming earnestness that the instruction as to the interest to which the court conceived the plaintiff would be entitled on any verdict or judgment which might properly be awarded to him under the evidence involves a misapplication of the law in that respect; the contention being that, because of the nature of the contract between the parties, the plaintiff was entitled to no interest at all.

The contract stipulated that the freight charges for the transportation of the goods from Portland to San Francisco were to be paid by defendant upon receipt of the same, and were to be deducted from the gross price of said goods. The evidence disclosed—in fact, it was practically admitted, as Beardsley, secretary of defendant, so testified—that the gross sum for the goods at the prices quoted to defendant by plaintiff amounted to \$3,590.82, and the amount of the freight charges paid by the defendant was \$782.74, leaving as due the plaintiff the sum of \$2,808.-

08, the sum awarded by the jury. The court instructed the jury upon the question of interest as follows: "The situation is that the amount of the goods furnished figured up to \$3,590.82, the amount of freight was \$782.74, which, being deducted from the price of the goods, leaves \$2,808.08. If you should find that A. A. Courteney in the light of other instructions which I shall give you is entitled to recover as plaintiff in this case, he will be entitled to recover that sum, \$2,808.08, and also interest from the date of the commencement of this action, November 27, 1906." The argument urged against said instruction or the allowance of interest upon the amount awarded by the jury is that the claim of plaintiff constituted an uncertain and unliquidated demand, made so by the fact that the sum to be deducted on account of freight charges, to be paid by defendant, from the gross sum or price for which the goods were sold, could not be ascertained from the contract itself; that the defendant was entitled to a reduction for reasonable freight charges only, or such charges as the jury might determine from all the evidence were reasonable, although such finding might be for an amount below that actually paid by defendant. Hence it is pointed out the court erred in allowing interest, and in support of the proposition so advanced the following cases are cited: *Brady v. Wilcoxson*, 44 Cal. 245; *Coburn v. Goodall*, 72 Cal. 509, 14 Pac. 190, 1 Am. St. Rep. 75; *Cox v. McLaughlin*, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164; *Ferrea v. Chabot*, 121 Cal. 237, 53 Pac. 689, 1092; *Erickson v. Stockton & T. C. R. Co.*, 148 Cal. 206, 82 Pac. 961; *MacComber v. Bigelow*, 123 Cal. 535, 56 Pac. 449; *Swinerton v. Argonaut L. & B.*, 112 Cal. 379, 44 Pac. 719.

But it will be found upon an examination of these cases that in each instance the action was upon a quantum meruit or for the recovery of the reasonable value of goods sold and delivered or services rendered, and they are therefore not in point.

In the case at bar the prices for the goods sold and delivered to defendant and accepted by it were definitely fixed and agreed upon in the contract and the time for payments definitely fixed and specified. The amount, if any, to which the plaintiff was entitled as compensation for these goods was capable of being readily made certain (if, indeed, it was not already certain or liquidated within legal contemplation), by the ascertainment, by the simple process of subtraction, of the difference between the gross sum for which, under their agreement, the plaintiff furnished and the defendant accepted the goods and the total amount paid by defendant for freight charges. It is, of course, idle to argue, under the circumstances disclosed by this record, that the freight charges, so far as the amount thereof was concerned, were subject to determination by the jury upon evidence disclosing whether such charges

were reasonable or unreasonable. Whatever sum was actually paid by defendant for such charges was precisely known to the latter, and therefore easily and readily ascertainable, and the sum so paid would represent the sum to be deducted from the gross sum for which the goods were sold. The jury could not, without exercising the most arbitrary and unwarranted power, find a sum less than that actually paid. Indeed, the question whether the sum so paid was reasonable could not arise, since the plaintiff himself shipped the goods and selected the route and manner of such shipments and thus himself virtually regulated the charges therefor.

But conceding for the purposes of the case that the claim or demand upon which the complaint declares is, in a sense, unliquidated in that the amount precisely due must be ascertained by arithmetical calculation, yet the proposition that interest is allowable thereon is still unimpeachable.

[9] It is thoroughly settled by the authorities in this as well as in other jurisdictions that while, as a general rule, interest may not be allowed on unliquidated claims, there are, nevertheless, exceptions thereto. The reason of the denial of interest on such demands "is said to be that the person liable does not know what sum he owes, and, therefore, can be in no default for not paying." *Cox v. McLaughlin*, 76 Cal. 67, 18 Pac. 100, 9 Am. St. Rep. 164. When, therefore, as is the case here, the exact sum of defendant's indebtedness is known to him, the reason suggested for the denial of interest does not exist. In the case last cited it is said: "We are not prepared to say, in general terms, that no interest in any case can be recovered in an action upon contract for an unliquidated demand. *Mix v. Miller*, 57 Cal. 356, decided since the adoption of the Code, and *McFadden v. Crawford*, 39 Cal. 662, decided previously, attest the doctrine that in this state interest is allowable on such demands under some circumstances. These were cases in which the contract had been fully performed by the creditors, the fruits thereof accepted by the debtors, without objection, and they were clearly in default, and in the latter case the only question was as to value." The foregoing language is quoted approvingly in the case of *Easterbrook v. Farquharson*, 110 Cal. 317, 42 Pac. 811. See full and interesting discussion of this subject in all its phases in the leading case of *Selleck v. French*, 1 Conn. 32, 6 Am. Dec. 185, and the footnotes in the last mentioned volume. Therefore, if it may be held that the claim which is the basis of this action constitutes, strictly speaking, an unliquidated demand, still we think that there is no possible ground for doubting that this case comes clearly within the exceptions pointed out by the cases above referred to. It follows from the foregoing views that whether interest has been allowed upon the theory that compensation is thus awarded plaintiff for the use of

his money, past due (section 1917, Civ. Code), or as damages for defendant's wrongful withholding of said money from plaintiff (section 3287, Civ. Code), in either case the allowance was perfectly proper, and the instruction of the court upon that subject, therefore, so far as defendant is concerned, without prejudice. Indeed, although the question is not presented here for decision, it may be suggested that it might well be claimed, under the circumstances of this case, that the plaintiff was entitled to interest from the date that the money became due, in which case he, and not the defendant, would be the sufferer from the instruction and the verdict on the score of interest.

[10] It is further objected that the court committed prejudicial error by its disallowance of an instruction, requested by the defendant, that would have told the jury, in effect, that, if the defendant intended the orders in question to be for the agency and that plaintiff at the time said orders were given knew such to be the fact, the agency, in order to defeat defendant's right to offset its counterclaim against the agency, could not, without the consent of defendant, turn said orders over to the Multnomah Lumber & Box Company or any other party to be filled; that if, under the circumstances as thus indicated, the agency did turn the orders over to the said Multnomah Company and they were filled by "Courteney or the Multnomah Lumber & Box Company, the defendant has the right to set off against the price for the goods supplied under those orders whatever amount may be due it from the * * * agency for any loss suffered by defendant through the failure of the * * * agency to carry out any contract it might have had with the * * * agency for the furnishing of boxes."

Several other instructions involving the enunciation in a different form of the same proposition were also requested by the defendant and rejected by the court. These instructions were properly refused for the reason that there was adduced no evidence to which they were applicable. We have found no testimony in the record which discloses that the intention of the defendant was that the orders should be filled by the agency, with the exception that a possible inference might be deduced that the defendant so intended from the fact that it had previously had transactions of a similar character with the agency through plaintiff as the agency's manager; but such inference, at best, would manifestly amount to nothing more than a mere conjecture. Nor does there appear to have been any serious effort made by defendant to show its intention in that regard. It is true that its counsel asked its business manager what his "understanding" was with respect to the person with whom it was transacting the business concerned here; but had the court permitted an answer to that question and

such answer had been favorable to defendant, as undoubtedly it would have been, the intention of the defendant would not thus have necessarily been shown. And, assuming that defendant would thus have shown its intention to have been to deal with the agency, and even going further, supposing that it had been shown, as it was not, that the agency received the orders and then turned them over to plaintiff to be filled, there is nothing to disclose its purpose or motive in doing so, except the bare inference that might possibly be drawn from the fact that the defendant held against the agency an alleged claim for damages which defendant might have maintained as a set-off to the price of the goods in question. But the only tangible evidence from which the intention of the defendant on the subject referred to may be presumed consists of the letters addressed by it to plaintiff relative to the sale of the goods, and, as we have seen, those letters were so addressed to plaintiff ostensibly as an individual and not as a representative of the agency.

Moreover, we do not conceive nor concede it to be true as a legal proposition that if the agency, in order to defeat defendant's counterclaim turned the orders over to Courteney or to any other party, to be filled, without the consent of the defendant, the latter would nevertheless be entitled to interpose and maintain its counterclaim against the agency in a suit by Courteney (or such other party) for the price of the goods, unless it could be shown that Courteney (or other party) did not act in good faith in the matter, or that the agency itself was interested in the goods so shipped or the money which might become due thereon. If, in other words, A. should order goods from B., and the latter, for whatsoever reason, should turn the order over to C. without the express consent of A., and C. in good faith fills the order by shipping to A. goods in which B. has no interest, and A. accepts the goods, we know of no reason or principle which would preclude a recovery by C. of the price of the goods free from any set-off or counterclaim A. might have against B., even though it might transpire that C. knew at the time the contract was so transferred to him that the motive of B. in transferring the contract was to escape the consequences of a plea and proof of a counterclaim against him in the event that it became necessary to institute an action to recover the price of the goods from A., C. might not, under such circumstances, be able to sustain a declaration for the price of the goods so supplied on an express contract, his mind and that of A. not having by express terms come together on or concurred in the proposition, still, since A. had accepted the goods and so enjoyed the fruits of the transaction, C. could certainly recover the reasonable market value of the goods upon an implied assumpsit or a quantum meruit, and in such

case the plea of the counterclaim against B. could not be sustained.

We have now considered such criticisms of the action of the court in the matter of instructions as we deem worthy of special notice. As before stated, every legal principle pertinent to the issues tendered by the pleadings and presented by the evidence was declared to the jury in clear language and correctly.

After a thorough examination of the record as well as the briefs of appellant, the latter embracing, in the aggregate, 192 printed pages, we have been unable to discover any error in the trial of the cause or in the result thereof for which a reversal of the order would be justified.

The order is therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

16 Cal. App. 634

OSBORN v. HAMILTON et al. (Civ. 980.)

(District Court of Appeal, Second District, California. July 21, 1911.)

1. **BILLS AND NOTES (§ 539*)—ACTIONS—FINDINGS—IMMATERIAL FINDINGS.**

The answer in an action on a note admitted its execution, but denied delivery to plaintiff, or that he was the legal holder, or that any sum remained due thereon, and further alleged that it was given without consideration, and that defendant's signature was obtained by plaintiff's fraud. *Held*, that a finding that a certain deed was delivered in escrow to secure payment of the note, but before commencement of the suit was returned to, and accepted by defendant, was not responsive to any issue, and hence was immaterial.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1911-1913; Dec. Dig. § 539.*]

2. **BILLS AND NOTES (§ 495*)—LIABILITY OF PARTIES—JOINT MAKER—LIABILITY AS SURETY.**

To entitle a joint maker of a note to defend on the ground that he was only surety, he must show that fact, and that the payee knew thereof, and consented to deal with him as surety.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1663-1668; Dec. Dig. § 495.*]

3. **BILLS AND NOTES (§§ 492, 524*)—DELIVERY—EVIDENCE.**

The production in evidence of the note sued on was presumptive evidence that the maker made and delivered the note to the payee, and that the payee was the owner thereof.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1649-1651, 1669-1674; Dec. Dig. §§ 492, 524.*]

Appeal from Superior Court, Los Angeles County; Frank F. Oster, Presiding Judge.

Action by Earl R. Osborn against Louise M. Hamilton and others. From a judgment for plaintiff and an order denying a new trial, one defendant appeals. Affirmed.

R. W. Richardson and Dian R. Gardner, for appellant. Clair S. Tappan, for respondent.

SHAW, J. Action to recover upon a promissory note. Judgment went for plaintiff, from which, and an order denying her motion for a new trial, defendant Fette appeals.

The note, dated June 14, 1907, payable to plaintiff 90 days after date, signed by each of the defendants as principal, was set out in *hæc verba* in the complaint. The appellant Fette filed a separate answer admitting the making and execution of the note as alleged in the complaint, but denied that it was delivered to plaintiff, or that he was the legal holder thereof, or that any sum remained due and unpaid thereon. As a separate defense appellant alleged that the note was given without consideration, and that her signature thereto was obtained by means of a fraudulent conspiracy entered into between her co-defendants and the plaintiff for the purpose of defrauding her and sharing the proceeds derived from such fraudulent conspiracy. As to all the issues joined by the complaint and answer of appellant, the court, upon ample evidence in support thereof, made findings in favor of plaintiff.

While the fact was not pleaded by way of defense and not made an issue in the case by consent of parties, the court nevertheless found that a deed to certain real estate was delivered to a third party in escrow for the purpose of securing payment of the note, which deed, prior to the commencement of the suit, was returned to and accepted by defendants. The terms of the escrow are not disclosed by the record, and hence from all that appears to the contrary such security may have been exhausted by a return of the deed pursuant to the terms of the agreement under which it was placed in escrow.

[1] Moreover, the finding is immaterial, and has no place in the record, for the reason that no issue to which it is responsive appears therein. Appellant did not base her defense upon the fact that the alleged indebtedness was secured by a mortgage or otherwise. "As the appellant neither asked for the judgment which it is now claimed should have been entered in the court below, nor alleged facts upon which such a judgment could properly have been entered, he cannot here demand a reversal of the judgment which responded to the issues actually made and submitted to the trial court." Noonan v. Nunan, 76 Cal. 49, 18 Pac. 100.

Counsel contends that, notwithstanding the apparent character of appellant as principal and maker of the note, she was in fact a surety for her comakers. Conceding the fact, it is not alleged nor claimed that appellant acted upon other than her apparent character as one of the makers of the note. Section 2832, Civ. Code.

[2] A joint maker of a note, in order to defend on the ground that he is merely a surety for his comaker, must not only plead such fact, but further allege that the payee knew of the fact and consented to deal with him in that capacity. *Bank v. Stover*, 60 Cal. 387; *Bostwick v. McEvoy*, 62 Cal. 496. No issue was tendered involving the question. Neither is there evidence in the record supporting appellant's contention.

[3] It is next claimed the evidence is insufficient to support the finding that defendants made and delivered the note to plaintiff, and that he was the owner and holder thereof. The production of the note at the trial in the hands of plaintiff was prima facie evidence of the facts found, in addition to which plaintiff testified in direct terms that the note was delivered to him two or three weeks after its date.

The appeal is wholly without merit, and the judgment and order are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

16 Cal. App. 626

EDWARDS v. BROCKWAY et al. (Civ. 970.)

(District Court of Appeal, Second District, California, July 21, 1911. Rehearing Denied by Supreme Court. Sept. 18, 1911.)

1. MUNICIPAL CORPORATIONS (§ 744*)—DUTY OF OFFICERS—SUPERINTENDENT OF STREETS—REPAIR OF STREETS.

San Diego City Charter (St. 1889, p. 670) art. 5, c. 1, § 8, gives the board of public works, subject to ordinances adopted by the council, control of the streets and all improvements and repairs thereon, and section 11 (St. 1889, p. 672) authorizes such board to appoint a superintendent of streets "whose duty it shall be to see that the laws, ordinances, orders and regulations relating to public streets" are executed, and who shall keep himself informed of the condition of the streets and report the same to the board. *Held*, that failure to repair a street which he was not directed to repair by ordinance or order would not make the sureties on the bond of the superintendent of streets liable for resulting injuries, though he knew of its dangerous condition.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1565; Dec. Dig. § 744.*]

2. MUNICIPAL CORPORATIONS (§ 203*)—DUTIES OF OFFICERS—APPLICATION OF STATUTES.

Henning's Gen. Laws 1905, p. 787, relating to municipal corporations of the first class, section 136 of which fixes the duties of the superintendents of streets, is not applicable to cities governed by freeholders' charters which fix the duties of such officers.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 548-556; Dec. Dig. § 203.*]

3. JUDGMENT (§ 642*)—CONCLUSIVENESS—SUPREME COURT—TRANSFER OF CAUSE.

An order by the Supreme Court denying a motion to dismiss an appeal, made before the transfer of the appeal to the appellate court, is final.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1156; Dec. Dig. § 642.*]

Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Action by Anna M. Edwards against J. C. Brockway and another. From a judgment for plaintiff, the defendant United States Fidelity & Guaranty Company appeals. Reversed.

Lloyd S. Ackerman, for appellant. Patterson Sprigg, for respondent.

SHAW, J. Action to recover damages for personal injuries alleged to have been sustained by reason of official negligence of defendant Brockway, who at the time was superintendent of streets of the city of San Diego; the United States Fidelity & Guaranty Company being impleaded as a party defendant under an allegation that it was surety upon his official bond. Judgment went against both defendants, from which the United States Fidelity & Guaranty Company alone prosecutes this appeal.

It appears that at the time of the injury to plaintiff defendant Brockway was the duly appointed, qualified, and acting superintendent of streets of the city of San Diego; that he made and delivered a bond signed by himself as principal and the United States Fidelity & Guaranty Company as surety, conditioned "that if the said J. C. Brockway shall well and faithfully execute and perform all duties of such office of street superintendent now required of him by law, and shall well and faithfully execute and perform all the duties of such office of street superintendent required by any law to be enacted subsequently to the execution of this bond, then this obligation is to be void, and of no effect; otherwise to remain in full force and virtue;" that one Engebretsen, a contractor, had, pursuant to the terms of a contract signed by Brockway's predecessor in office, completed the grading of a street in said city known as Julian avenue; that at the crossing of this avenue with Twenty-Second street a cut was made, leaving the surface of Julian avenue as graded some four or five feet below the surface of Twenty-Second street, thus leaving Twenty-Second street in a dangerous condition for public travel; that Brockway accepted the work on Julian avenue as completed; that, after said acceptance, no lights or guards were placed at the point in Twenty-Second street where it intersected Julian avenue; that at the time of the injury complained of Brockway, as such superintendent, had knowledge of the condition of Twenty-Second street at the intersection thereof with Julian avenue; that on June 28, 1907, at about 7:30 p. m., while plaintiff was walking along Twenty-Second street, she walked or fell from said street into Julian avenue, by reason whereof she received the injuries for which she asks damages. It does not appear that Twenty-Second

street had ever been graded or otherwise improved, or that any sidewalks had been constructed thereon.

At the times in question the government of the city of San Diego was conducted under a freeholders' charter which provided for the establishment of a board of public works consisting of three commissioners. By section 8, c. 1, art. 5, of the charter (Stats. 1889, p. 670), this board, subject to such ordinances as the common council might from time to time adopt, was given charge, superintendence, and control of the streets and sidewalks belonging to the city, or dedicated to public use, and of all improvements and repairs thereof, and of all public works and improvements to be done by the city, as well as control of the manner of using the streets and sidewalks, and the power to prevent and remove obstructions therefrom, and the right to cause the prompt repair of streets and sidewalks. Section 11 of said chapter 1 (Stats. 1889, p. 672) authorized the board of public works, when deemed necessary, to appoint a superintendent of streets, "whose duty," as prescribed by said section, "it shall be to see that the laws, ordinances, orders, and regulations relating to public streets and highways be fully carried into execution, and that the penalties thereof are rigidly enforced; he shall superintend and direct the cleaning of streets, and shall keep himself informed of the condition of all public streets and highways, and also of all public buildings, lots, and grounds of the city, and report the same to the board, and shall perform such other duties as are hereinafter specified, or as may be required of him by this board." It does not appear that either the common council or the board of public works at any time required of Brockway, as superintendent of streets, the performance of any other duties than those specified in this section. The only finding of the court touching the subject is as follows: "It is true that among the duties of the said J. C. Brockway, as such superintendent of streets, during all the times herein mentioned, were to see that the laws, ordinances, orders, and regulations relating to public streets and thoroughfares in the city of San Diego should be fully carried into execution, and that he keep himself informed of the condition of all the public streets, thoroughfares and highways of the said city of San Diego."

The alleged official negligence on the part of Brockway as superintendent of streets, as found by the court, consisted in this: That on June 24, 1907, "said J. C. Brockway had official and personal notice of the said condition of said Julian avenue at the corner of Twenty-Second street; and it is true that said defendant J. C. Brockway failed and neglected to repair or place any protection whatsoever at the said corner of Julian ave-

nue and said Twenty-Second street, and it is true that he had official and personal notice of the said condition of said streets at least 24 hours prior to the injuries in said complaint complained of."

[1] Under the provisions of the charter fixing his duties, the superintendent was not required even though he had personal notice of the dangerous condition of the street, to repair or protect the same, unless the duty so to do was imposed upon him by ordinance adopted by the common council, or order made by the board of public works. It was his duty to see that the ordinances and orders relating to public streets be carried into execution. Neglect and failure to execute the same rendered him and the sureties upon his official bond liable in damages to those sustaining injuries by reason of such neglect. *Doeg v. Cook*, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171; *Merritt v. McFarland*, 4 Cal. App. 390, 88 Pac. 369. But, in the absence of such order or direction, the superintendent had no authority to make the repairs or pay the cost thereof. A careful examination of the record discloses nothing whatever showing, or tending to show, that any ordinance, order, or regulation relating to streets in general, or to Twenty-Second street, or its intersection with Julian avenue, had ever been adopted by the city council or the board of public works, directing Brockway, as superintendent, to make any repairs at the intersection of Twenty-Second street and Julian avenue, or place any protection whatsoever at the said corner of Julian avenue and Twenty-Second street. In the case of *Merritt v. McFarland*, 4 Cal. App. 390, 88 Pac. 369, this court held the superintendent of streets of the city of Riverside liable for damages resulting from the dangerous condition of a street, but that decision was based upon the fact that it was conceded the superintendent was authorized by the city council to do the work; his negligence consisting in the fact that he failed to execute the order. So, too, in the case of *Doeg v. Cook*, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171, a like decision was had, based upon the fact that an ordinance had been adopted imposing upon the street commissioner the duty of keeping the particular street open and in good repair. The facts presented in the case at bar, however, wholly fail to bring it within the principle enunciated in these cases.

[2] Respondent directs our attention to section 136 of the general law pertaining to municipal corporations of the first class (Gen. Laws Cal. p. 787), which fixes the duties of superintendent of streets. This section is almost identical with the provisions of the charter of the city of San Diego prescribing the duties of superintendent, and tested by the provisions of this section, conceding its application, it does not appear that Brock-

way failed to perform the duties imposed upon him by the same. However, said section was intended to apply only to cities of the first class organized under general laws, and the provisions thereof are not applicable to cities governed by freeholders' charters, which, as here, fix the duties of such officer.

Our attention is also called to section 23 of the Vrooman act (Gen. Laws Cal. p. 1326), which provides that "if, in consequence of any graded street or public highway improved under the provisions of this act, being out of repair and in condition to endanger persons or property passing thereon," no recourse for damages suffered shall be had against the city, "but if such defect in the street or public highway shall have existed for the period of twenty-four hours or more after notice thereof to said superintendent of streets, then the person or persons on whom the law may have imposed the obligations to repair such defect in the street or public highway, and also the officer or officers through whose official negligence such defect remains unrepaired, shall be jointly and severally liable to the party injured for the damage sustained; provided, that said superintendent has the authority to make said repairs, under the direction of the city council, at the expense of the city." No facts are presented bringing the case within the provisions of this section. Twenty-Second street does not appear to have ever been improved or sidewalked at all; nor can it be said upon this record that Julian avenue was graded or improved under the provisions of this act (Vrooman act). Moreover, it is not made to appear that the superintendent had authority to make repairs under the direction of the city council, the board of public works, or otherwise, at the expense of the city.

We are clearly of the opinion that the record discloses no facts showing that Brockway was guilty of official negligence as superintendent of streets, or that he failed and neglected to perform any official duty imposed upon him either by law, ordinance, order, or regulation of his superiors. Hence there was no breach of the condition of the official bond given by the United States Fidelity & Guaranty Company, appellant herein.

Appellant urges several grounds upon which it is claimed the bond is void. Inasmuch, however, as the judgment must be reversed for the reasons given, we deem it unnecessary to discuss the points.

[3] The motion of respondent to dismiss the appeal was heard by the Supreme Court prior to the transfer of the case to this court, and an order made denying the motion. Such ruling must be deemed a final disposal of the motion.

Judgment reversed.

We concur: ALLEN, P. J.; JAMES, J.

16 Cal. App. 618

PEOPLE v. AYHENS. (Cr. 321.)

(District Court of Appeal, First District, California. July 19, 1911.)

1. CRIMINAL LAW (§ 1036*)—APPEAL—OBJECTIONS TO EVIDENCE.

Error in admitting evidence not objected to at trial cannot be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2639-2641; Dec. Dig. § 1036.*]

2. BURGLARY (§ 38*)—ADMISSION OF EVIDENCE.

In a prosecution for burglary, charged to have been jointly committed by accused and M., a police officer testified that he met accused and M. shortly after the burglary, and, upon approaching them, accused fled, and that he immediately searched M.'s person and found cigars, subsequently identified as having been taken from the burglarized premises, and that, immediately after accused had been taken to the city prison in a patrol wagon, other articles were found secreted in the wagon which came from the burglarized premises. *Held*, that the evidence was competent as tending to show that the premises described in the information had been burglarized.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 91; Dec. Dig. § 38.*]

3. CRIMINAL LAW (§ 424*)—EVIDENCE—HEARSAY.

In a prosecution for burglary claimed to have been committed jointly by accused and M., a police officer testified, in answer to the question, "Tell us what M. said in the presence of the defendant?" that in the presence of himself and accused, after both accused and M. were arrested, M., who was not summoned as a witness on accused's trial, stated that accused committed the burglary, which accused promptly denied. *Held*, that the evidence as to M.'s accusation was hearsay and inadmissible, even if he was a co-conspirator or an accomplice; statements of persons not witnesses, such as charges of guilt, though made in accused's presence, not being admissible except in connection with incriminatory conduct by accused upon hearing such statements, when they are admissible only to characterize accused's conduct as tending to show guilt such as his failure to deny a charge of guilt or his false denial thereof, such guilty conduct by accused, and not the accusation, being the evidence which is admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1002-1010; Dec. Dig. § 424.*]

4. CRIMINAL LAW (§ 424*)—DECLARATIONS OF CO-CONSPIRATOR—TIME OF DECLARATION.

To be admissible in evidence, the declaration of a co-conspirator must be made during the existence of the conspiracy and in furtherance thereof, and not after its consummation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1002-1010; Dec. Dig. § 424.*]

5. CRIMINAL LAW (§ 407*)—ADMISSIONS.

Ordinarily accused's conduct in not answering or denying an accusation of guilt when he has an opportunity to reply is admissible as an admission of guilt, but the accusation alone is not admissible if he promptly denies it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 898-900; Dec. Dig. § 407.*]

6. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where it cannot be said that the verdict of guilty would have been rendered had incom-

petent evidence been excluded, error in admitting it is reversible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Chester Ayhens was convicted of first-degree burglary, and from the judgment of conviction and an order denying a motion for a new trial he appeals. Reversed and remanded for new trial.

J. J. Van Hovenberg, for appellant. Attorney General Webb, for the People.

LENNON, P. J. The defendant, jointly with one Charles Miller, was charged with the crime of burglary. He was convicted, upon a separate trial, of burglary in the first degree, and sentenced to 15 years in the state's prison at San Quentin.

[1] The testimony of the arresting officer with reference to a conversation which he had with the codefendant Miller at the time of the arrest and not in the presence of the defendant was not objected to at the trial, and the error in the admission of this testimony cannot now be considered.

[2] Shortly after the commission of the burglary Police Officer Frank Anderson, while patrolling his beat, encountered the defendant and Miller. Their conduct was such as to attract the attention and arouse the suspicion of the officer. Upon the approach of the officer the defendant fled, and an immediate search of Miller's person revealed a box of cigars, which was subsequently identified as having been stolen from the premises charged to have been burglarized. Miller was placed under arrest and taken to the city prison in a patrol wagon. The arresting officer was permitted to testify, over the objection of the defendant, that immediately after Miller had been booked a brush and a razor, also identified as a portion of the property stolen from the premises in question, were found secreted in the patrol wagon. This testimony was admissible as a part of the people's case in proof of the fact that the burglary charged had been committed. It may not have been competent evidence to show that the defendant committed the crime charged, but it did tend to show that the premises described in the information had been burglarized, and for this purpose it was competent, relevant, and material. The defendant's objection, which went only to the competency of the evidence, was properly overruled.

Several days after the arrest of Miller the defendant was apprehended and charged with the crime. Miller was not called at the trial as a witness for the people, but Police Officer Kyle was permitted to testify, in effect, that, in his presence, and in the

presence of the defendant, Miller declared that the defendant committed the burglary. Kyle testified, further, that the defendant promptly and unequivocally asserted that Miller was not telling the truth, and then, in response to questions put to him by Kyle, narrated the circumstances of his meeting with and being in the company of Miller on the night of and shortly after the commission of the crime.

Counsel for defendant objected to the testimony of the witness Kyle, upon the ground that the proffered statements of Miller were hearsay, and made after the commission of the burglary. The court overruled the objection upon the theory that Miller's accusation of the defendant was admissible merely because it was made in the presence of the defendant. Subsequently the defendant moved to strike out the testimony referred to. The district attorney resisted this motion upon the theory that he had shown the existence of a conspiracy by Miller and the defendant to commit the crime charged, and that, inasmuch as the testimony of Officer Kyle purported to disclose the declarations of a co-conspirator made in the presence of the defendant, it was admissible. The motion to strike out was denied, and in this, and in its ruling upon the previous objection, the court erred to the prejudice of the defendant.

[3] The testimony objected to was clearly hearsay, and its admission cannot be justified upon the theory that it was evidence of the declarations of a co-conspirator, or merely because the declarations of Miller were made in the presence and hearing of the defendant. The record is barren of any evidence which would tend to show the existence of a conspiracy to commit the crime charged. But, even if the record disclosed evidence sufficient to warrant the theory of the existence of a conspiracy, it is apparent that the declarations of Miller were made subsequent to the perpetration of the crime, and several days after the completion of the conspiracy claimed to have been shown by the people.

[4] The declarations of a co-conspirator, to be admissible in evidence, must be made during the life of and in furtherance of the conspiracy, and not upon or after its consummation. *People v. English*, 52 Cal. 212; *People v. Aleck*, 61 Cal. 138; *People v. Dilwood*, 94 Cal. 90, 29 Pac. 420. We are aware that there are several decisions in this state wherein it has been said generally that conversations had in the presence and hearing of a defendant are not hearsay, and may be admitted in evidence against him. *People v. Moore*, 45 Cal. 20; *People v. Irwin*, 77 Cal. 504, 20 Pac. 56; *People v. Mayes*, 113 Cal. 627, 45 Pac. 860. But we do not understand those cases to decide as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

an unqualified rule of law that the declarations of a person not called as a witness at the trial, even though he is shown to be a co-conspirator, are competent evidence merely because such declarations were made in the presence and hearing of the defendant. The sum and substance of the rule in this behalf, as well as its purpose and the circumstances under which it may be invoked and applied, are concisely stated by Mr. Justice Cooper in *People v. Philbon*, 138 Cal. 532, 71 Pac. 651, wherein it is said: "It is undoubtedly the rule in this state that statements of persons not called as witnesses are not admissible in evidence simply because made in the presence and hearing of the accused person. It is only when there is something in the conduct of the accused person, in response to the statement, that is material to the issue, that the statements are admissible at all, and they are admissible then solely for the purpose of explaining the conduct of the accused."

The fact that Miller was either a co-conspirator or an admitted accomplice does not take his declarations, made when the crime or alleged conspiracy was a thing of the past, out of the category of hearsay evidence, nor entitle them to any greater consideration than that accorded to the statements of an innocent and disinterested third person. *People v. Oldham*, 111 Cal. 653, 44 Pac. 312. The declarations of Miller could have been admissible against the defendant only in the presence of those circumstances which create an apparent exception to the rule excluding hearsay testimony, and permit in evidence statements made in the presence and hearing of a defendant, by a person not called as a witness, for the single purpose of showing that the defendant's conduct and statements in reply were not those of an innocent man. *People v. Weber*, 149 Cal. 338, 86 Pac. 671. Under this rule, repeatedly declared and defined in this state, the statements themselves cannot be received or considered as evidence. It is only the guilty conduct or incriminating reply of a defendant in response to an accusation of crime or statements implicating him in its commission that constitute relevant and competent evidence against him. *People v. Teshara*, 134 Cal. 542, 66 Pac. 798.

[5] Ordinarily when a defendant, under conditions which fairly afford him an opportunity to reply, stands mute in the face of an accusation of crime, the circumstance of his silence may be taken against him as evidence indicating an admission of guilt. *Jones on Ev.* § 291; *People v. McCrea*, 32 Cal. 98; *People v. Ah Yute*, 53 Cal. 614; *People v. Louie Foo*, 112 Cal. 24, 44 Pac. 453; *People v. Mallon*, 103 Cal. 513, 37 Pac. 512; *People v. Amaya*, 134 Cal. 536, 66 Pac. 794. But, if he promptly and fully deny the charge, the accusatory statements standing alone are not in any sense competent

evidence of the defendant's guilt (*People v. Estrado*, 49 Cal. 171; *People v. Ah Yute*, 54 Cal. 90), and should in such a contingency be excluded from the consideration of the jury (*People v. Teshara*, supra; *People v. Philbon*, supra). As was said in the case of *People v. Teshara*, supra: "The court and the district attorney seem to have lost sight of the fact that it is not the accusation, but the conduct of the accused, that is evidence in such cases, and that the only reason for admitting the accusation is to explain the conduct." This rule applies with peculiar force to the facts of the case at bar, for it appears from the record that when Miller had concluded his statement, wherein he declared the defendant to be the perpetrator of the crime, Officer Kyle turned to the defendant and asked him if Miller was telling the truth. Under such circumstances the silence of the defendant would have been competent evidence against him; but, in view of the defendant's prompt denial, the propriety and necessity of excluding Miller's statements from the evidence in the case at bar are readily apparent. The question which elicited the evidence complained of was: "Tell us what Miller said in the presence of the defendant?" This question upon its face was objectionable. It sought to adduce only the conversation of Miller, and not the conduct and statements of the defendant in reply, and in view of the defendant's objection it was incumbent upon the district attorney to amplify the question by adding the particulars which he expected to prove, or, at least, announce to the court that the question and the testimony sought to be adduced thereby were the preliminaries of a purpose and an effort to show the defendant's conduct and statements in the presence of an accusation of crime. The district attorney knew, or should have known, what the witness Kyle would testify to; and if it had been stated to the court by the district attorney that it was his purpose to show that the defendant had been charged by Miller with the commission of the crime, and that the defendant had promptly denied the accusation, it is but fair to the trial court to assume that the objection would have been sustained.

We are not unmindful of the suggestion made by the Attorney General that, as indicated in *People v. Cole*, 141 Cal. 88, 74 Pac. 547, the rule of evidence under discussion is subject to the qualification that such testimony is admissible notwithstanding a defendant's prompt and full denial of guilt, if, in addition and in an attempt to avoid the effect of the accusation, he makes a statement which is calculated to deceive or is subsequently shown to be false. In such a case, however, the scope and effect of the evidence is not materially modified. The fact would still remain that the accusation

could not be considered as evidence, for, in such a case, it is the falsehood, and not the accusation, which indicates a consciousness of guilt, and weighs against the defendant. *People v. Turner*, 1 Cal. App. 422, 82 Pac. 397.

Even in this modified form the rule of evidence referred to cannot, on the facts of this case, be invoked to support the rulings of the trial court. Apart from the alleged declarations of Miller, no attempt was made to contradict or impeach the statement of the defendant made in explanation of his conduct, his recent possession of stolen property, and his association with Miller on the night of the burglary. Neither is it apparent from the record before us that the defendant's reply to the accusation of Miller was a false and deceptive statement made in an attempt to avoid the effect and consequences of the accusation. Moreover, the defendant's subsequent explanation of his whereabouts on the night in question, and the reason which he gave for his flight on the approach of the arresting officer, were in response to questions by the witness Kyle, and do not appear to have been made in reply to anything that was said by Miller. This being so, the declaration of Miller that the defendant committed the crime charged became an independent piece of evidence which, although manifestly incompetent, was through the medium of the witness Kyle, submitted to the jury for its consideration.

[6] In any view of the case, we are forced to the conclusion that the evidence complained of was improperly admitted; and, as we are not permitted to say that the verdict would have been the same if the testimony of the witness Kyle had been rejected, the judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: HALL, J.; KERRIGAN, J.

16 Cal. App. 682

PEOPLE v. KNAPP. (Cr. 324.)

(District Court of Appeal, First District, California. July 25, 1911. Rehearing Denied by Supreme Court Sept. 22, 1911.)

1. HOMICIDE (§ 253*)—SUFFICIENCY OF EVIDENCE—DEGREE OF MURDER.

Evidence held sufficient to sustain a verdict of murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 253.*]

2. HOMICIDE (§ 233*)—MURDER—MOTIVE.

Proof of motive is not indispensable to a conviction for murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 481; Dec. Dig. § 233.*]

3. HOMICIDE (§ 282*)—TRIAL—PROVINCE OF JURY—DEGREE OF CRIME.

Where there is an abundance of evidence that defendant committed a homicide charged to

him, it is the province of the jury to determine the degree of crime.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 574; Dec. Dig. § 282.*]

4. CRIMINAL LAW (§ 476*)—OPINION EVIDENCE—WOUND—FORCE OF BLOW.

Testimony of an autopsy surgeon in a homicide case that it would "require a pretty heavy blow with some instrument to cause that fracture" is admissible as opinion evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1062; Dec. Dig. § 476.*]

5. CRIMINAL LAW (§ 696*) — MOTION TO STRIKE—EVIDENCE ADMISSIBLE IN PART.

Where the answer of a witness is responsive in part to a question, defendant's motion to strike the entire answer as nonresponsive is properly denied.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1639-1644; Dec. Dig. § 696.*]

Appeal from Superior Court, City and County of San Francisco; Frank R. Willis, Judge.

John D. Knapp was convicted of murder in the first degree, and he appeals. Affirmed.

Frank McGowan and Elmer Westlake, for appellant. Attorney General Webb, for the People.

KERRIGAN, J. The defendant was convicted of murder in the first degree, and the jury fixed his punishment at imprisonment in the state prison for the term of his natural life.

The Attorney General makes a preliminary objection to the consideration of the appeal, claiming (1) that the record discloses no appeal from the judgment; and (2) that, as neither the law nor a rule of court provides a method of appeal from an order denying a motion for a new trial, an appeal from such an order cannot be reviewed.

Notwithstanding these objections, we have examined the record, and the conclusion we have reached on the merits of the case renders a decision of those points unnecessary. It is defendant's contention that the evidence is wholly insufficient to sustain the verdict of the jury. We will therefore briefly review it.

On the morning of November 14, 1910, at about 8 o'clock, the body of Julia Carey was found in a vacant lot behind some billboards near the corner of McAllister and Leavenworth streets, in San Francisco. She was a woman who drank heavily, took poor care of herself, and for a long time had been in poor health. She was about 70 years of age, and when her dead body was discovered both eyes were contused, there was a compound fracture in the nasal bone, several contusions of the lower jaw, and a fracture of the parietal bone on the left side. This last injury, with the subsequent hemorrhage and shock, caused her death. The deceased had an abnormally thick skull, and her death, according to the testimony

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of a physician, must have been the result of a very heavy blow with some blunt instrument. Police Officer John D. Collins discovered the body. Quite a crowd had gathered at the spot, and among them was the defendant. The sides of his face and the backs of his hands were scarred with fresh scratches, and he attracted the attention of Officer Collins. The officer asked him if he knew anything about the death of the deceased, and he replied that he did not. We quote from the testimony of Officer Collins: "I talked to him quite a little while about the case and of the dead woman. A crowd commenced to collect around us, and finally he said for me to come into the barn. I said, 'What barn?' He said, 'This stable here—Clausen.' He said, 'I worked in there.' So we went in the barn. * * * Other officers joined me, and we commenced questioning him about the case. He denied that he knew this woman or anything about her death. We took him into custody and examined his room, which was in the stable. The walls of his room were bespattered with blood. The bedclothes and the mattresses were soaked with blood. There was blood also on a coat, vest, a pair of pants, a pair of drawers, a pair of blankets, a pillow, some towels, a sofa cushion, and on a handkerchief, all of which was the property of the defendant. An iron instrument which could have produced the wounds was found in the room, containing blood stains. Later, and while the defendant was in custody, a man by the name of Stevens, who had worked around the barn with the defendant, was arrested; and the defendant, referring to the arrest of Stevens, said: 'What in hell do you want to hold Stevens for? He doesn't know anything about this case, for he was not there when the thing happened.'" The day after the homicide Frank M. Esola, a police officer, found, hidden in the barn, an undershirt belonging to the defendant on which there was some fresh blood. The defendant, when questioned about the scratches on his face, responded that he did not "know how he got them," that he must have "fallen out of bed."

It is evident that the body of the deceased was dragged from the barn to the place where it was found, for there was a trail between those two points made by the dragging of a heavy body over the ground, and on this trail there were spots of blood. Defendant told Officer Esola that there was a "racket" near the stable during the night of November 13th-14th; that "at about 3 o'clock in the morning he was waked up by a noise in the street right outside of his bedroom; that the noise sounded like a man and woman in fighting; and that some one apparently fell against the outside of the barn." There were grey hairs, like those of the deceased, on the lapel of defendant's coat. A police officer accused the defend-

ant of having murdered the woman, and he stood silent.

The defendant's explanation of his connection with the matter, given as a witness in his own behalf, is substantially as follows: That on the evening of November 13th he was engaged at work in the stable, when the deceased came in; that he had never seen her before, and she said she had a pain in her head, and she wanted him to get her some whisky; that he said something to her and went into a stall, and on his return found that she had fallen against the wheel of a spring wagon; that he rendered her some assistance, and she subsequently fell again; that he washed her face with some water and a handkerchief, sat her on a box, and told her to rest herself; that she got up from the box, walked into his room, and sat on a trunk, holding a towel in her hands; that she continually pleaded with him for whisky, and that he went out to get her some; that he went to a restaurant, got his supper, read a newspaper, played cards, walked back to the stable, tried to arouse the woman, and found that she was dead, whereupon he became horrified, and fainted. When he came to he was bewildered, and, remembering that he had before been convicted of murder, concluded that he would be charged with the murder of this woman, and that, in order to screen himself, he dragged the body to the place where found by the officer. He accounted for the scars on his face by saying that, when he assisted the deceased to her feet after her first fall, she grabbed the side of his face with her hands and scratched him.

The defendant called two character witnesses and some others, who gave inconsequential testimony.

[1] The inference sought to be given by a part of the defendant's testimony is that the deceased fractured her skull when she fell, as he says, against the wheel of the wagon; but, according to his testimony, she walked after that fall, whereas the contradicted testimony of the physicians is that she could not have walked after her skull was fractured. The defendant made inconsistent statements about the circumstances of the crime. As a whole, his narrative is very improbable, and we think the evidence in the case points convincingly to him as the perpetrator of the crime. It may be that the blood on the underclothing of defendant does not suggest very strongly that passion was the motive actuating him to kill the deceased, but some one killed her; and, as she was poor, old, penniless, and harmless, there could be but little motive on the part of any person to take her life. Whoever killed her had but a slight motive.

[2] But it may be said in passing that proof of motive is never indispensable to a conviction. *People v. Durrant*, 116 Cal. 179, 48 Pac. 75.

[3] We think the jury reached a correct conclusion in the case. But, be that as it may, there is certainly an abundance of evidence tending to show that the defendant committed the homicide. A question of law therefore is not presented to this court. *People v. Cole*, 127 Cal. 545, 59 Pac. 984; *People v. Mahatch*, 148 Cal. 200, 82 Pac. 779; *People v. Oppemeheimer*, 156 Cal. 746, 106 Pac. 74.

[4] Dr. C. A. Glover, the autopsy surgeon, was permitted to testify over the objection of defendant that it would "require a pretty heavy blow with some instrument to cause that fracture." This testimony, says the defendant, "was a mere speculation, and did not call for expert testimony." The witness had already testified that the skull of deceased was abnormally thick, and later, without objection, that the wound was necessarily caused by some blunt instrument. The testimony disclosed that the skull of the deceased was abnormally thick, and we think the jury, therefore, without this testimony, would naturally draw the conclusion that it would take a harder blow to fracture her skull than to fracture a skull of normal thickness. Even if the testimony were improperly admitted, the error would be harmless, but we think the ruling of the court was sound. "Any witness familiar by experience with the appearance or treatment of wounds, particularly a physician or surgeon, may give an opinion as to the manner in which a mortal wound was probably inflicted; as to the kind of weapon used; as to the distance from which a shot was fired; as to the degree of force employed and as to the direction of a blow. * * *" *Underhill*, *Crim. Ev.* § 321. "Whether a particular wound could have been produced by a particular instrument is a question on which the opinion of experts can be asked." *Wharton on Homicide*, p. 943. See, also, *State v. Wilcox*, 132 N. C. 1120, 44 S. E. 630; *State v. Breaux*, 104 La. 540, 29 South. 222; *Tune v. State*, 49 Tex. Cr. R. 445, 94 S. W. 231; and particularly *Fairall on Crim. Law and Procedure*, p. 228.

[5] The same witness on cross-examination testified to a certain condition of the defendant's brain; and after denying that he had testified differently at the preliminary examination, he in effect said that, if the stenographic transcript of such examination showed that such was the case, then the reporter was "evidently mistaken." A motion to strike out this testimony on the ground that it was not responsive, and that it was argumentative, was denied. This ruling is now assigned as error. The point has little merit, but it is sufficient to say that part of the answer certainly was responsive; hence the motion to strike out

the whole answer was too general. *People v. Pembroke*, 6 Cal. App. 591, 92 Pac. 668.

The judgment and order are affirmed.

We concur: LENNON, P. J.; HALL, J.

(160 Cal. 692)

RECLAMATION DIST. NO. 730 v. HER-SHEY et al. (Sac. 1,832.)(Supreme Court of California. Sept. 8, 1911.
Rehearing Denied Oct. 7, 1911.)**1. APPEAL AND ERROR (§ 867*)—QUESTIONS REVIEWABLE—ORDER DENYING NEW TRIAL.**

An order striking amendments to the answer, tendering new matters of defense, can only be reviewed on appeal from the judgment, and not from the order denying a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3478; Dec. Dig. § 867.*]

2. PLEADING (§ 409*)—WAIVER OF DEFECTS.

If a denial of the answer is merely defective, the introduction of evidence by the parties without objection waives the defect.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1386; Dec. Dig. § 409.*]

3. PLEADING (§ 129*)—ADMISSIONS—FAILURE TO DENY.

Failure to deny allegations of the complaint by the answer admits them as true.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 270-275; Dec. Dig. § 129.*]

4. DRAINS (§ 71*)—ASSESSMENTS—NONBENEFITED LANDS.

That certain parcels of a tract will not be benefited by reclamation levies does not exempt the assessment of the tract as a whole.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 71.*]

5. DRAINS (§ 76*)—PLANS OF WORK—ASSESSMENT.

That reclamation commissioners, through mistake or under the belief that the district would not be required to pay the cost of acquiring certain levees owned privately, did not include the cost of acquiring them in their estimate of the cost of the work was a mere defect in the plans, not jurisdictional, and not preventing the supervisors from ordering an assessment based on the cost, including such levees; Pol. Code, § 3455, providing for new or supplemental plans.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 76.*]

Department 2. Appeal from the Superior Court, Yolo County; E. E. Gaddis, Judge.

Proceedings by Reclamation District No. 730 against Ella L. Hershey and others. From an order denying defendants' motion for a new trial after judgment for plaintiff, defendants appeal. Affirmed.

Hudson Grant and E. A. Bridgford, for appellants. Arthur C. Huston and Harry L. Huston, for respondent.

HENSHAW, J. This is an action brought by plaintiff to enforce the collection of an assessment upon the lands of the defendants and appellants. Judgment passed for plaintiff. From that judgment these defendants did not appeal; their sole appeal being from the order denying their motion for a new trial.

[1] Upon this appeal, however, they urge certain propositions cognizable, if at all, only on appeal from the judgment, and others which in the condition of the record cannot here be considered. Thus appellants filed an amendment to their answer tendering certain

new matters as a defense. This amendment was stricken out by the court. Its ruling in this regard can be reviewed only on appeal from the judgment. *Bode v. Lee*, 102 Cal. 583, 36 Pac. 936; *Holmes v. Warren*, 145 Cal. 460, 78 Pac. 954; *Petaluma, etc., Co. v. Singley*, 136 Cal. 618, 69 Pac. 426; *Swift v. Occidental Mining Co.*, 141 Cal. 165, 74 Pac. 700. Again, appellants undertake to attack the legality of the formation of the district. But if the organization of such a district be subject to collateral attack, in an action to collect an assessment, no issue upon the matter is joined by the pleading. Amongst other propositions advanced are that the report of the board of trustees to the board of supervisors of the plans of reclamation do not conform to the requirements of section 3455 of the Political Code, that the lands of these appellants are not described, as required by the provisions of section 3461 of the Political Code, and that the amount of the charge assessed against each tract, as provided by subdivision 4 of section 3461 of the Political Code, is not stated. The complete answer to these propositions is that the complaint charged the due performance of these matters, and that the defendants did not join issue upon any of them. The effort of the defendants to raise any of these issues by the amendment to their answer was rendered futile by the court striking out those amendments, and their redress for any injury which they may deem they suffered by this ruling can only be given them upon an appeal from the judgment—an appeal, as has been said, which they have not taken.

[2, 3] Conceding the force of this, appellants undertake to meet it by such cases as *Tynan v. Walker*, 35 Cal. 645, 95 Am. Dec. 152; *Tuffree v. Polhemus*, 108 Cal. 676, 41 Pac. 806; and *Kimball v. Richardson Co.*, 111 Cal. 397, 43 Pac. 1111. Those cases, one and all, however, are simply to the effect that where an allegation is pleaded, though defectively, or where denial is made, though defectively, the introduction by the parties of evidence upon the question, without objection, will be construed as waiving such defect. The reason upon which this ruling is founded is plain and just. The parties by their conduct have accepted the pleadings as sufficient, and neither will be allowed, after the time for amendment has passed, to urge the insufficiency to defeat his adversary's rights. In the case at bar, the answer by its silence admitted as true all these allegations of the complaint. No issue was tendered or sought to be tendered upon any of these matters. The effort to meet any of them by the amendments to the answer was promptly opposed by plaintiff by demurrer and by motion to strike out, and, when the court finally ruled in accordance with plaintiff's demurrer and motion to strike out, the only redress of defendants was plainly before them—an ap-

peal from the judgment, which they did not take.

[4] The remaining contentions of appellants which are reviewable upon appeal are, first, that the assessment is levied upon lands which it is found would not be benefited by the work of reclamation, and which, therefore, should have been exempted in the assessment levy. Even where such a state of things exists, the assessment is properly levied upon the whole tract (Reclamation District v. McCullah, 124 Cal. 175, 56 Pac. 887), and the finding of the commissioners that certain fragmentary pieces or parcels of a tract will not be benefited does not relieve from the necessity of assessing the whole as a tract; the proper method of treating the matter being as was done in this case, and as approved in Reclamation District No. 70 v. Birks, 113 Pac. 170.

[5] The second and remaining proposition is that the assessment levied upon the lands of the defendants is not in proportion to the *whole* expense and to the benefits which will result from the proposed works of reclamation. Herein appellants' contention is that, by section 3455 of the Political Code, it is the duty of the board of trustees, after the adoption of plans and specifications for the reclamation of the lands, to report to the board such plans and specifications, "together with estimates of the cost of the works necessary for the reclamation of the lands of the district in pursuance of any such plan or plans," and the assessment under section 3456 is to be made upon the lands by "a charge proportionate to the whole expense and to the benefits which will result from such works." It is insisted that by the imperfections in these plans the *whole* of the cost was not estimated, and therefore that the assessment was not in proportion to the "whole expense." It appears that the commissioners, either through inadvertence or in the belief that the district would not be called upon to pay for them, did not include in their estimate of the cost of work the acquisition of certain levees held in private ownership. At the most, this amounts to a mere defect in the plans, which would not result in destroying them so completely as to deprive the supervisors of the power to order the assessment based on the cost as disclosed by them. The law itself contemplates such mistakes or imperfections when it provides, in section 3455 of the Political Code, for "new, supplemental or additional plans." It is well settled that defects in the plans do not affect the jurisdiction. *Haughwout v. Hubbard*, 131 Cal. 676, 63 Pac. 1078; *Reclamation District v. Goldman*, 65 Cal. 635, 4 Pac. 676.

The order appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

160 Cal. 695

RECLAMATION DIST. NO. 730 v. SNOWBALL et al. (Sac. 1,831.)

(Supreme Court of California. Sept. 8, 1911.
Rehearing Denied Oct. 7, 1911.)

1. AFFIDAVITS (§ 12*)—AUTHORITY TO ADMINISTER—ABSENCE OF SEAL.

The absence of a seal from the jurat of the clerk of the circuit court, attached to an affidavit, does not affect the validity of the oath.

[Ed. Note.—For other cases, see Affidavits, Cent. Dig. § 53; Dec. Dig. § 12.*]

2. EVIDENCE (§ 83*)—PRESUMPTIONS—CONFORMITY TO LAW.

If an affidavit was necessary to give jurisdiction to establish a reclamation district, and the jurat of the officer administering the oath was defective for not showing that it was administered as clerk of the circuit court, it would be presumed that evidence was taken to supplement the jurat and show that the oath was duly administered.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

3. DRAINS (§ 90*)—ACTIONS FOR ASSESSMENTS—DEFENSES—CONSTRUCTION OF LEVEES BY OWNER.

An action to collect the assessments for a reclamation district cannot be defeated by showing an agreement between certain property owners, to which the district was not a party, by which some of them should construct levees and have their land set off as an independent district, or by the showing of an owner assessed that he had constructed a levee, which was used by the district, for which he had not received compensation.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 90.*]

Department 2. Appeal from Superior Court, Yolo County; E. E. Gaddis, Judge.

Action by Reclamation District No. 730 against Leutie E. Snowball and others. From a judgment for plaintiff and an order denying a motion for a new trial, defendants appeal. Affirmed.

Rehearing denied; BEATTY, C. J., dissenting.

Hudson & Grant, R. H. Countryman, and A. G. Bailey, for appellants. Arthur C. Huston and Harry L. Huston, for respondent.

HENSHAW, J. This is an action to enforce the collection of an assessment upon the lands of defendants and appellants. The plaintiff is the same plaintiff and the assessment the same assessment considered in *Reclamation District No. 730 v. Ella L. Hershey et al.*, 117 Pac. 904 (Sac. 1,832). Most of the propositions here advanced are disposed of by what has been said in the opinion in that case. In this instance, however, the appeal is from the judgment, as well as from the order denying defendants' motion for a new trial.

[1, 2] The answer in this case denied, for lack of "knowledge, information, or belief," the allegations touching the due organization of the district. Those denials were stricken out by the trial court as being sham and frivolous, since the organization was a mat-

ter of record, and it was not proper for the defendant to deny record matter for lack of information. But waiving the question of the soundness of this ruling, waiving also the question as to whether the due organization of such a district can be attacked in a proceeding such as this, and coming to the consideration of the sole ground of attack which is here presented, the ground itself is untenable, and the contention without merit. The affidavit of the publication of the petition (Pol. Code, §§ 3446, 3447) was admittedly in due form. The jurat declared that it was sworn to before "G. L. Duncan, Clerk." Attached thereto was the seal of the superior court of Yolo county. It is contended that this jurat was insufficient, and therefore the board of supervisors did not acquire jurisdiction. G. L. Duncan was county clerk of the county of Yolo. As such clerk he was ex officio clerk of the superior court and ex officio clerk of the board of supervisors. In any one of these three capacities, he was empowered to administer an oath. In which capacity he did in fact administer it is immaterial, but it would seem from the seal attached to have been administered by him as clerk of the superior court. Even the absence of any seal would have amounted to a mere irregularity not affecting the validity of the oath (Dennis v. Bith, 122 Cal. 42, 54 Pac. 378, 68 Am. St. Rep. 17), and, in so far as this affidavit was necessary to confer jurisdiction upon the supervisors to act, it would be presumed, if necessary, where the jurat was defective, that they took evidence to supplement the jurat and to show that in fact, the oath was duly administered.

J. W. Snowball appeared in the proceedings for the organization of the district, and filed a remonstrance. His remonstrance was admitted in evidence in this case. Its introduction was unnecessary, but its admission could work no injury. It certainly tended to show the knowledge of Snowball of the proceeding, and the jurisdiction acquired by the supervisors, at least as to him, by his appearance and application for affirmative relief. But, as a matter of fact, as has been said, no question is raised as to the propriety and legality of the proceedings, saving in the one matter above mentioned.

The court refused admission in evidence of an agreement between certain residents and property owners of the district. The purport of the agreement was that certain property owners within the district would construct levees. Upon complying with the terms of the agreement, some of these property owners were to initiate proceedings to have their lands set off into an independent reclamation district. This contract was not entered into with the district. Whatever the property owners did or did not do under the agreement could not bind the district, nor

operate to impair or curtail the rights and powers of the district as an agent and mandatory of the state.

[3] For the same reason the court's ruling in striking out the amendment to the answer was sound and proper. This amendment was in the nature of a defense based upon the contract above adverted to and the performance of the contract by J. W. Snowball, and further advanced as a defense the contention that he constructed a levee which was being used by the district, and for which he had never been compensated. An action to enforce the collection of an assessment is not one to which a defense such as this will lie. *Reclamation District v. Burgur*, 122 Cal. 442, 55 Pac. 156.

For the above reasons, the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; MELVIN, J.

(160 Cal. 699)

GURNSEY v. NORTHERN CALIFORNIA POWER CO. (Sac. 1,745.)

(Supreme Court of California. Sept. 8, 1911.
Rehearing Denied Oct. 7, 1911.)

1. HIGHWAYS (§ 95*)—HIGHWAY EASEMENT—SUPERVISOR'S CONTROL.

Where the public acquires only an easement in a highway, its right is limited to the right to travel, and the only control over it which the board of supervisors can exercise is such as is necessary to maintain the highway in a proper condition for the exercise of such use by the public.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 95.*]

2. DEDICATION (§ 57*)—EASEMENT—DEDICATION—RIGHTS OF OWNER.

Where land is dedicated to the public for a highway, the owner retains his right to the soil for all purposes not inconsistent with the public's easement, and to all profit or advantage that may be derived therefrom; and hence a municipality, embracing the highway, may not confer on a third person the right to enter on the highway and occupy any portion thereof, without the consent of the landowner, when such entry is not for a purpose incidental to the effective use of the highway by the public for travel.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 100; Dec. Dig. § 57.*]

3. EMINENT DOMAIN (§ 119*)—FRANCHISES—"LAWFUL PURPOSE."

County Government Act 1897 (St. 1897, p. 466), § 25, subd. 35, authorizes county supervisors to grant franchises over the public roads and highways for all "lawful purposes" on such terms and conditions as, in their judgment, may be necessary and proper, and in such manner as to present the least possible obstruction and inconvenience to the traveling public. *Held*, that the words "lawful purposes," as so used, should be construed as limited to purposes in aid of the public's easement of travel, something which would promote the public comfort and convenience in the use of the highway; and hence such act did not authorize a county board of supervisors to grant a franchise to an electric power company to erect its power line along a highway, the title to the soil of which is not in the abutting property owners, for the primary purpose of furnishing light and power to private

individuals, without rendering compensation to such abutting owners.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 304-314; Dec. Dig. § 119.*]

For other definitions, see Words and Phrases, vol. 5, p. 4032.]

4. EMINENT DOMAIN (§ 119*)—FRANCHISES—PUBLIC PURPOSE.

Where a franchise improperly granted by a board of supervisors authorized defendant power company to place its poles and wires over all the roads and highways of the county, to conduct and transmit electric current for power, light, and other necessary and useful purposes, without the consent of or payment of compensation to abutting owners, it could not be supported, as against such owners, on the theory that it was in effect a contract with the county that the company's system should be erected for the purpose of lighting the highway.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 304-314; Dec. Dig. § 119.*]

5. EMINENT DOMAIN (§ 119*)—POWER—LIGHT—USE OF HIGHWAY—PUBLIC PURPOSE.

Where a franchise, authorizing a power company to construct its line over a highway, was originally granted primarily to enable the corporation to furnish electricity to private individuals, without requiring the consent of or payment of damages to abutting owners, the franchise could not be supported, as having been granted for a purpose consistent with the maintenance of the highway, by the fact that years after its construction the county contracted for the use of electricity to furnish power to a pumping station used in connection with other appliances for sprinkling a section of the highway.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 304-314; Dec. Dig. § 119.*]

6. HIGHWAYS (§ 88*)—USE OF HIGHWAY—EFFECT.

Under County Government Act 1897 (St. 1897, p. 466), § 25, subd. 35, giving the county board of supervisors power to grant franchises over the public roads and highways for all "lawful purposes," a franchise granted to a public service corporation engaged in discharging a public duty to use the highway is only effective to permit an entry on the public's easement in subordination to the rights of the owners of the fees, and does not warrant any invasion of the property rights of such owner.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 88.*]

7. EMINENT DOMAIN (§ 119*)—USE OF HIGHWAY—POWER CURRENT—ADDITIONAL SERVICE.

Where an electric power company's franchise did not authorize it to erect poles and wires along the highway, without the consent of or without paying compensation to abutting property owners, the erection of poles and wires, without such consent or the payment of compensation, constituted an additional servitude, for which the owner of the land was entitled to redress.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 304-314; Dec. Dig. § 119.*]

8. EMINENT DOMAIN (§ 280*)—RIGHT TO RELIEF—INVASION OF HIGHWAY.

Where defendant electric power company erected poles and wires along a highway, without the consent of or the payment of compensation to plaintiff, an abutting property owner, under a franchise which conferred no right so to do, but plaintiff acquiesced in the occupation of his land for a long period as to a part of the line so constructed, and failed to sue with reference to any part of the land until the line had been constructed and a public interest had intervened, plaintiff was not entitled to compel the removal of the line in ejectment, but was

only entitled to recover such damages as he had sustained thereby.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 304-314; Dec. Dig. § 280.*]

In Bank. Appeal from Superior Court, Tehama County; James F. Ellison, Judge.

Action by W. H. Gurnsey against the Northern California Power Company. Judgment for plaintiff, and defendant appeals. Reversed.

Reid & Dozier, for appellant. P. H. Coffman, for respondent.

LORIGAN, J. Plaintiff is the owner in fee of a large tract of land near Red Bluff, in Tehama county, across which for over 40 years a public wagon road or highway, commencing at Red Bluff and running to the easterly boundary of the county, has existed. Defendant is a public service corporation, organized for the purpose of furnishing the public along its lines with electricity for power, heat, and lighting, and also furnishing municipalities, cities, and towns with electricity for like purposes, including the lighting of highways, and when this action was brought was engaged in furnishing it for these purposes in the counties of Shasta, Glenn, and Tehama.

In October, 1902, defendant applied to and obtained from the board of supervisors of Tehama county a franchise, the material provision of which involved here is as follows: "The right, privilege and franchise is hereby granted the Northern California Power Company, its successors or assigns, to erect poles of not less than six inches in diameter at the top, and stretch wire and other appliance thereon for the purpose of conducting and transmitting electric current for power, light and other necessary and useful purposes, over and along the county roads, bridges and highways of said Tehama county, and along the streets, alleys and avenues of the various unincorporated towns and villages in said county." This franchise was granted for 50 years. In 1903 defendant built a power pole line from its electrical station in Red Bluff easterly along the public highway referred to and over the land of plaintiff to a point where an avenue intersected said public road. In 1906 this line was further extended about a mile along said public road, across the land of plaintiff, to the premises of the Cone Ranch Company. In June, 1906, plaintiff brought this action in ejectment, alleging: "That the defendant, without title and without the consent of the plaintiff, entered upon and into the possession of the said land and premises, and has dug holes and erected poles thereon, and has strung, built, and erected wires and an electric power line for a distance of about two miles on and over the said lands."

In its answer defendant set up that it was a public service corporation, organized for

the purpose of and actually engaged in the business of furnishing electricity for the purposes heretofore stated, and the fact that it had obtained a franchise from the board of supervisors of Tehama county granting it the privilege of erecting poles and stringing wires thereon along the county roads and highways of said county; that it had erected a power pole line along the highway in question, where it crosses the land of plaintiff, for the purpose of furnishing power, heat, and lighting, and for the purpose of connecting up with other portions of its system, so as to furnish power and light to towns, cities, and municipal governments, and for the purpose of lighting public highways leading to and from cities, both incorporated and unincorporated; that the portion of its line which crossed the public highway over the land of plaintiff was intended to be used for lighting public highways over which it might cross, including the public highway across the land of the plaintiff herein, and for furnishing electric power for pumping water along said public highway, to be used in sprinkling the same; that it was and for a long time past had been actually engaged, under contract with the board of supervisors of Tehama county, in lighting said highway and in furnishing electric power along the line of said public highway for pumping water to be used in sprinkling the same, and that if compelled to move its power pole line from the highway it could not fulfill its contract to light said public highway or provide electric power on said highway for pumping water for said sprinkling purposes. It was further alleged that defendant did not claim to hold said highway, or any part thereof, exclusively from the plaintiff or the public, or any one else, but only claimed the right to use that portion of the highway actually occupied by its power poles in common with the public, under and by virtue of the franchise granted it by the board of supervisors of Tehama county, and not otherwise.

The court found that plaintiff was the owner of the fee in the land over which the public highway crossed, and on which defendant had erected its power pole system, and that it had been granted a franchise, as alleged, permitting it to erect its poles over the roads and highways of the county; that while defendant was organized to engage in the business of furnishing electric power for all purposes claimed by it, including the lighting of highways, the line in question, starting from the station of defendant in Red Bluff and running on said highway over and across the land of plaintiff to its eastern terminus near the Cone ranch, was not constructed for the purpose of lighting that or any public highway, or for the purpose of furnishing power to pump water on said highway, to be used for sprinkling purposes, and that it never at any time had been

actually engaged under a contract with the board of supervisors of Tehama county in lighting any portion of said highway along or across the land of plaintiff. Upon the findings so made, the court entered a judgment for possession and restoration of the premises described in the complaint, and that defendant and its poles and power lines be ejected and removed from said premises.

The main points for consideration on this appeal are whether the board of supervisors had power to grant a franchise to the defendant, authorizing it to enter upon the highway, the fee to which was in the plaintiff, and erect its power pole system thereon, without permission of or compensation being first paid to plaintiff as the owner of the land, and, if it did not, and the entry of the defendant thereon was unauthorized and unwarranted, and an invasion of the property rights of plaintiff in the fee of the land, was plaintiff entitled to maintain an action in ejectment to cause its removal therefrom?

The first proposition is presented for consideration under what the appellant claims was the effect of the franchise granted it by the board of supervisors, and also under an attack which is made upon the findings of the court that it had not been granted a franchise for the lighting of the highway, or for the purpose of furnishing power to the pumping station of the county for road-sprinkling purposes, and was not built for either of these purposes.

There is no question in this case but that plaintiff is the owner of the fee in the land in question, and entitled to the full beneficial use of it, subject to the easement or limited fee which the public has in the highway over it.

[1, 2] It is well settled that the easement or right which the public acquires by the establishment of a highway is the right to travel thereover, and that the only control over it which the board of supervisors, as trustees for the public, can exercise is such as is necessary to maintain the highway in a proper and convenient manner for the exercise of the use by the public. Aside from this, the owner of the land retains his right to the soil for all purposes not inconsistent with the easement, and to all profit or advantage which may be derived therefrom; and a municipality may not confer upon any one the right to enter upon such highway and occupy any portion thereof, without the consent of the owner of the soil, when such entry is not for purposes incidental to the effective use by the public of the highway. All that the public acquires under the easement is declared by section 2631 of the Political Code, as follows: "By taking or accepting land for a highway, the public acquires only the right of way, and the incidents necessary to enjoying and maintaining the same, subject to the regulations in this and

the Civil Code provided." This is but the declaration of the general rule on the subject stated in the case quoted from in *Wright v. Austin*, 143 Cal. 236, 240, 76 Pac. 1023, 1025 (65 L. R. A. 949, 101 Am. St. Rep. 97), where it is said to be well established, "in conformity with the principles of the common law, that a highway is simply an easement or servitude conferring upon the public only the right of passage over the land on which it is laid out, and, as an incident of such right, that of using the soil or material upon it in a reasonable manner, for the purpose of making and repairing it. * * * Subject to this right of the public, he may take trees growing upon the land, occupy mines, sink water courses under it, and generally has a right to every use and profit which can be derived from it consistent with the easement, and when disseised (as he may be) can maintain ejectment, and recover possession, subject to the easement, and can also maintain trespass for any act done to the land not necessary for the enjoyment of the easement, which would be an actionable injury if the land was not covered by a highway."

[3] Authority, it is true, is given to the board of supervisors of any county "to grant franchises over and along the public roads and highways for all lawful purposes, upon such terms and conditions as in their judgment may be necessary and proper, and in such manner as to present the least possible obstruction and inconvenience to the traveling public." County Gov. Act 1897 (Stats. 1897, p. 466, subd. 35 of section 25). This right given to the board to grant such franchises "for all lawful purposes" has in view primarily a purpose in aid of the easement; something which will promote the public comfort and convenience in the use of the highway. It may be that a public highway, by reason of its proximity to a large city, is so heavily traveled that in the judgment of the county authorities it would be necessary, to promote the convenience and safety of the traveling public, that a highway be lighted. It seems to be well settled by the weight of authority that, under a general power over public highways to promote the safety and convenience of the public travel thereover, the authorities have a right to provide for the lighting of such highway at night. And for that purpose a public service corporation may be granted a franchise to erect its poles thereon; that such a use of the highway, for the purpose of lighting it, is incidental to the full enjoyment of the public easement, imposing no additional servitude of which the abutting owner can complain. This matter is treated fully in *Gurnsey v. Northern California, etc., Co.*, 7 Cal. App. 534, 94 Pac. 858, to which reference is made on the subject. It may be conceded, too (though we do not so decide), that a franchise to an electric light company to erect its system over a highway, for the purpose of furnishing

power at a pumping plant erected thereon, for water to be used in sprinkling a highway, may be justified for the same reason that authorizes the franchise for lighting the highway. But conceding all this, it is clear that the franchise attempted to be granted by the board of supervisors to this corporation was not for either of these purposes, and this brings us to a consideration of the franchise actually granted by the board of supervisors to the appellant, as also to a consideration of its attack upon certain of the findings.

[4] It is claimed, as to the franchise granted by the board of supervisors, that it was in effect a contract between the county and the appellant that its electric system should be erected for the purpose of lighting the highway. There is no merit whatever in this claim. The franchise was in general terms, and granted permission to the appellant corporation to place its poles and string its wires over all the roads and highways of Tehama county, for the purpose of conducting and transmitting electric current for power, light, and other necessary and useful purposes. It was granted, obviously, under the provision of the county government act of 1897, heretofore referred to, and followed its language. If it be conceded that the board could grant such a franchise, all that it undertook to do was to give the company permission to enter upon the public easement, which was under the control of the board as trustees for the public, an entry upon which by the company, without such permission, would have made it a trespasser upon the easement. The board could not confer permission on the company, for purposes not incidental to the proper use of the highway, to invade the property rights of plaintiff in the soil by digging holes therein and erecting poles. Not a word is said in the franchise about lighting any highway. The board of supervisors did not at any time authorize the construction of this electric system along the highway in question for lighting it. No action was ever taken by the board declaring that it was necessary to do so; no contract was ever entered into by the board with the company for any such lighting; and the highway was in fact never lighted by the appellant. A board of supervisors has no authority to grant a general franchise to any one to light all the highways in the county, and it would be an entirely unwarranted construction of the ordinance authorizing the appellant generally to occupy any and all of the roads and highways in a county to say that it amounted to a contract with the board to light any and all the roads and highways generally referred to in the ordinance. Nothing of the kind was contemplated by the board, nor was the system constructed across the highway by the appellant for that purpose. The evidence clearly shows that the first extension of the line from the electric station in

Red Bluff to an avenue leading to the land of General N. P. Chipman was built in 1903, solely for the purpose of supplying power for pumping purposes on the premises of General Chipman, and furnishing light to those premises, under a contract made with him for that purpose before the building of the extension was commenced, and that the extension thereafter, in 1906 (the same year this action was brought), from the avenue last mentioned to the Cone ranch was for the purpose of furnishing power and light at the Cone Ranch Company premises. No doubt the appellant would, after its line was built, have furnished electricity to any one who desired it, but it was built for the purposes indicated. Under this evidence it is clear that this line was not built for the purpose of furnishing light to the highway, but for purely commercial purposes—the sale of power and light to the Chipman and Cone ranch premises, and to such others as might desire it.

[5] As to the attempt to justify its occupation of the highway over the premises of plaintiff, on the ground that it is under contract with the board of supervisors to furnish power to the county for pumping water for sprinkling the roads. Its original construction was for no such purpose. It appears that years after the appellant had constructed its system over this highway the board of supervisors installed a pumping plant on the line of the highway, for the purpose of sprinkling the road from near Red Bluff to a gate on the Cone ranch—some three miles—and entered into a contract with the appellant to furnish electric power to the pumping station. It is insisted that, as authority is given to the county to provide means for making the roadway more convenient for travel by sprinkling, through the erection of waterworks (subdivision 10, § 2643, Pol. Code; subdivision 7, § 25, County Gov. Act 1897), that the occupation of the highway by the system of appellant, for the purpose, among other things, of furnishing such power, justify its occupation of the highway. We are not cited to any authority sustaining this claim of appellant, nor do we deem it necessary to consider it. As we have seen, the original occupation of the highway was not for lighting nor for furnishing power to the pumping plant, which are the only grounds upon which it can justify its occupation of the highway as against the plaintiff; hence a subsequent contract with the county, under which it purchased power from the company, cannot justify the original entry. If its entry was invalid in the first instance, this contract to purchase power from it did not validate its occupancy.

[6] It may be, as claimed by appellant, that under the county government act, heretofore referred to, empowering the board of supervisors to grant franchises along the public highway "for all lawful purposes," the board

of supervisors of Tehama county was authorized to grant to defendant, as a public service corporation engaged in discharging a public duty, the right to enter upon the highway. But, if this be conceded, it does not affect the situation here. Such a franchise could only permit an entry upon the easement itself. Such a franchise must be taken in subordination to the paramount rights of plaintiff as owner of the fee, and would afford no warrant for the invasion of the property rights of plaintiff therein.

[7] Our conclusion, therefore, is that the planting of its power pole line in the highway over the land of plaintiff, for a purpose not incidental to the use of such highway, is inconsistent with the dedication of the highway to the use of the public. It constituted an additional servitude or burden upon the land of plaintiff beyond the purpose of the dedication, and was an invasion of his property rights therein, for which he was entitled to redress.

[8] Now as to the remedy. It is insisted by appellant that the only remedy available to plaintiff under the circumstances of this case is an action for damages, and not ejectment. In this view we are satisfied that the appellant is correct. While the general rule is that one may maintain ejectment against either an individual or corporation who has, without right, entered upon his land, this rule is subject to some exceptions. One of these exceptions is applied in the case of public service corporations, when it appears that, although the entry was originally without right, the owner permitted the corporation to make the entry on his land, and complete and construct the works to do which his land was appropriated, and failed to bring any action until after public interests, by reason of the construction, had intervened. Under such circumstances, the right to maintain ejectment is denied, and the owner of the land is remitted to an action for damages alone. Jones, in his work respecting Telegraph and Telephone Companies, § 53, says: "In many cases telegraph and telephone companies enter upon the land of another without the latter's knowledge or consent, but the fact that they do, or that he permitted them to do so, does not give the company a title or right of way, or estop him from maintaining an action for damages; and yet it may preclude him from maintaining any action of ejectment; * * * and should he stand by until the line is completed and in operation, and public interests have become involved, he will be denied the right to maintain an action of ejectment, or the right to enjoin them. His only remedy under such circumstances is a proceeding brought to recover damages." This is the rule, too, of the adjudicated cases. *Ind. Bloomington & Western Ry. Co. v. Allen*, 113 Ind. 581, 15 N. E. 446; *Reichert v. Railway*, 51 Ark. 491, 11 S. W. 696, 5 L. R. A. 183; *Hanlin v. Chicago & N. W. Ry. Co.*, 61 Wis. 515, 21 N. W.

623; *Kittell v. Railroad Co.*, 56 Vt. 96; *Goodwin v. Cinn. W. Con. Co.*, 18 Ohio St. 169, 98 Am. Dec. 95; *Roberts v. Northern Pac. R. R. Co.*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 373. Numerous other authorities might be cited from other jurisdictions. But, in effect, this principle is sustained by the authorities in this state. *Fresno, etc., Co. v. Southern Pac. Co.*, 135 Cal. 202, 67 Pac. 773; *Southern Cal. Ry. Co. v. Slauson*, 138 Cal. 344, 71 Pac. 352, 94 Am. St. Rep. 58; *Crescent Canal Co. v. Montgomery*, 143 Cal. 252, 76 Pac. 1032, 65 L. R. A. 940. In these latter cases, it is true, there were oral agreements under which the railroad companies went into possession of the land, and in the last case the construction of the canal was with the tacit consent of those who sought to have it abated and removed from their land as a nuisance. The principle, however, upon which the right to maintain ejectment or to quiet title or to abate the canal was denied in those cases was that, as public interests had intervened through the construction and operation of these public agencies before the actions in those cases were commenced, any right of the parties to disturb them in their possession of the property was thereby lost, and only an action to recover compensation for the land taken could be available. In principle there can be no difference, as far as the application of the rule of public policy is concerned, whether the entry is by original consent of the owner, or he permits it to be made and attempts to assert no right until after the public interests have intervened.

In the case at bar a large portion of the original line was erected over the land of plaintiff in 1903, and the latter part was built before this action was brought. These facts show acquiescence on the part of plaintiff in the occupation of his land for a long period as to one part of the line constructed, and a failure to bring an action respecting the entry on any part of his land by the defendant corporation until the construction of its power pole line had been accomplished over it, and public interests had intervened; and hence, under the rule, he is precluded from maintaining any action, save one for compensation.

The principle which underlies this rule is not based on any consideration of rights pertaining to the public service corporation itself, but solely upon considerations of public policy. The rights which a public service corporation may exercise under the power of eminent domain are conferred upon it on account of its public character and to advance the interests of the public. The defendant, as such corporation, was authorized to proceed and acquire a right of way over the land of plaintiff. It is true the Constitution provides that private property may not be taken for public use, unless compensation is first paid to the owner. But this condition of compensation to be first paid is solely for the benefit of the owner of the land,

and, like any other personal right, may be insisted on by him, or waived, at his pleasure. He might, when the defendant corporation commenced the construction of its electric power system over his land, have stood upon his constitutional rights and enjoined its entry until he had been first paid for it, or he could have permitted the defendant to enter thereon and perfect the construction of its system for the public benefit. But when he has thus permitted, by inaction, expenditures to be made and public interests to intervene, he will be deemed to have waived all other remedies which he might have invoked, save that of an action for compensation. This rule is not based so much upon the application of the doctrine of estoppel, under which an owner of land, who remains inactive and permits a public service corporation, such as a railroad, telegraph, telephone, electric power, gas, or water company, to enter upon his land without right and expend large sums of money in constructing and completing the work, will be deemed to have acquiesced in the entrance, so that all remedies save one for compensation will be denied him. It is based mainly on the great principle of public policy, under which the rights of the citizen are sometimes abridged in the interest of the public welfare. It is applied in a case such as this, when the plaintiff has stood by, without asserting a right which he might have invoked, until the corporation charged with a service, public in its nature, has completed its electric line over his land, and is actually engaged in discharging a public duty, advantageous and important alike to the social and business interests of the community in proximity to its power lines. Public policy requires that, under such circumstances, the remedy of ejectment should be denied to plaintiff, when the effect of a judgment in such an action would be to destroy the efficiency of the electric line system by taking possession from defendants of that part of it constructed over the land of plaintiff, and thus destroying the public rights which have intervened.

Nor does the application of this rule of public policy, limiting his right, so that public interest shall not suffer, work any particular hardship upon the owner of the land. The effect of his inaction until public interests have become involved only deprives him of his right to maintain ejectment. He may not recover possession, but he may maintain an action under which full compensation may be recovered. This compensation is all he could have required the defendant first to have paid him, before it took his land for public use. This compensation he may still have under his present pleading. While the complaint contains the usual averments in ejectment, it sets forth, also, the particular method of entry and occupancy of his land by defendant, namely, by placing poles therein and stringing wires, and avers damages sustained thereby. The trial court should,

on the remission of this case for a new trial, permit the plaintiff to amend his complaint in such respects as will permit him to invoke this remedy, which is alone available to him, to recover just compensation for his land, which the defendant has appropriated for a public use, and any damages sustained thereby. When this case was before the District Court of Appeal (*Gurnsey v. Northern Cal., etc., Co., supra*), on an independent appeal from the one now under consideration, it was held that ejectment was the proper remedy available to plaintiff, but with such view, for the reasons above stated, we cannot agree.

The judgment and order appealed from are reversed.

We concur: HENSHAW, J.; SHAW, J.; ANGELLOTTI, J.; MELVIN, J.; SLOSS, J.

(160 Cal. 713)

ASIATIC CLUB v. BIGGY et al. (S. F. 5,698.)

(Supreme Court of California. Sept. 8, 1911.)

1. APPEAL AND ERROR (§ 1024*)—DISCRETION OF TRIAL COURT—DENYING INJUNCTION.

An order refusing an injunction pendente lite is conclusive, where it depends upon substantially conflicting evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3818; Dec. Dig. § 1024.*]

2. APPEAL AND ERROR (§ 920*)—PRESUMPTIONS—SUPPORT OF JUDGMENT.

If there was evidence to support a finding of facts which stated a valid ground for refusing an injunction pendente lite, it must be presumed on appeal, in support of the trial judge's action in denying the injunction, that he denied it on that ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3717; Dec. Dig. § 920.*]

3. INJUNCTION (§ 77*)—PURPOSE OF RELIEF—AIDING CRIMES.

If plaintiff's club was maintained solely to conduct gambling games in violation of statute, a temporary injunction will not be granted to restrain the police authorities from interfering with its premises and the gambling operations maintained therein.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 146, 147; Dec. Dig. § 77.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Suit by the Asiatic Club against W. J. Biggy and others. From an order denying an application for an injunction pendente lite, plaintiff appeals. Affirmed.

Devoto, Richardson & Devoto, for appellant. Chas. M. Fickert, Dist. Atty., W. H. Langdon, R. W. Harrison, and A. R. Cotton, Jr., for respondents.

ANGELLOTTI, J. This is an appeal by plaintiff from an order of the superior court, refusing to grant an injunction pendente lite, in an action brought to obtain a judgment perpetually enjoining the defendants, members of the police department of the city

and county of San Francisco, from entering upon or in any way interfering with plaintiff's possession and enjoyment of its premises at No. 118 Waverly place, in said city and county, which premises, it is alleged, are used by the members of said club solely for "educational and social purposes."

The complaint was filed November 6, 1908, and an order to show cause why a temporary injunction should not issue was made. The motion was heard upon the complaint and affidavits, and on June 22, 1909, the order to show cause was discharged, and a temporary injunction denied. An appeal was improperly taken to the District Court of Appeal for the First district; appellate jurisdiction in such a case as this being in this court. The matter has been transferred to this court for hearing and determination.

[1, 2] We see no merit whatever in this appeal. Counsel are necessarily compelled to concede that the decision of the trial judge in a matter of this kind cannot be disturbed by an appellate court, in the absence of a clear showing of abuse of discretion, and that the decision of such judge upon a substantial conflict of testimony is conclusive in an appellate court. Every allegation contained in the complaint and in the affidavits presented in support of the application for a temporary injunction, tending to show any unlawful or unauthorized interference with the rights of plaintiff or any of its members by the defendants, or any one acting in collusion with them or under their direction, prior to the commencement of the action, was specifically and in detail denied by the affidavits presented for defendants. Some affidavits were presented on behalf of plaintiff, tending to show that subsequent to the commencement of the action, and while the order to show cause why an injunction should not issue was pending, certain police officers on several occasions entered plaintiff's premises, using such force as was necessary to effect an entry, and on one of these occasions arrested all the persons found thereon. These entries were admitted, and were attempted to be justified, in some cases by the fact that the officers had a search warrant authorizing them to enter and search for implements intended to be used in the commission of crime, and in another case by the fact that they had information warranting the conclusion that crime was actually being committed thereon. There is no pretense that anything done by the officers in relation to these premises was not done in good faith, under the belief that gambling games prohibited by section 330 of the Penal Code were being conducted thereon, and for the purpose of stopping such games and arresting the violators of the law. We are not called upon here to consider the question of the sufficiency of the facts alleged in justification of

those entries. The evidence before the trial court was amply sufficient to support a conclusion that the plaintiff's so-called club was maintained solely for the purpose of conducting certain gambling games prohibited by section 330, Penal Code; that such games were being constantly carried on therein, in violation of such statute; and that the only object of the injunction sought was to prevent interference with such illegal practices by the proper authorities. Doubtless this was the conclusion of the learned trial judge, and the reason for his denial of a temporary injunction. In any event, in support of the action of the trial court we must so assume.

[3] This brings the case within the doctrine stated in a concurring opinion, in *Pon v. Wiltman*, 147 Cal. 280, 298, 81 Pac. 984, 2 L. R. A. (N. S.) 683, expressly agreed to by six members of this court. Assuming the facts to be as stated above, the plaintiff, to use the language of such opinion, "is in reality simply asking a court of equity to prevent the suppression of places maintained in violation of law." As stated in such opinion, "it needs no citation of authorities to substantiate the elementary proposition that equity will not stretch forth a helping hand for the purpose of aiding one in committing a crime." If the learned judge of the trial court was satisfied by the evidence that the facts were as above stated, as we must here assume to have been the case, it was his duty to deny the application for a temporary injunction.

The order appealed from is affirmed.

We concur: SLOSS, J.; SHAW, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

160 Cal. 632

COLBY v. TITLE INS. & TRUST CO. et al. (S. F. 5,274.)

(Supreme Court of California. Sept. 6, 1911.
Rehearing Denied Oct. 6, 1911.)

1. APPEAL AND ERROR (§ 867*)—MOTION FOR NEW TRIAL—REVIEW.

Where the court's failure to find on all of the issues is urged as a ground of the motion for new trial, such failure will be considered on appeal from the order denying the motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476-3486; Dec. Dig. § 867.*]

2. JUDGMENT (§ 198*)—CONFORMITY TO FINDINGS.

As a general rule, no judgment can be properly rendered, unless there are findings upon all the material issues presented.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 362, 363; Dec. Dig. § 198.*]

3. CONTRACTS (§ 138*)—EFFECT OF ILLEGALITY—RELIEF.

Equity will not aid one party or another to an illegal transaction where they stand in *pari delicto*, but will leave them where it

finds them, to settle the controversy without the aid of the court.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681-700; Dec. Dig. § 138.*]

4. CONTRACTS (§ 139*)—EFFECT OF ILLEGALITY—PARTIES NOT IN *PARI DELICTO*.

Where the party seeking relief from an illegal contract was not a free agent in the execution of the contract, or his consent thereto was obtained by duress or undue influence, he is not regarded as in *pari delicto* with the person obtaining his consent by such means, and will not be precluded from invoking affirmative relief in equity to set aside contracts so executed, or to defeat an attempted enforcement of them against him.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 684-700; Dec. Dig. § 139.*]

5. CONTRACTS (§ 139*)—ILLEGALITY OF CONSIDERATION—PERSONS ENTITLED TO RELIEF.

Where plaintiff, upon a charge of embezzlement against her daughter and in consideration of the compounding of the felony and the release of the daughter from custody, executes an agreement admitting the daughter's guilt, and a deed and a declaration of trust to secure payment to her employer of the amount embezzled, when found, through the duress, menace, and undue influence asserted by defendants, plaintiff is not in *pari delicto* with the defendants, and is entitled to have the instruments canceled and set aside on proof of the illegality and duress.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 684-700; Dec. Dig. § 139.*]

6. TRIAL (§ 397*)—FAILURE TO FIND—MATERIAL ISSUES.

Where plaintiff, in an action for the cancellation of certain instruments and for other relief, alleged illegality of the consideration of such instruments, and that they were procured by duress and undue influence by defendants, and was entitled, on proof of the allegations, to the relief sought, the refusal or failure of the trial court on issues joined to make any findings on the material issues of illegality, duress, and menace is reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940-945; Dec. Dig. § 397.*]

7. CONTRACTS (§ 138*)—ILLEGALITY—RELIEF—RELIEF OF PARTIES—ESTOPPEL.

The doctrine of estoppel by conduct or laches has no application to a contract or an instrument which is void for illegality, since as such a contract or instrument has no legal existence, an estoppel cannot validate it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 690; Dec. Dig. § 138.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Mary A. Colby against the Title Insurance & Trust Company, David C. Lercari, Louis Lercari, and John J. Pera, copartners under the firm name of Lercari, Pera & Company. Judgment for defendants, and plaintiff appeals. Reversed.

Mott & Dillon and Lent & Humphrey, for appellant. Otto Irving Wise, Louis Hirsch, and Lawler, Allen & Van Dyke, for respondents.

LORIGAN, J. This action was brought to enjoin the defendant corporation from proceeding to sell a certain lot of land in

the city of Los Angeles, to quiet the title of plaintiff thereto, and to have canceled certain written instruments executed by plaintiff to the defendant corporation, and between her and the copartnership of Lercari, Pera & Co. Judgment was entered in favor of defendants, from which and an order denying her motion for a new trial plaintiff appeals.

Various grounds are urged by appellant for a reversal of the judgment and order, but the main point insisted on is that the decision is against law in this: That the court failed to find on material issues raised by the pleadings.

Before proceeding to set forth particularly the facts alleged in the pleadings, and the findings made, it may be stated, towards a clearer understanding of the issues, that for several years prior to November 19, 1904, Fannie M. Colby, a daughter of plaintiff, was the bookkeeper of the firm of Lercari, Pera & Co., doing business in the city and county of San Francisco; that shortly prior to the above date the firm, claiming that Miss Colby had embezzled a large, but not then definitely ascertained, amount of money from it, consulted the Morse Detective Agency of San Francisco in the matter. On the evening of November 18, 1904, accompanied by a detective connected with the Morse agency, and a member of the firm of Lercari, Pera & Co., Miss Colby left San Francisco for Los Angeles, where the plaintiff, her mother, resided, and where the written instruments, the validity of which are questioned in this action, were executed on November 19, 1904. These consisted of an agreement, a deed, and a trust declaration. The agreement, which was signed by Fannie M. Colby, and by the plaintiff, her mother, and the firm of Lercari, Pera & Co., contained an admission and an acknowledgment by Fannie M. Colby of an indebtedness to the firm in an unascertained and undetermined amount, and an agreement on the part of plaintiff to pay the same to the firm as soon as the indebtedness was fixed and determined. The agreement also provided that the most practicable means should forthwith be adopted to ascertain as nearly as practicable the amount of the indebtedness, and that the conclusion of an expert, or experts, employed for that purpose, should be conclusive evidence of the correctness of the amount, and that within 30 days after the indebtedness was so determined the plaintiff agreed to pay the amount thereof to Lercari, Pera & Co., together with the expense of ascertaining it. The agreement further provided that, as security for performance of its terms and the provisions of a declaration of trust accompanying the same, the plaintiff should convey to the defendant Title Insurance & Trust Company, by a grant, bargain, and sale deed, lot 2, block B. of the Morris Vineyard tract, in the city of Los Angeles, the property which is involved in this action. Pursuant

to the terms of the agreement, the deed called for was immediately executed by plaintiff to the Title Insurance & Trust Company, and following the execution thereof a declaration of trust was executed by plaintiff to the same company for the benefit of the firm of Lercari, Pera & Co. This trust declaration recited the execution of the agreement above referred to and the conveyance to the Title Insurance & Trust Company of the lot above described to secure the payment to Lercari, Pera & Co. of the indebtedness, when ascertained, together with the expenses of ascertaining it, and contained provisions for the sale of the premises by the trust company on demand of the firm if default was made in such payment, and the application of the proceeds to extinguish the indebtedness. These are the instruments, under the terms of which the defendant Title Insurance & Trust company was proceeding to sell the premises described in the deed from plaintiff to defendant when this action was brought by her to have the sale enjoined and these instruments all declared null and void, on the ground that each of them was obtained from plaintiff upon an illegal consideration, and also by means of duress, menace, and undue influence.

In this latter regard, it is particularly alleged in the complaint, after setting forth in extenso all the said written instruments and admitting their execution by her on November 19, 1904, that on said date and long prior thereto and since plaintiff and her family, consisting of three children, other than Fannie M. Colby, resided on said premises described in said written instruments; that plaintiff is a widow, over the age of 52 years, and in very poor health, and said premises were used and maintained as a home for the family, her only income being derived from the rental of rooms in the house on said premises; that long prior to November 19, 1904, said Fannie M. Colby was employed as a bookkeeper by defendant Lercari, Pera & Co.; that on said last-stated date plaintiff read in the daily papers published in the city of Los Angeles that said Lercari, Pera & Co. charged said Fannie M. Colby with the commission of a felony, to wit, the embezzlement of funds of said partnership, and had said Fannie M. Colby in custody and intended sending her to jail; that plaintiff was greatly prostrated and unnerved by said news, and during said day and ever since has suffered extreme mental anguish, and on said day and still is unable to concentrate her thoughts on business matters, and on said day was possessed by a fear that her said daughter would be committed to prison, and of a desire to save her daughter therefrom and herself and family from the disgrace and shame of such imprisonment; that while in this condition a representative of said Lercari, Pera & Co. called on plaintiff and informed her that he was a detective, and had said Fannie M. Colby in charge in the city

of Los Angeles, but that she would not be permitted to go to the home of plaintiff, except when accompanied by a detective; that shortly thereafter the defendant David Lercari, representing the firm of Lercari, Pera & Co. and its members, together with an attorney at law, called on plaintiff and informed her that her daughter was in the custody of a detective, and guilty of embezzling the funds of her former employer, and would be sent to jail, unless plaintiff agreed to pay all money alleged to be embezzled by the said daughter, and, to secure such agreement, execute the deed heretofore referred to; that plaintiff protested against executing said instruments, and requested that her daughter be released from custody and arrest, but was told that if she consented to make such agreement and deed, when she signed and delivered such papers, her daughter would be released from custody, and she would be permitted to take her said daughter home; otherwise her said daughter would be arrested and prosecuted for a felony (embezzlement); that plaintiff asked that the execution of said papers be delayed until the following morning, and that her daughter be permitted in the meantime to return home, but this was denied; that during all of said time and thereafter, until the signing and delivering of said agreements and deed, her daughter was deprived of her liberty and incarcerated in a room in a building in said city of Los Angeles, and guarded by a detective in the employ of said defendants.

It is then further alleged that the fears entertained by her for the safety of her daughter and the charges made humiliated and prostrated plaintiff, and under the belief that her daughter would be prosecuted and sent to jail, if plaintiff refused to consent, she assented to the terms and conditions imposed upon her by said defendants; that thereupon said defendant allowed plaintiff to go to the place where her daughter was incarcerated, and permitted her and her daughter to converse for a brief time, but refused to allow said daughter to return home until said papers were signed; that thereupon, about 11 o'clock in the night, said defendants and their attorney returned to the home of plaintiff and induced her to sign said papers, which she did only under the terms, condition, and promises and for the purposes hereinabove set forth; that the said agreements and deed were thereupon taken from plaintiff, and her daughter released from the custody of said detective and permitted to remain at the home of plaintiff; that at no point of said transactions and at no time during said day or night did plaintiff have any counsel or advice. Then follow allegations of service of written notice on plaintiff, March 14, 1905, by the defendant Title Insurance & Trust Company, of the ascertainment by an expert that the indebtedness of Fannie M. Colby to the firm of Lercari, Pera & Co. was the sum

of \$9,886.69 and the expenses of ascertaining it \$769, accompanied by a further notice that said Title Insurance & Trust Company would proceed to sell the premises described in the deed from plaintiff to defendant, unless payment of these amounts was made within 30 days. These allegations are accompanied by an averment on the part of plaintiff that no conclusion was in fact reached by such expert, but that the said indebtedness was wholly undetermined, and that said Fannie M. Colby is not indebted to said firm of Lercari, Pera & Co. in the sum claimed to have been ascertained, or in any sum at all. Under these facts alleged, and the further allegation that the defendant Title Insurance & Trust Company had given public notice that it would sell the premises described in the deed to it, and unless restrained would proceed to do so, plaintiff prayed that said agreements and deed be decreed null and void, for a temporary injunction restraining the sale of the property described in the deed to be made permanent by the final judgment, and that the title of plaintiff to said property be quieted.

The answer of defendants denied that said instruments were executed for the considerations set forth in the complaint, or that they were executed otherwise than voluntarily, and in consideration of the indebtedness of said Fannie M. Colby to the firm of Lercari, Pera & Co. In addition, defendants affirmatively plead facts under which they asserted estoppel and laches against plaintiff. Briefly stated, estoppel was predicated on the following alleged facts: That plaintiff voluntarily proposed and offered to pay to Lercari, Pera & Co. the indebtedness of Fannie M. Colby, when ascertained as provided in the instruments executed by her; that Fannie M. Colby admitted prior to, and when said instruments were executed, that she was indebted to Lercari, Pera & Co. in a sum stated by her to be between \$2,500 and \$5,000, but claimed by Lercari, Pera & Co. to be from \$7,000 to \$10,000; that plaintiff also admitted said indebtedness; that at said time, as defendants and Lercari, Pera & Co. are informed and believe, Fannie M. Colby was the owner of and possessed of certain property of the value of about \$2,000; that by reason of the execution by plaintiff of said agreement defendant Lercari, Pera & Co. refrained at said time and has since refrained from searching for or attempting in any way to attach said property or to collect the amount of said indebtedness from said Fannie M. Colby, except pursuant to the terms of the agreement executed by plaintiff; that at no time has plaintiff in any way repudiated the admission of indebtedness contained in the written instruments or the oral admissions thereof made by Fannie M. Colby at the time of their execution, except until and by the filing of this action, and that said Lercari, Pera & Co. are without any other security for the recovery of said in-

debtedness. Laches is predicated on the same allegation. This action was commenced about July 6, 1905.

It is to be observed that under the facts alleged in her complaint plaintiff based her right to have all these instruments declared void upon several independent grounds. There were allegations that the execution of said instruments were based upon an illegal consideration, namely, the compounding of a felony charge against her daughter, which, if sustained by evidence, made the agreement absolutely void under the general rule applying to such contracts, and under section 1608 of the Civil Code. Aside from this, and independent of the allegations of illegal consideration for the execution of said instruments, there were allegations that their execution was obtained through duress and menace exercised on plaintiff through the unlawful confinement of her daughter by defendants, and threats to so unlawfully confine her until said instruments were executed (Civ. Code, §§ 1569, 1570), and by undue influence in taking a grossly oppressive and unfair advantage of her distress (Civ. Code, § 1568) in procuring their execution. Issue was joined by defendants on all these allegations, and evidence addressed to all of them on the trial. The court, however, made no findings whatever upon the issue of illegality of consideration for the agreements and the deed, or on the other issues of their procurement through duress, menace, or undue influence, but made findings in favor of defendants on their plea of estoppel and laches and in the terms pleaded by them, and upon these findings based its judgment in favor of defendants and denying plaintiff any relief.

[1] On the appeal from the judgment, appellant insists that the findings do not support the judgment on account of the failure of the court to find on these issues, and, as the omission to find thereon was also urged as one of the grounds for a new trial in her motion therefor, it is likewise up for consideration here on the appeal from the order denying said motion. *Kaiser v. Dalto*, 140 Cal. 167, 73 Pac. 828; *Lyden v. Spohn-Patrick Co.*, 155 Cal. 177, 100 Pac. 236.

[2] Respondents while conceding that, as a general rule, no judgment can be properly rendered, unless there are findings upon all material issues presented, take the position that the court having found in their favor on their plea of estoppel and laches it was not necessary to find on the other issues; that the findings so made necessarily defeated the right of plaintiff to recover, even if all the issues upon which the court omitted to find had been found in her favor. *Brison v. Brison*, 90 Cal. 328, 27 Pac. 186; *Windhaus v. Bootz*, 92 Cal. 622, 28 Pac. 557; *Smith v. Dubost*, 148 Cal. 624, 84 Pac. 38. The theory of respondents, as we understand it, is that, whether the execution by plaintiff of the agreements and deed was procured through

an illegal consideration, and therefore void, or whether procured through duress, menace, or undue influence and voidable on that account at her election, it was unnecessary to find on any of these issues, because, even if they were all found in her favor, she would be precluded from obtaining any relief thereunder by reason of the findings of estoppel and laches.

In the same connection it is claimed that, as far as the issue as to the illegality of the consideration for the execution of the agreements and deed is concerned, it was immaterial to find on it, because respondents assert that it appears from the complaint that, as the consideration for the execution of the instruments was the compounding of a felony, and therefore an illegal consideration, all the parties, including plaintiff, were in pari delicto, and under such circumstances equity will not permit its aid to be invoked by any of the parties to such an illegal transaction, either to enforce it, if it remains executory, or to set it aside or to restore the title which has been parted with under it. We do not deem it necessary to discuss what would be the effect of the findings of the court as to estoppel and laches in favor of defendants, if the issues in the case were simply as to the procurement of the agreements and deed by duress, menace, or undue influence, and the court omitted to make findings on these issues, for certainly as to the issue of illegality of consideration such findings of estoppel and laches could not obviate the necessity of the court finding on that issue.

[3, 4] It is true that, as a general rule, equity will not aid one party or another to an illegal transaction where they stand in pari delicto, but will leave them just where it finds them, to settle these questions without the aid of the court. This rule is universally recognized, and a few of the many authorities announcing it are *Pomeroy's Eq. Jur.* (3d Ed.) pp. 659, 667, 1703; *Atwood v. Fisk*, 101 Mass. 363, 100 Am. Dec. 124; *Ager v. Duncan*, 50 Cal. 325; *Hays v. Windsor*, 130 Cal. 230, 62 Pac. 395; *Chateau v. Singla*, 114 Cal. 91, 45 Pac. 1015, 33 L. R. A. 750, 55 Am. St. Rep. 63, cited by respondent. But this rule only applies where the parties are in pari delicto; where the illegal transaction is entered into voluntarily, and the turpitude of the parties is mutual. Where, in the cases cited, the rule has been applied, it will be found that both parties entered into the illegal contract or transaction there under consideration voluntarily, were equally culpable, and relief was refused on that account. Where, however, the party seeking the relief is not a free moral agent, and his consent to the illegal transaction is obtained through duress, menace, or undue influence, he is not regarded as in pari delicto with the person obtaining his consent by the employment of such means, and will not be precluded from invoking affirmative relief in

equity to set aside contracts or instruments so executed, or to defeat an attempted enforcement of them against him. This qualification to the general rule is as universally recognized as the general rule itself.

In *Woodham v. Allen*, 130 Cal. 194, 62 Pac. 398, plaintiff sued defendant to recover an amount paid him on secured notes and the value of merchandise; the complaint alleging that the money and merchandise had been extorted from her by defendant through fear of threats of a criminal prosecution against her husband. The trial court sustained a demurrer to the complaint. In reversing the judgment, it was said: "It is true, as a general rule, that, 'where an illegal contract has been fully executed on both sides, the law will aid neither party to recover anything parted with thereunder,' but this rule is subject to the qualification, among others, that the parties to the illegal contract are in *pari delicto*; and it will be seen, upon examination of the cases cited to support this rule, that they all proceed upon the theory that the parties to the contracts were equally in fault and each had freely joined in the transaction without being induced thereto by the oppression or fraud of the other. We think, therefore, that neither the general rule referred to nor the authorities cited in support thereof govern the case made by the complaint herein."

In 6 *American and English Encyclopedia of Law*, page 416, after laying down the general rule, it is said: "But when the parties do not stand in *pari delicto*, and it appears that the contract or deed was obtained by duress, equity will not refuse its aid. Thus, when the inequality in the situation of the parties is such that it is apparent the act was not voluntary, as where one of the parties exacts a security which the other is driven to give in order to save one dear to him from exposure, disgrace, and ruin, equity will set aside the contract or deed so obtained."

In 6 *Cyc.* page 317, it is said: "Although both parties are chargeable with knowledge that their agreement is contrary to some rule of law, yet, if one of them acts under duress, or what the law regards as undue influence on the part of the other, they do not stand on an equal footing, and the weaker one may be granted affirmative relief."

In *Bryant v. Peck, etc., Co.*, 154 Mass. 461, 28 N. E. 678, the plaintiff sued the defendant company to cancel a note and compel a retransfer of stock. A demurrer to the complaint was sustained, and plaintiff appealed. In reversing the judgment and directing the overruling of the demurrer, the opinion proceeds: "According to the allegations of the bill, the plaintiff became a party to the note from which he prays to be relieved and transferred his stock in consideration that the defendant would not prosecute his son for perjury, and under a threat from it that otherwise his son would be prosecuted. The

transaction was illegal (*Pub. St. c. 205, § 27*; *Gorham v. Keyes*, 137 Mass. 583), and if the parties stood on an equal footing neither of them would have a remedy against the other. *Atwood v. Fisk*, 101 Mass. 363 [100 Am. Dec. 124]. But it is well recognized that, although both parties are chargeable with knowledge that their agreement is contrary to some rule of law, yet, if one of them acts under duress, or what the law regards as undue influence on the part of the others, they do not stand on an equal footing, and the weaker one may be granted affirmative relief. *Worcester v. Eaton*, 11 Mass. 368, 376; *Belding v. Smythe*, 138 Mass. 530, 533. It is settled that such threats as are alleged to have been addressed to the plaintiff constitute duress. *Harris v. Carmody*, 131 Mass. 51 [41 Am. Rep. 188]. See *Rau v. Von Zedlitz*, 132 Mass. 164. And accordingly it has been decided in other jurisdictions, in cases like the present, that the plaintiff was entitled to relief in equity. *Foley v. Greene*, 14 R. I. 618 [51 Am. Rep. 419]; *Schoener v. Lissauer*, 107 N. Y. 111, 13 N. E. 741; *Williams v. Bayley*, L. R. 1 H. L. 200; *Davies v. Insurance Co.*, 8 Ch. Div. 469, 477. See *Sharon v. Gager*, 46 Conn. 189; *Rau v. Von Zedlitz*, 132 Mass. 164, 167-169."

In *Bell v. Campbell*, 123 Mo. 1,¹ the son-in-law of plaintiff, Mrs. Bell, was threatened with prosecution for defalcation of public funds. Upon importunities by the sureties on his bond and to save him from prosecution, plaintiff executed notes and a deed of trust of a farm to the sureties. On failure of plaintiff to pay the notes, the farm was advertised and sold under the deed of trust. Pending the proceedings for the sale of the farm and before sale thereof, plaintiff brought an action to cancel the notes and deed of trust. The trial court dismissed her petition and entered judgment against her. On appeal the Supreme Court reversed the decree and remanded the case, with directions to the trial court to enter a decree in favor of the plaintiff, canceling the notes and deed of trust. In its opinion the court said: "The circumstances of this case clearly bring it within the operation of the principle that condemns and avoids a contract entered into where the obligor is not a free agent; where he stands in *vinculis*; where he is not equal to the task of protecting himself; where the circumstances which surround him at the time are of such extreme necessity or of distress that his will is overcome, his free agency destroyed by some oppression or fraudulent advantage or imposition incident to the transaction. In such case a court of equity will protect him by setting aside the contract thus made. * * *

It is urged that if the deed of trust and notes executed by plaintiff had been given through fear of Carter's criminal prosecution, and in order to prevent the same, that then she stands in *pari delicto* with the other parties to the transaction, and therefore

¹ 25 S. W. 359, 45 Am. St. Rep. 505.

could have no relief against the enforcement of these writings obligatory. There are two answers to this contention: (1) Granting that plaintiff did enter into the contract with that purpose in view, she will not be debarred from pursuing her remedy, because she cannot in any event be regarded as equally culpable with the adversary parties. When this is the case, a court of equity will interfere and go to the relief of the less guilty party, whose transgression has been brought about by the imposition, undue influence, etc., of the party on whom the burden of the original blameworthiness principally rests. 2 Pomeroy's Eq. Jur. (2d Ed.) § 942; 1 Story's Ex. Jur. (13th Ed.) § 300; Pinckston v. Brown [56 N. C. 494]; Kitchen v. Greenbaum, 61 Mo. 115."

Authorities might be multiplied, but we cite only the following as similar in their facts to the allegations in the complaint of plaintiff, and which hold that a party from whom the execution of an illegal contract has been obtained through oppression or undue influence, exercised on him in its procurement, does not stand in *pari delicto* with the other party to the illegal transaction, and may be granted affirmative relief, or may defeat any attempt to enforce the contract, as the case may be: *Foley v. Green*, 14 R. I. 618, 51 Am. Rep. 419; *Meech v. Lee*, 82 Mich. 274, 46 N. W. 383; *Gray v. Freeman*, 37 Tex. Civ. App. 556, 84 S. W. 1105. Numerous other cases supporting the exception to the general rule will be found cited in 6 American and English Encyclopedia of Law, and 6 Cyc., in support of the text from those works which we have above quoted.

[5.6] In the complaint at bar, although it is alleged that the consideration for the execution of these instruments in question was an illegal one—the compounding of a felony—still it is further alleged that such execution for that purpose was procured through the duress, menace, and undue influence of the defendants Lercari, Pera & Co. The allegations set forth a good cause of action to have the instrument set aside for illegality of consideration under the qualification to the general rule above referred to, and entitled plaintiff to relief, if established by evidence. Issue was joined on this cause of action, and it was the duty of the court to have made a finding upon it, and a failure to do so necessitates a reversal of both the judgment and order denying a new trial, unless, as claimed by respondents, the findings which the court did make on their plea of estoppel and laches rendered it unnecessary to find on the issue of illegality of consideration.

[7] But the doctrine of estoppel by conduct or by laches, or even ratification, has no application to a contract or instrument which is void because it violates an express mandate of the law or the dictates of public policy. Such a contract has no existence whatever. It has no legal entity for any

purpose, and neither action nor inaction of a party to it can validate it; and no conduct of a party to it can be invoked as an estoppel against asserting its invalidity. The authorities are uniformly agreed on this principle, and the following cases, out of a number, are selected on this point, because they involve contracts which, like the instruments alleged by plaintiff to have been executed for an illegal consideration, were declared void as against public policy, and where it was held that the plea of estoppel as against such contracts could not be asserted. *Brown v. First Nat. Bank*, 137 Ind. 655, 37 N. E. 158, 24 L. R. A. 206; *Langan v. Sankey*, 55 Iowa, 52, 7 N. W. 393; *Wheeler v. Wheeler*, 5 Lans. (N. Y.) 355; *Robinson v. Patterson*, 71 Mich. 141, 39 N. W. 21; *Hardy v. Smith*, 136 Mass. 328; *Stanard v. Sampson*, 23 Okl. 13, 99 Pac. 796; *McCormick Harvester Mfg. Co. v. Miller*, 54 Neb. 644, 74 N. W. 1061; *Henry v. State Bank of Laurens, etc.*, 131 Iowa, 97, 107 N. W. 1034. To quote from a few of these cases: In *Brown v. First National Bank*, supra, it is said: "The contention of counsel that the appellee, having received the benefit of the contract, is estopped to defend against it on the principle that a corporation which has such benefit is estopped to assert that it had no power to contract is unsound, as applied to the case at bar. The rule suggested applies to cases where private rights alone are concerned; while in contracts void as against public policy the public is interested. The public concern cannot be made a matter of private bargain. A number of maxims apply to interdict the enforcement of such a contract, and many decisions hold that the receipt of benefits and retention of property under such a contract give no right of recovery. * * * It cannot be rendered valid by invoking the doctrine of estoppel." In *Langan v. Sankey*, supra: "But it is insisted such a contract may be relied on as an estoppel, and a recovery, therefore, had. We do not believe that this is correct, and are unwilling to hold that a contract void as being against public policy has any vitality whatever. It matters not how it may be pleaded, a substantial right cannot be enforced thereunder. That which cannot be recovered in an action on the contract cannot be done by indirection." In *Wheeler v. Wheeler*, supra: "The defendant's counsel contends that, even if the agreement was void as against public policy, still it was competent for the parties to ratify it after the sale and purchase; and that the plaintiff, having received from the defendant his share of the purchase price, or a portion thereof, is estopped from alleging the illegality of the agreement until he refunds or offers to refund the money received. But the principle of estoppel does not apply to an agreement which the law holds to be void as against public policy. The ratification of such a contract is as nugatory as

the contract itself." In *Stanard v. Sampson*, supra: "It is settled by the overwhelming weight of authority that where a contract is illegal, on account of involving the commission of a crime, such contract cannot thereafter be ratified."

It is clear, therefore, under the authorities that the necessity for a finding upon the issue of illegality of consideration was not rendered unnecessary or immaterial by the finding of estoppel and laches which the court did make, as the principle of estoppel has no application to agreements which are void as contravening public policy. The dominant issue under the pleadings in this case was whether the instruments were executed for an illegal consideration. If it was found that they were, plaintiff would have been entitled absolutely to a decree awarding her the full relief prayed for. Other independent issues as to duress, menace, or undue influence, and the affirmative plea of estoppel, and laches interposed by defendants, could only become important if this issue was found against her. As there was no finding at all on it, no judgment in the case could be properly rendered.

In addition to the points we have been considering, appellant attacks the sufficiency of the evidence to sustain the findings made and their sufficiency as findings to support the judgment. But, as the judgment and order denying a new trial must both be reversed, we do not deem it necessary to discuss these points, as such questions will only become of real moment when the trial court has made findings upon all the material issues in the case.

The judgment and order appealed from are reversed.

We concur: HENSHAW, J; MELVIN, J.

160 Cal. 649

PEARSON v. McKINNEY. (L. A. 2,704.)

(Supreme Court of California. Sept. 6, 1911.
Rehearing Denied Oct. 6, 1911.)

1. SALES (§ 172*)—PERFORMANCE BY SELLER—IMPOSSIBILITY.

Where one agrees unconditionally to sell goods deliverable at a fixed time or on demand, that the seller expected to manufacture or procure them from a certain source, and has been unable to do so, does not excuse his failure to deliver; but he must buy them in the market for delivery, if necessary. Where the agreement is to sell a specified article when it attains a certain size or age, or it is to be prepared in the manner prescribed by the buyer, the sale and delivery is dependent upon the happening of the precedent conditions, such as the articles becoming of the size or age specified, etc.; and upon their failure to do so the seller is excused from performance.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 425-430; Dec. Dig. § 172.*]

2. SALES (§ 273*)—CONSTRUCTION OF CONTRACT—IMPLIED WARRANTIES.

A contract made by plaintiff for the purchase of orange trees provided that if all or a part of the seed-bed stock sold by plaintiff to defendant was killed by frost defendant should be relieved from his obligation to furnish trees to plaintiff in the proportion which the total number of trees sold to defendant bore to the trees killed by frost; and further provided that defendant should sell to plaintiff 25,000 budded trees of standard size, and plaintiff should have the option of purchasing them at one year or two years old from the bud, at certain fixed prices; and further provided as to the size of standard trees of the ages named, the trees to be delivered between 1909 and 1911, plaintiff to notify defendant before the trees were budded as to the variety required. *Held*, that the contract was conditioned upon the trees reaching the age, size, etc., stipulated, so that there was no implied warranty by defendant that they should be one year old from the bud and of standard size at any particular time during the year 1909; the provision of the Civil Code relating to warranties implied from a sale of merchandise or manufactured articles not applying.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 772-776; Dec. Dig. § 273.*]

3. SALES (§ 81*)—CONSTRUCTION OF CONTRACT—PERFORMANCE—TIME.

The contract of sale did not fix a time for the completion of the budding of the trees sold, so that the seller would have a reasonable time for budding them, pursuant to Civ. Code, § 1657, providing that a reasonable time shall be allowed, where no time is specified for performing an act.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 217-223; Dec. Dig. § 81.*]

4. SALES (§ 81*)—TIME OF DELIVERY—CONSTRUCTION OF CONTRACT.

The provision giving plaintiff the option to take the trees at one year old or two years old from the bud, of a standard size, did not entitle him to demand them at that exact age, but defendant could make delivery within a reasonable time after demand, so that if the number of trees demanded had not grown to the standard size when demand was made, without defendant's fault, plaintiff would have to wait until they attained that size, though the trees were more than one or two years old from the bud when delivered; and, subject to such rule, the buyer could make successive demands for reasonable quantities less than the whole 25,000.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 217-223; Dec. Dig. § 81.*]

5. SALES (§ 411*)—ALLEGATIONS OF BREACHES.

In an action for the seller's breach of a contract of sale, the complaint must allege all of the breaches relied upon.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1161-1164; Dec. Dig. § 411.*]

6. SALES (§ 71*)—CONSTRUCTION OF CONTRACT—"VARIETY."

Though a contract for the sale of orange trees provided that the buyer should give the seller notice one month before the trees were budded as to the "variety" which he would select in purchasing, the buyer could choose a reasonable number of the varieties of those trees which could be obtained by the seller with a reasonable effort; the singular including the plural.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 71.*]

7. SALES (§ 81*)—CONSTRUCTION.

Where defendant agreed to deliver to plaintiff a certain number of orange trees at one or two years old from the bud, of standard size, as all of the trees could not reasonably be expected to become one year old from the bud, of standard size, on a particular day, but would ordinarily become so in smaller lots in uncertain intervals, plaintiff had the right to make successive demands for performance, or require delivery by piecemeal, and defendant to make successive offers.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 217–223; Dec. Dig. § 81.*]

8. SALES (§ 152*)—PERFORMANCE—DEMAND—PAYMENT.

While, if the contract of sale does not provide to the contrary, and the sale is for an agreed price, payment and delivery are concurrent, if the goods are not present for immediate delivery to the buyer when he demands delivery, he may accompany the demand with an offer to pay when actual delivery is made, without making payment when demand is made.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 357; Dec. Dig. § 152.*]

9. SALES (§ 152*)—PAYMENT—OFFER—NECESSITY.

Civ. Code, § 1440, provides that if a party to an obligation gives notice that he will not perform, such other may enforce the obligation without previously performing or offering to perform any conditions upon his part. Section 1511, subd. 1, provides that the want of an offer to perform is excused, where such offer is prevented by the act of the creditor or operation of law; and section 1515 provides that refusal by a creditor to accept performance, made before offer thereof, is equivalent to an offer and refusal. The buyer of orange trees demanded delivery at the seller's office, stating that he was ready to pay for the trees upon delivery, but the seller refused delivery. The buyer then went to the nursery to get the trees, being prepared to pay for them on delivery, but was again refused delivery. *Held*, that the buyer was not required to actually produce the money, either at the office or at the nursery, in order to make his demand for delivery effectual.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 357; Dec. Dig. § 152.*]

10. SALES (§ 81*)—CONSTRUCTION OF CONTRACT—DELIVERY—NOTICE AND DEMAND.

Where a contract for the sale of nursery trees required the buyer's notice of the selection of the varieties to be budded for delivery to be given to the seller one month before the trees were budded, the budding, pursuant to notice, need not be commenced during the month following the service of such notice, so that, where there were at least 150,000 trees to be budded, and the seller had the right to begin budding as soon as they were large enough, he could not be required to deliver trees of the April budding where notice as to the varieties the buyer desired was only given on March 31st; an earlier notice of selection being necessary, if he desired trees budded in April.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 217–223; Dec. Dig. § 81.*]

Department 1. Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by George M. Pearson against J. G. McKinney, administrator with the will annexed of the estate of E. E. Hendrick deceased. From a judgment for plaintiff and

an order denying a motion for a new trial, defendant appeals. Reversed.

Sidney J. Parsons and Purrington & Adair, for appellant. Miguel Estudillo and Geo. A. French, for respondent.

SHAW, J. Appeals by defendant from the judgment and from the order denying a new trial.

The plaintiff sued to recover damages alleged to have been sustained by reason of the refusal of the decedent, E. E. Hendrick, to deliver to plaintiff certain orange and lemon trees bought by plaintiff of decedent. The action was begun in Hendrick's lifetime. He died before the trial, and the present defendant as administrator, etc., was substituted as the party defendant in his stead. Judgment was given in favor of plaintiff for \$28,453.40.

The agreement of sale was in writing, and is made a part of the complaint. It was executed on November 12, 1906, and embraced two contracts of sale. The first was a sale by Pearson to Hendrick of a number of "seed-bed orange plants" on the Charlton Ranch, estimated at 150,000, at \$20 per thousand, to be delivered by the 15th of May, 1907. This contract was fulfilled and is of no importance, except as it may explain the meaning of the other contract of sale. The second was a contract of sale from Hendrick to Pearson of "25,000 budded trees of standard size" at prices fixed according to age. Delivery was to be made during the years 1909, 1910, and 1911.

The court below found that Pearson demanded delivery of orange and lemon trees under the contract, and as alleged in the complaint, as follows: Of orange trees, 5,000 on April 30, 1909; 5,406 on May 25, 1909; 5,000 on May 31, 1909; and 6,326 on June 30, 1909; of lemon trees, 2,000 on May 31, 1909, and 500 on June 30, 1909; and that none was ever delivered. The action was begun on July 1, 1909, the day following the last demand. The market price at the time of the demands was \$1.50 each for orange trees and \$1.25 each for lemon trees. The agreed price being 30 cents each, the court estimated the damage as \$1.20 for each orange tree and 95 cents for each lemon tree, making a total of \$28,453.40 for the 21,732 orange trees and 2,500 lemon trees demanded. For this sum the judgment was given. The main question for determination is whether or not, under the terms of the contract and the facts of the case, Hendrick was justified in refusing to deliver the trees when demanded.

The contract for the sale of the 25,000 budded trees is peculiar in some respects, and we think the court below did not correctly construe it. It is necessary to state its terms at some length. In quoting it we will, for the sake of brevity and for an easier grasp of

its meaning, substitute the name "Pearson" for the words "party of the first part," and "Hendrick" for the words "party of the second part." The seed-bed orange plants sold by Pearson to Hendrick were to be delivered by Pearson in boxes by the 15th of May, 1907, and this was done. The material parts of the second contract are as follows: "It is also agreed that in case of all or a portion of the seed-bed stock sold by [Pearson] to [Hendrick] being killed by frost, [Hendrick] will be relieved from the obligation contained in this contract to furnish trees to [Pearson] in the proportion which the total amount of trees sold to [Hendrick] by [Pearson] bears to the amount of trees killed by frost.

* * * It is further agreed, in consideration of the premises and of the covenants hereinafter contained, that [Hendrick] will sell to [Pearson] and [Pearson] will buy 25,000 budded trees of standard size, and [Pearson] shall have the option of purchasing said trees at one-year old or two-year old from the bud. If taken at the age of one year from the bud [Pearson] agrees to pay thirty cents per tree; if taken at the age of two years old from the bud, thirty-five cents per tree, and if taken at the age of three years old from the bud forty cents per tree. It is stipulated that a standard tree one year old from the bud shall be five-eighths of an inch in diameter two inches above the bud, and that a standard tree two years old from the bud shall be three-fourths of an inch in diameter two inches above the bud. The delivery of said trees shall be between 1909 and 1911 inclusive. It is hereby agreed that [Pearson] shall give notice to [Hendrick] one month before the trees are budded as to the variety which [Pearson] will select in purchasing the trees as per this contract and the option hereinafter set forth." A paragraph followed, stating the option last mentioned, which gave Pearson the privilege of purchasing 25,000 additional standard trees upon the same terms. No trees covered by this option are in controversy here, and it has no bearing on the case.

The complaint sets forth the contract in full, alleges the several demands for trees one year old from the bud, and the several refusals to deliver the same, states the amount of damages caused thereby, and demands judgment. It does not aver that at the time of each or any demand Hendrick had on hand trees of standard size, or trees one year old from the bud, in numbers sufficient to comply with such demands. The evidence shows that at the time of these demands and up to the time the action was begun only about 5,000 trees had reached standard size. The complaint alleges, in general terms, that Pearson duly performed all the conditions of the agreement on his part, but it does not otherwise aver that he gave Hendrick any notice one month before the trees were budded, or at all, as to the variety

of trees he would buy. There is no allegation that any such notice was given, or that any trees were budded in pursuance thereof, or at all. The findings, in response to the allegations in the answer, state that on March 31, 1908, Pearson notified Hendrick as to the varieties he would select in purchasing under the agreement, to wit, "20 per cent. Thompson Improved Navels, 25 per cent. Valencias, 45 per cent. Washington Navels and 10 per cent. Eureka Lemons."

[1] Where one makes an unqualified agreement to sell goods to be delivered at a fixed time, or on demand of the buyer within a stated period, and it is inherently possible to obtain the goods, the fact that the seller may have expected to manufacture the goods himself, or to procure them from a certain source, and has not been able to complete or obtain them when delivery is due, does not excuse performance. In that event, his contract being unconditional and unqualified, he must go into the market, if necessary, and obtain the goods, and he will be liable in damages for nondelivery. 2 Mechem on Sales, § 1103. The complaint herein was evidently drawn upon the theory that the agreement in question was of this character. It sets forth the contract in full; but aside from that it alleges in general terms that plaintiff fully performed his part of the contract, and avers the several demands above mentioned for trees one year old from the bud, and of standard size, except that of April 30th, which did not specify standard size, the refusals, the damages, and nothing more. These facts alone would make the defendant liable in damages only upon the theory that the agreement was a general undertaking by Hendrick to sell and deliver 25,000 trees one year old from the bud and of standard size, to be obtained by him at his peril. Where the contract is not a general undertaking to sell the goods, which the seller is to have ready at all events when delivery is due, but is a contract to sell a specified article when it grows to a specified size or age, or a certain number to be selected out of a particular larger lot or to be produced from a specified source, or to be prepared in a manner to be afterwards prescribed by the buyer, a different rule prevails. The sale and delivery are then made to depend upon the happening of the precedent conditions. Until they have occurred, there is no obligation upon the seller to deliver, unless their nonoccurrence was occasioned by his fault. And if they do not occur, or their occurrence becomes impossible without his fault, he is excused from performance. Likewise, if the occurrence is delayed without his fault, the time of performance is postponed accordingly. A case in point is *Howell v. Coupland*, L. R. 9 Q. B. 462 (s. c. on appeal, L. R. 1. Q. B. Div. 258), where one party agreed to sell a crop of potatoes to be grown on a certain tract of land. The crop was so poor, from blight, that he did

not raise enough to fill the contract, and he was excused thereby from full performance. Other illustrations of the general rule are found in *Appleby v. Myers*, L. R. 2 C. P. 657; *Taylor v. Caldwell*, 3 Best & S. 833, 32 L. J. Q. B. 164; *Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215; *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *McMillan v. Fox*, 90 Wis. 173, 62 N. W. 1052. See, also, 2 *Mechem on Sales*, § 1100, 1101.

[2] This contract is of the latter kind. It is an agreement by Hendrick to sell 25,000 trees of standard size to be grown by him from small plants, either those furnished to him by Pearson or others of like kind and size, in a place of his selection. They were to be budded by him to certain varieties, to be afterwards selected by Pearson, of which selection Pearson was to give him notice one month before budding was to begin, and they were not to be delivered until the year 1909, nor until they were one year old from the bud, and had grown to standard size. It may be added that by the letter of the contract to sell the 25,000 trees it does not appear what kind of trees were to be budded by Hendrick and sold by him to Pearson, whether orange, lemon, apple, peach, pear, or indeed any kind of fruit trees. It is only by reference to the clause reducing proportionally the number of trees to be sold by Hendrick, if the orange plants sold to him by Pearson should be partly killed by frost, and practically annulling the sale by Hendrick, if all of the Pearson stock were killed, thus implying that the 25,000 trees were to be grown from the Pearson seed-bed orange plants, and by reference to the provision for a notice of selection of varieties by Pearson, and the written notice of selection, subsequently made by him, coupled with an assumption of judicial knowledge of the significance of the names of the varieties stated in the notice, which we are not sure we can claim, that we can infer, as both parties seem to have understood, that the 25,000 trees were to be citrus trees budded upon orange stock, and presumably upon the seed-bed stock furnished by Pearson, since no other seems to have been contemplated. Under these conditions there was no implied warranty by Hendrick that the trees should be one year old from the bud and of standard size at all times, or at any particular time, during the year 1909. There is clearly no express warranty to that effect. He was under no obligation to bud for Pearson until one month after Pearson gave him notice, and after such budding one year must have elapsed and the trees must have grown to standard size before there could be any obligation resting upon Hendrick to deliver them. There is no express warranty that the trees so budded should grow to standard size in one year thereafter, or at any specific date thereafter. And the law does not imply such warranty from the conditions of

the contract or the facts alleged. The time required for the natural growth of a tree to a given size depends very much on natural conditions beyond human control. Temperature, soil, rainfall, force and constancy of winds, cultivation and fertilization, all affect it. A warranty of such uncertain events should not be implied, unless settled principles of law require it. It is not like the manufacture of an article, the completion of which one is presumed to warrant, if he agrees to sell and deliver it at a given time. The rules of the Civil Code relating to warranties to be implied from a sale of merchandise or manufactured articles do not apply. The only language that could be suggested as constituting such warranty is the provision that "a standard tree one year old from the bud shall be five-eighths of an inch in diameter, two inches above the bud." This is a mere description of the thing meant by the term "standard size," and it was obviously inserted solely to prevent dispute or the necessity of proof on the subject. It does not declare that when the trees are one year old from the bud they shall be of that size, or anything to that effect, as would be necessary to constitute such warranty, but, in effect, that upon or after reaching that age they must be of the size stated, before they can be considered of "standard" size.

[3, 4] The contract fixes no time for the completion of the process of budding the 25,000 trees in question. It required it to be begun at the expiration of 30 days from service of notice of selection; but no time of completion is stated. "Where no time is specified for the performance of an act required to be performed, a reasonable time is allowed." Civ. Code, § 1657. It cannot reasonably be contended that it required the task of budding to be done in one day. Referring for the moment to the evidence in the particular case, it appears that only a little over one-fourth of these 150,000 trees were large enough to bud until after July 1, 1908. The suit was begun July 1, 1909. The evidence further shows by the uncontradicted testimony of experienced nursery men that but a small percentage of budded citrus trees will grow to standard size in one year after budding, even with proper care and treatment. No definite time of delivery is fixed, except as it is fixed by the option to Pearson to take them "at one year old or two year old from the bud," and the provision that delivery should be during the years 1909, 1910, and 1911. The option clause obviously does not mean at the precise age stated, but at some reasonable time during the second or third year after budding. As the time allowed for budding is a reasonable time, and it could not well be done all at once, and as the arrival at standard size must necessarily be irregular and uncertain, it follows that Hendrick was entitled to a reasonable time after demand in

which to make delivery. If sufficient trees had then grown to standard size, delivery would be due immediately upon a proper demand. If not, and his fault had not caused the failure, both parties would have to await their growth to the size required to bring them within the contract.

From all these considerations, it follows that the complaint fails to state a cause of action. It should have alleged generally that Hendrick had trees of the size and age specified, subject to the contract, which he could have delivered. In the absence of this, and perhaps this would have been a better form of pleading, it should have stated the particular facts showing a legal obligation upon Hendrick to comply with the demands at the times they were made. In the latter form it should have shown the date of the giving of notice by Pearson of the selection of varieties, and that the varieties selected were the same as were demanded. In view of the fact that a reasonable time was allowed to complete the budding and the uncertainty that the trees budded in May and June, 1908, would attain standard size, in May or June, 1909, when the demands were made, in sufficient numbers to meet those demands, such growth would scarcely be presumed, and it should have been alleged. This defect in the complaint requires a reversal of the judgment.

[5] We have considered the rights of the parties under the contract, as we conceive them to be, upon the hypothesis that Hendrick had performed all the duties thereby imposed upon him, except the failure to deliver the trees. No other breach is alleged, and none other can be presumed. Upon the trial an attempt was made by the plaintiff to show that Hendrick had carelessly selected an unsuitable place in which to transplant, bud, and grow the trees to standard size, and that he had not properly watered or cultivated them, and that this neglect was the cause of their failure to grow to and be of standard size at the times of the demands. The contract implies an undertaking by Hendrick to use reasonable and ordinary care in these respects. It is only necessary to say upon this point that if the plaintiff relied upon a breach of this obligation the particular neglect and its effect should have been alleged. The findings are defective upon the point, and do not cure the defect in the complaint.

[7] It is contended by the defendant that the contract was an entire one for the sale of 25,000 trees in one lot, and that Pearson had no lawful right to make successive demands for performance or require delivery by piecemeal. The contract must receive a reasonable construction, and its subject-matter must be considered in its interpretation. We have seen that all of the trees could not be reasonably expected to become one year old from the bud, or of standard size, on a particular day, but that ordinarily they would

become so in smaller lots at irregular and uncertain intervals. No objection seems to have been made at the time by Hendrick to successive demands of parts only of the entire lot. We think a reasonable construction of the agreement, and one most favorable to both parties, would allow demands by the buyer, or offers by the seller, of reasonable quantities, less than the whole, at reasonable intervals, subject to the rule before stated that, in the absence of negligence, reasonable time for delivery must be given, as the circumstances required.

[6] In view of the possibility of another trial upon amended pleadings, it is necessary to notice some other points presented by the record. Pearson, in the notice as to the variety he would select in buying, included four different varieties. It is claimed that the contract limited him to one. We think in this case the singular should be held to include the plural, and that it gave Pearson the right to choose a reasonable number of varieties that could be obtained by Hendrick with reasonable effort.

[8, 9] It is contended that Pearson's demands were insufficient and ineffectual, because no money was tendered in payment concurrently with the demand for delivery. It is true that upon a sale of goods for an agreed price, if the contract contains nothing to the contrary, payment and delivery are concurrent acts. *Cole v. Swanson*, 1 Cal. 51, 52 Am. Dec. 288. But actual payment need not accompany the demand for delivery, unless such delivery is to be made then and there. If the goods are not present to be then delivered to the buyer, the buyer may accompany his demand with an offer to pay when actual delivery is made to him. This the plaintiff did. His demand was made at the office of defendant in Riverside, and it was accompanied by the statement that he was ready to pay for the trees upon delivery. He was met with a refusal, and a statement that there were no trees on hand of standard size that were subject to the contract. The trees were then at the nursery 17 miles distant. Pearson thereupon went to the nursery to get the trees, prepared to pay for them on delivery, but he was again refused delivery, for the same reason as before. Under these circumstances he was not required to actually produce the money, either at the office or at the nursery, in order to make his demand effectual. *Civ. Code*, §§ 1440, 1511, subd. 1, 1515; *Scribner v. Schenkel*, 128 Cal. 253, 60 Pac. 860; *Pierce v. Lukens*, 144 Cal. 401, 77 Pac. 996.

[10] The notice by Pearson as to the varieties he would select in buying was given on March 31, 1908. About 23,000 trees were budded by Hendrick in the month of April, 1908, to some of the varieties selected by Pearson, and about 22,000 more were budded in May and June, 1908. These comprised all of the trees of the Pearson stock that were large enough for budding at that time. The

plaintiff insists that 5,000 of the trees budded in April had reached standard size in May, 1909, and that they constituted a part of the trees which Hendrick agreed to sell by the contract, and that plaintiff was therefore entitled to delivery thereof upon the demand of May 31, 1909, or upon one of the previous demands. Hendrick refused to deliver them, claiming that they were not subject to the agreement of sale. The contract declares that Pearson's notice of the selection of varieties to be budded for delivery to him should be given to Hendrick "one month before the trees are budded." Consequently budding in pursuance of the notice and for delivery to Pearson need not have been commenced during the month following the service of the notice. This time was evidently allowed for the benefit of Hendrick, to enable him to procure buds of the varieties chosen and prepare for the work of budding. It would seem reasonable to conclude that Hendrick was not required to deliver trees of the April budding to Pearson. There were at least 150,000 trees to be budded. Hendrick had the right to begin budding them as soon as they were large enough. Pearson must be assumed to have knowledge of their age and size. If he wished to obtain trees upon his contract that were budded in April, 1908, he should have given an earlier notice of his selection. In the absence of neglect by Hendrick retarding the growth to budding size, and bad faith in immediately budding the trees in April, in order to avoid having trees to fill Pearson's orders in 1909, he would not be bound to deliver trees of the April budding to Pearson. No such neglect or bad faith is alleged.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

160 Cal. 647

CITY OF LINDSAY et al. v. MACK, City Clerk. (S. F. 5,981.)

(Supreme Court of California. Sept. 6, 1911.)

MUNICIPAL CORPORATIONS (§ 867*)—INCURRING INDEBTEDNESS—NOTICE OF ELECTION—"FOR TWO SUCCEEDING WEEKS."

St. 1901, p. 28, authorizing the incurring of indebtedness by municipalities, provides by section 3 that the ordinance calling an election shall be published once a day for at least seven days in some newspaper published at least six days a week in such municipality, or once a week for two weeks in some newspaper published less than six days a week in such municipality, and that one insertion each week "for two succeeding weeks" shall be sufficient, and that in municipalities where no daily or weekly is published the ordinance shall be posted in three public places therein for two succeeding weeks; and in a municipality where there was no daily newspaper the ordinance was published for two succeeding weeks in a weekly newspaper, the first publication being only twelve days from the election. *Held* that, while the publication by posting "for two suc-

ceeding weeks" required a posting for two full weeks, where publication was by weekly newspaper and the second publication was completed several days before the election, it was sufficient.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1841; Dec. Dig. § 867.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2857-2861; vol. 8, p. 7664.]

In Bank. Application by the City of Lindsay and others for a writ of mandate against W. H. Mack, City Clerk. Writ issued.

H. T. Miller, for petitioners. Joseph C. Meyerstein, for respondent.

PER CURIAM. In this proceeding a peremptory writ of mandate, as requested by petitioner, was ordered issued from the bench. This opinion is filed to show the grounds of such action by this court. The proceeding was in mandate to compel the respondent, city clerk of the city of Lindsay, to sign and attest certain municipal bonds proposed to be issued under the act authorizing the incurring of indebtedness by cities, etc., found in Statutes of 1901 at page 27. The only question was whether notice of the election at which the bonds were voted was given for the time required by the provisions of said act.

The provisions of such act as to notice are as follows: "Such ordinance [the ordinance calling an election] shall be published once a day for at least seven days in some newspaper published at least six days a week in such municipality, or once a week for two weeks in some newspaper published less than six days a week in such municipality, and one insertion each week for two succeeding weeks shall be a sufficient publication in such newspaper published less than six days per week. In municipalities where no such newspaper is published, such ordinance shall be posted in three public places therein for two succeeding weeks. No other notice of such election need be given." Section 3. There being no paper in the municipality published more than once a week, the ordinance was published once a week for two successive weeks in a weekly newspaper published therein, viz., on June 14, 1911, and on June 21, 1911. The ordinance fixed June 26, 1911, as the day for the election, and the election was in fact had on the last-named day. This was less than two weeks from the first publication day, June 14, 1911, and the claim of respondent was that the statute required two full weeks' notice of the election.

The notice given was in full accord with the statute. It is nowhere required thereby that two weeks' notice of the election shall be given, except in the single case where, by reason of the fact that there is no newspaper published in the municipality, the notice is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

given by posting. As to such a case, the requirement that the ordinance shall be posted "for two succeeding weeks" necessarily means that the notice must be posted for two full weeks, and that the publication by posting is not complete until such two weeks have expired. As to cases where the notice is given by publication in a newspaper, the only requirement is, in one case, publication for "at least seven days" in a daily newspaper, and, in the other, publication "once a week for two weeks * * * and one insertion each week for two succeeding weeks shall be a sufficient publication," etc. In all three of the cases provided for by the statute, the election may be set for any day subsequent to the completion of the publication, and the only reason why two weeks must intervene between the time of posting and the day of election, where the publication is by posting, is that the notice in such case is not fully published until the expiration of such two weeks. In the case at bar the publication was completed by the second publication on June 21, 1911, several days before the day of election.

For the reasons stated, it was ordered that a peremptory writ of mandate issue in accordance with the prayer of the petition.

160 Cal. 661

KEARNEY v. BELL. (S. F. 5,209.)

(Supreme Court of California. Sept. 7, 1911.)

1. ACCOUNT STATED (§ 20*)—FRAUD AS DEFENSE.

The action on an account stated being one at law, the defense that defendant's assent to the account stated was procured by fraud is for the jury.

[Ed. Note.—For other cases, see Account Stated, Dec. Dig. § 20.*]

2. TRIAL (§ 295*)—INSTRUCTIONS—CONSIDERATION AS A WHOLE.

The instruction, in an action on an account stated, in which the defense was fraudulent procurement of defendant's assent, that the jury should find for defendant, if she had a certain belief when assenting is not erroneous because not stating such must have been the result of fraudulent representations by plaintiff; the jury having been told this by other instructions, and the instructions being required to be read as a whole.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 295.*]

3. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF ERROR.

Admission of evidence of defendant's financial condition at the time of her signing the account stated for medical services, defended against on the ground of fraudulent procurement of signature, is not of sufficient importance to be prejudicial; plaintiff being shown to have been acquainted with such conditions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4166; Dec. Dig. § 1050.*]

4. ACCOUNT STATED (§ 19*)—EVIDENCE—ITEMS OF ORIGINAL ACCOUNT.

Where the account stated is defended against on the ground of fraud in procuring

defendant's assent thereto, the original items appearing on plaintiff's books may be gone into, and their falsity shown, as bearing on the issue of fraud.

[Ed. Note.—For other cases, see Account Stated, Dec. Dig. § 19.*]

5. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—REFRESHING MEMORY.

Allowing a witness to refresh his recollection from a memorandum made several years after the event, without a sufficient showing under Code Civ. Proc. § 2047, is harmless, his testimony merely that he was at a certain place on a day when plaintiff claimed to have there rendered medical services to defendant, and that he did not see plaintiff there, having at most only slight tendency to contradict plaintiff, who testified to leaving such place that day on the morning train.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4160; Dec. Dig. § 1048.*]

6. APPEAL AND ERROR (§ 262*)—REVIEW—NECESSITY OF EXCEPTIONS.

Directing a jury to answer special issues not having been, at the time of the trial, one of the matters deemed excepted to under the provisions of Code Civ. Proc. § 647, exception to the submission to them of special issues presenting questions of law was necessary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1582-1595; Dec. Dig. § 262.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Peter A. Kearney against Teresa Bell. From an order denying a motion for new trial, plaintiff appeals. Affirmed.

Edmund Tausky, for appellant. T. Z. Blakeman, for respondent.

SLOSS, J. This is an appeal by plaintiff from an order denying his motion for a new trial. The appeal was originally heard and determined in the District Court of Appeal for the First appellate district. That court, after first reversing the order appealed from granted a rehearing, and thereafter entered a judgment of affirmance, stating the grounds for its later action in an opinion, a copy of which is as follows:

"In this case a rehearing was granted, and upon further consideration we adopt that portion of the opinion reading as follows:

"This is an appeal from an order denying plaintiff's motion for a new trial.

"The second amended complaint, upon which the action was tried, contains two counts, each upon an account stated for \$25,500, of which \$21,780 remained unpaid. In the first count it is charged that the account was stated on the 25th day of August, 1898, and in the second on the 23d day of January, 1899.

"In her answer defendant denied the material allegations of each of said counts, and also as a separate defense pleaded in substance that she had been induced to execute the instrument relied on as the account stated, of August 25, 1898, by false and fraudu-

lent representations made to her by plaintiff.

"The action came on for trial before a jury, and at the beginning thereof plaintiff moved the court to first try and dispose of the issues presented by what he termed the equitable defense of fraud. The motion was denied.

"After the close of plaintiff's evidence, defendant filed an amendment, in which she set up in substance that she had been induced to execute the writing of January 23, 1899, relied on as an account stated on that day, by false and fraudulent representations made to her by plaintiff. Whereupon plaintiff renewed his said motion, and the same was again denied, and the whole case was finally submitted to the jury for a general verdict and answers to special issues directed to the defense of fraud. Plaintiff urges that the court erred in said rulings. With this contention we cannot agree.

[1] "An account stated is a contract, and like any other contract may be avoided by showing that the assent of one party thereto was procured by the fraud of the one seeking to enforce the contract. Such a defense is a legal and complete defense. "Both courts of law and equity in proper cases have jurisdiction in cases of fraud, and when the acts constituting the fraud and the relief sought are such as are cognizable in a court of law, the parties are entitled to a jury trial. * * * Fish v. Benson, 71 Cal. 428 [12 Pac. 454]. The action upon an account stated is an action at law, and we know of no reason why the defense that the defendant's assent to the account stated was procured by fraud may not be passed upon by the jury, under the instructions of the court. This is what was done in this case, and there was no error in so doing. Defendant sought no affirmative relief. The fraud was pleaded simply as a defense to an action for a money judgment only.

"Defendant was and is the widow of Thomas Bell, deceased, and had been given a family allowance for the support of herself and the minor children of herself and decedent, by order of the court in which was pending the administration of the estate of said deceased. Plaintiff, as a physician, had rendered services to defendant and her children, covering a period from October, 1892, to some time in 1898. On August 25, 1898, plaintiff rendered to defendant a bill for his services as follows: "San Francisco, Cal., Aug. 25, 1898. Mrs. Teresa Bell (Guardian), to Peter A. Kearney, M. D., Dr. For professional services rendered Marie T. Bell, Robina Bell, Muriel Bell, Reginald Bell, Eustace Bell from October 17, 1892, to May 21, 1898, and Thomas F. Bell, from October 17, 1892 to May 10, 1896—\$25,500, twenty-five thousand five hundred dollars." Defendant indorsed on the back thereof the following: "Messrs. Maxwell & Staacke, executors of the Bell estate. Pay this account and charge the same to the family allowance.

Teresa Bell,"—and returned the same to plaintiff. This paper was marked "Plaintiff's Exhibit 1." The bill not having been paid, on the 23d day of January, 1899, plaintiff presented to defendant another writing, and at his request she signed it and returned it to him. This writing is as follows: "On the 25th day of August, 1898, I gave Dr. Peter A. Kearney an order for the payment of \$25,500 on the executors of the estate of Thomas Bell, deceased, due him for services rendered as physician to me and my children at my request, and said executors having refused to pay or honor said order, I hereby acknowledge said indebtedness as just and legal this 23d day of January, 1899. Teresa Bell." This paper was marked "Plaintiff's Exhibit 2."

[2] "There can be no doubt but that this second paper, read in connection with the first paper, constituted an account stated, and, as the execution thereof was admitted by defendant, entitled plaintiff to a verdict, unless the evidence showed that the execution thereof by defendant was procured by the fraud of plaintiff. In this connection the court instructed the jury as follows: "The paper marked 'Plaintiff's Exhibit 2,' taken in connection with the paper marked 'Plaintiff's Exhibit 1,' constitute an account stated between plaintiff and defendant, unless you find that defendant's signature to said paper was procured by plaintiff through or by means of misrepresentation or artifice on plaintiff's part. The presumption of law is that a person's signature to an instrument was made freely and voluntarily, and was obtained without fraud, misrepresentation, or artifice, and the burden of proving the contrary is on the party alleging it." But at the request of the defendant the court also charged the jury as follows: "The court instructs the jury that if they believe from the evidence that the defendant, when she signed and delivered to plaintiff the writing dated January 23d, 1899, believed and intended the same to be only a further acknowledgment of plaintiff's right to collect from the family allowance, granted in the estate of Thomas Bell, deceased, the sum of \$25,500, not binding her individually to pay plaintiff said sum of \$25,500, they will find for the defendant"—to which plaintiff excepted. It is claimed that this instruction is erroneous, for the reason that the jury were not told that defendant's belief must be the result of misrepresentation on plaintiff's part, or that they must believe that defendant's signature was obtained by means of false statements relied on by defendant.

"It was upon this theory that the instruction was held to be erroneous, and the judgment reversed in the former opinion; but, upon rehearing and a further consideration of the instruction and of all the record, we have concluded that the jury were told over and over again in other instructions that the belief must have been the result of false and

fraudulent representations by plaintiff. Instructions must be read together as a whole; and when so read, if they are not contradictory, and if, supplemented by each other, they fairly state the law, a case will not be reversed because one particular instruction does not state all the rule with its modifications. The court of its own motion instructed the jury as follows: "If you find, therefore, that plaintiff was not guilty of any fraud or misrepresentation or artifice in procuring defendant's signature to the papers marked, respectively, 'Plaintiff's Exhibit 1' and 'Plaintiff's Exhibit 2,' your verdict must be for the plaintiff for the balance remaining unpaid on said account." And at the request of the defendant as follows: "If you find from the evidence in this case that the writings or instruments of August 25, 1898, and January 23, 1899, were signed by defendant freely and voluntarily, without any misrepresentation or fraud or undue influence or artifice made by or practiced upon the defendant by plaintiff, then the plaintiff will be entitled to recover." And again the court instructed the jury as follows: "The paper marked 'Plaintiff's Exhibit 2,' taken in connection with the paper marked 'Plaintiff's Exhibit 1,' constitute an account stated between plaintiff and defendant, unless you find that defendant's signature to said paper was procured by plaintiff through or by means of misrepresentation or artifice on plaintiff's part." And in the concluding part of the court's charge to the jury the court again said: "Therefore, to crystallize this whole matter, I will say to you, if you find that the defendant in this case freely, voluntarily, and without any fraudulent practices or artifice or deception practiced on the part of plaintiff, executed and signed these papers, they constitute an account stated, and plaintiff would be entitled to a verdict for the amount of that account, less the payments made thereon. * * * But if, on the other hand, you find that the signature of the defendant to the papers was procured by fraud, misrepresentation, artifice of any kind, then it will be your duty to render a verdict in favor of defendant."

"It is further shown by the special issues submitted to the jury and the answers of the jury thereto that they were not misled by the instruction complained of, and that they not only understood the instructions as given, but found that the defendant's belief was the result of misrepresentation on the part of plaintiff. Among the special issues submitted to the jury at plaintiff's request, and their answers, were the following: "(3) Did defendant know the entire contents of the bill of August 25, 1898, before indorsing thereon that request to the executors?" The jury answered, "No." "Did the plaintiff, when he asked the defendant to sign the paper of January 23, 1899, represent to her that said bill was merely a further written acknowledgment of his right to collect \$25,-

500 from the family allowance?" The jury answered, "Yes." "(6) Did the plaintiff, when he asked the defendant to sign the paper of January 23, 1899, state to her that if she would sign that paper he would have his attorney get the executors to pay the balance due her upon family allowance?" The jury answered, "Yes." And at defendant's request the following special issues were submitted to the jury and answered as follows: "(5) Did the plaintiff obtain from the defendant the order indorsed and signed by her upon the account dated August 25, 1898, by means of any misrepresentations as to the quantity or value of his services?" The jury answered, "Yes." "(6) Did the plaintiff obtain from the defendant the writing signed by her and dated January 23, 1899, by means of any misrepresentation or untrue statement?" The jury answered, "Yes."

"The case was tried under our system with the aid of a jury, and the special function of the jury was to pass upon the facts; and, as the jury found, in answer to special issues and in several different forms, that the writing was procured from the defendant by means of false representations, it could not have based its verdict upon a finding as to the mere belief of the defendant as to the legal effect of the paper. No one could read the record, the instructions of the court, and the special findings of the jury and believe that the instruction claimed to be erroneous had any influence upon the verdict of the jury. The jury based its verdict upon the findings as to the belief founded upon and induced by misrepresentations, and under the special instruction of the court, given at plaintiff's request, to wit: "If you find, therefore, that plaintiff was not guilty of any fraud or misrepresentation or artifice in procuring defendant's signature to the papers marked, respectively, 'Plaintiff's Exhibit 1' and 'Plaintiff's Exhibit 2,' your verdict must be for the plaintiff for the balance remaining unpaid upon said account."

"The conclusion we have reached is supported by many well-considered cases. The case of *De Witt v. Floreston Pulp & Paper Co.*, 7 Cal. App. 774 [96 Pac. 397], decided by this court is directly in point. There, in an action for damages on account of personal injuries, the court at the request of the plaintiff instructed the jury that if the injuries received by the plaintiff "were caused by the failure of the defendant to furnish reasonably safe and suitable tools" the plaintiff would be entitled to recover. It was claimed, and correctly claimed, that the instruction did not state the law correctly for the reason that the law only requires the employer to "use reasonable and ordinary care in the selection of such tools and appliances." It was there said: "Instructions must be read as a whole, and when so read, if they are not contradictory, and if, supplemented by each other, they fairly state the law, a case will not be reversed because any

one instruction does not state all the rule with its modifications. Now under the rule it is the duty of the employer to furnish his employes with reasonably safe tools and appliances for the doing of the work intended to be done thereby. The law is so stated by all the authorities. If it were not so, then we would have the converse—that it is not the duty of the employer to furnish his employes with safe and suitable tools and appliances. The duty of the employer is performed, however, when he exercises reasonable and ordinary care, such as a reasonably prudent man would exercise in the selection of tools and appliances for the uses and purposes for which they are intended. The instructions complained of do not give the last rule stated, or, in other words, they do not instruct the jury as to when or how the duty is performed; but elsewhere the jury are fully instructed as to such duty." The opinion then, after showing that the other instructions fully covered the matter omitted from the instruction under consideration, concludes: "It seems to us that the instructions complained of could not have misled the jury when the court, as we have shown, repeated time and again that the duty of the defendant was performed if it exercised reasonable and ordinary care in the selection of the elbow. The jury evidently believed from the testimony that defendant did not use that degree of care which a reasonably prudent man would use in the selection of the elbow. It is no doubt the general rule that when the court instructs the jury upon what state of facts they may find a verdict the instructions should include all the facts in controversy upon which evidence has been offered material to the rights of the defendant or the plaintiff, as the case may be; but this rule must be reasonably applied in view of the whole record and all the instructions, for the purpose of determining as to whether or not the jury may, as reasonable men, have been misled by the instruction." In the case last cited the Supreme Court denied a petition for rehearing. We need only refer to the authorities collated and cited in that case to justify the conclusion we have reached in this, and we will cite no further authorities upon the proposition.

[3] "It would have been better for the court to have excluded evidence as to defendant's financial condition at the time she signed the statement; but, as the plaintiff was her family physician and was acquainted with her financial condition, as shown by the evidence, it was closely connected with the negotiations leading up to the signing of the papers. We do not believe it to be of sufficient importance to justify a reversal of the case, or that its exclusion would have in any way affected the verdict of the jury.

"As to the evidence, we have carefully examined it, and we find that there is suffi-

cient evidence to support the verdict of the jury and their special findings on the issues submitted to them.

"The order is affirmed."

Subsequently this court made its order transferring the cause here for hearing. After careful consideration of the arguments advanced by the respective parties, we have reached the conclusion that the District Court of Appeal was right in affirming the order denying a new trial. With respect to the matters discussed by that court, we are entirely satisfied with its opinion above quoted. The Court of Appeal did not, however, notice all of the contentions advanced by appellant, and some additional points made by him should, we think, be given attention.

[4] 1. It is earnestly contended that the court erred in compelling the plaintiff to produce his books of account, and in permitting the defendant to inquire into the various items of the account. It is, no doubt, the general rule that the correctness of the various items of an account stated cannot be attacked. *Hendy v. March*, 75 Cal. 566, 17 Pac. 702. "An action upon an account stated is not founded upon the original items, but upon the balance ascertained by the mutual consent of the parties." *Carey v. Petroleum Co.*, 33 Cal. 697. But this rule has no application where the defendant has raised an issue regarding his assent to the alleged account stated, and the items have a logical bearing on this issue. *Coffee v. Williams*, 103 Cal. 550, 37 Pac. 504. Nor does it apply where the account stated is, as it is here, attacked for fraud or mistake tainting the entire transaction. 1 Am. & Eng. Ency. L. (2d Ed.) p. 463. In such cases the real issue is whether the parties ever gave a binding assent to the account. Any competent evidence which is relevant to that issue may be introduced. See *Oil Co. v. Van Etten*, 107 U. S. 325, 1 Sup. Ct. 178, 27 L. Ed. 319. In *Coffee v. Williams*, supra, it was held that where the defendant's assent to the account had been denied it was proper to go into the various items, as the falsity of the items had a tendency to show that the defendant had never agreed to the alleged account. On similar reasoning, where it is averred that assent to the account has been obtained by fraud, proof of the falsity of the items, if such proof tends to support the charge of fraud, may be made. In the case at bar, the testimony offered by the defendant in contradiction of the items appearing on plaintiff's books, and the entries themselves, were relevant to the issue of fraud raised by the answer. There was therefore no error in the admission of this evidence.

[5] 2. The witness Manning was permitted to refresh his recollection from a memorandum made six or seven years after the event regarding which he testified. There was no showing sufficient, under Code Civ. Proc. § 2047, to authorize the use of the memoran-

dum for this purpose. But all that Manning testified to was that he had gone to the defendant's ranch on January 16, 1896 (one of the dates on which plaintiff claimed to have rendered services to the defendant at the ranch), and that he had not seen plaintiff there. The plaintiff and another witness testified that plaintiff had left the ranch on January 16th by the morning train, presumably before Manning's arrival. In view of these facts, the testimony of Manning had a very slight, if any, tendency to contradict the plaintiff, and its admission was not substantially prejudicial.

[6] 3. The appellant complains that two of the special issues submitted at the request of the defendant presented to the jury questions of law, rather than of fact. We are unable to see that the plaintiff was harmed by the course followed, if it was improper. Furthermore, no exception was taken, and the action of the court in directing a jury to answer special issues was not, at the time this action was tried, one of the matters deemed excepted to under the provisions of section 647 of the Code of Civil Procedure. For these reasons, in addition to those stated by the District Court of Appeal, we think the motion for new trial was properly denied.

The order is affirmed.

We concur: SHAW, J; ANGELLOTTI, J; LORIGAN, J; MELVIN, J; HENSHAW, J.

16 Cal. App. 743

MAZE v. LANGFORD, Sheriff, et al.
(Civ. 826.)

(District Court of Appeal, First District, California. Aug. 1, 1911.)

1. SHERIFFS AND CONSTABLES (§ 94*)—STAY OF EXECUTION—QUASHING STAY OF EXECUTION—EFFECT.

Where a sheriff, not knowing that the court had entered an order staying further proceedings on a judgment, threatened to levy upon the business of the judgment debtor, and the debtor paid to the sheriff the amount of the judgment, the sheriff was justified in paying this money to the judgment creditor, when the court recalled its order staying further proceedings, and the debtor failed to stay them by a proper bond on appeal.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 126, 222, 223; Dec. Dig. § 94.*]

2. APPEAL AND ERROR (§ 467*)—SUPERSEDEAS—STAY BOND.

Under Code Civ. Proc. § 1057, providing that where an undertaking is required by law the officer taking same must require the sureties to make an affidavit that they are each residents and householders or freeholders within the state, the allegation that the sureties are either householders or freeholders is a material part of the affidavit, and where an affidavit appended to an appeal bond failed to state those facts the bond was void, and did not stay execution.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 467.*]

Appeal from Superior Court, Santa Clara County; P. T. Gosbey, Judge.

Action by E. R. Maze against Arthur B. Langford, as Sheriff of Santa Clara County, and another. From a judgment for plaintiff, defendants appeal. Reversed.

See, also, 117 Pac. 930.

Will M. Beggs and R. C. McComish, for appellants. Wm. A. Coulter, for respondent.

KERRIGAN, J. This is an appeal from a judgment and from an order denying defendants' motion for a new trial, in an action for damages against the sheriff of Santa Clara county and his surety, for turning over to one E. V. Burke \$500 belonging to the plaintiff.

The salient facts of the case are as follows: E. V. Burke, on May 8, 1908, obtained a judgment against E. R. Maze, the plaintiff herein, for the sum of \$500 and costs. On the same day Burke procured to be issued thereon a writ of execution, directed to the defendant Langford as sheriff, commanding him to satisfy the said judgment out of the property of E. R. Maze, defendant in that case, the plaintiff here. The next day a deputy sheriff proceeded to Mountain View, where E. R. Maze with a partner was engaged in the hardware business, and demanded the amount of the judgment, threatening that if it was not at once paid he would levy on the stock of hardware in the store belonging to E. R. Maze and his partner, and put a receiver in charge. Before the deputy sheriff had taken any definite action in the matter, and later in the day, he was told by E. R. Maze that the court in which said action was pending had made an order staying the execution. Such was the fact, but the sheriff's office had not been notified of such order, and the deputy sheriff therefore insisted on proceeding with the execution, whereupon E. R. Maze, in order to prevent said hardware business from being placed in the hands of a receiver, turned over to the deputy sheriff on the execution the amount demanded, with the understanding and under such circumstances that it was not and cannot be regarded as a payment of or satisfaction of said judgment. On Monday, May 11th, E. R. Maze, by his attorney, delivered to Langford, the sheriff, a copy of the order staying execution. Thereafter, on the 14th day of May, E. R. Maze took an appeal from said judgment, and filed his undertaking on appeal and to stay execution; the affidavit to said undertaking containing no allegation that the sureties therein named were freeholders or householders. Thereafter both parties demanded of the sheriff, in writing, that he deliver to each of them the money in question, and E. R. Maze attached to his demand a copy of said undertaking. Subsequently, on May 15th, the court, having set aside its purported order suspending the execution of said judgment, the sheriff paid

over the \$500 to E. V. Burke. In March, 1909, this judgment was reversed, and the superior court, as directed by the appellate court, entered judgment on its findings in favor of E. R. Maze. Thereafter Maze brought the present suit to recover from the sheriff \$500, together with interest and costs and the 25 per cent. penalty provided for in section 4317 of the Political Code. The trial court found the facts substantially as related above, and rendered judgment in favor of Maze against Langford and his surety, the American Bonding Company, for the \$500 demanded, with interest and costs, but refused to allow the penalty claimed, upon the ground that the sheriff, not having acted personally in the matter, was not liable therefor. This appeal is prosecuted by both defendants.

[1] When the court recalled its order staying further proceedings under the judgment, the sheriff was then, if not before, at liberty to pay the money to the judgment creditor, if the stay bond on appeal was defective and void. We have no doubt that the affidavit to the stay bond, failing as it does to state that the sureties were freeholders or householders, as required by section 1057, Code of Civil Procedure, omits an element essential to the validity of the bond. *Tibbet v. Tom Sue*, 122 Cal. 208, 54 Pac. 741. Said section declares: "In any case where an undertaking or bond is authorized or required by any law of this state, the officer taking the same must * * * require the sureties to accompany it with an affidavit that they are each residents and householders or freeholders within the state, and are each worth the sum specified in the undertaking or bond over and above all their just debts and liabilities, exclusive of property exempt from execution. * * *"

[2] In the case of *Tibbet v. Tom Sue*, supra, after quoting the part of the section just referred to, the court, speaking of the circumstance that the sureties in an attachment proceeding were not shown to be either freeholders or householders, observed: "Such affidavit must accompany the undertaking, for the law demands it. That the sureties upon the undertaking are either householders or freeholders is a material part of the affidavit. It is probably the most material fact demanded by the affidavit. If the affidavit may omit this statement, then the entire affidavit goes for naught, and an undertaking without any affidavit of the sureties whatever would support the writ, even as against a motion by the defendant to discharge it."

The plaintiff in the present case, however, contends that the defendant sheriff had no right to question the validity of the undertaking; and he relies on the case of *Sam Yuen v. McMann*, 99 Cal. 497, 34 Pac. 80. That case is not in point. There the sheriff refused upon demand to release from levy personal property taken upon an execution, giving as his reason that the assignors of plaintiff were not entitled to such release un-

til the sureties upon the undertaking staying execution of the judgment had justified. But the court held that according to the explicit language of section 946, Code of Civil Procedure, the "effect of perfecting an appeal and giving an undertaking was * * * to release from levy property levied upon under execution issued upon such judgment," irrespective of any question as to the sufficiency or insufficiency of the sureties, and that therefore the sheriff's position could not be sustained. It was not held in that case that the sheriff would be warranted in retaining property held by him under execution on a judgment, where the stay bond on appeal was, as in the present case, absolutely void. The justification of the sureties on a bond is a thing apart from its validity; while, on the other hand, the qualification of the sureties is a material part of the bond.

The judgment and order are reversed.

We concur: LENNON, P. J.; HALL, J.

16 Cal. App. 747
MAZE v. LANGFORD, Sheriff et al.
(Civ. 817.)

(District Court of Appeal, First District, California. Aug. 1, 1911.)

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by E. R. Maze against Arthur B. Langford, as Sheriff of Santa Clara County, and another. From a judgment for plaintiff, plaintiff appeals. Reversed.

Wm. A. Coulter, for appellant. Will M. Beggs and R. C. McComish, for respondents.

KERRIGAN, J. This is an appeal by the plaintiff from a judgment in his favor, and is taken on the judgment roll alone.

The facts of the case are stated in an opinion this day filed in the case numbered 826, and entitled "E. R. Maze, Plaintiff and Respondent, v. Arthur B. Langford, as Sheriff of the County of Santa Clara, State of California, and the American Bonding Company, a Corporation, Defendants and Appellants," 117 Pac. 929, which is an appeal from the same judgment, but taken by the defendants.

As will be seen by reference to said opinion, the trial court found that the defendant Langford was not warranted in paying to E. V. Burke the sum of \$500—the subject-matter of the action—and accordingly gave judgment for that sum in favor of plaintiff and against defendants, but refused to give plaintiff judgment for the 25 per cent. damages and 10 per cent. per month interest provided for in section 4162 of the Political Code, to which he claimed to be also entitled. Both parties have appealed.

We have this day decided in said case numbered 826 that the stay bond on appeal was void, and that defendant Langford was justified in paying to Burke the said sum of

\$500, and have accordingly reversed said judgment.

It follows that the plaintiff, not being entitled to the principal, has no valid claim to the incident thereto, i. e., the penalty.

The judgment is reversed.

We concur: LENNON, P. J.; HALL, J.

16 Cal. App. 676

BAUHOFFER v. CRAWFORD. (Civ. 821.)

(District Court of Appeal, First District,
California. July 25, 1911.)

1. MUNICIPAL CORPORATIONS (§ 703*)—USE OF STREETS—USE BY VEHICLE.

The left side of a street may be used by a truck automobile, etc., to discharge passengers or goods, or a funeral may be formed on that side of the street as a matter of convenience.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1509-1513; Dec. Dig. § 703.*]

2. MUNICIPAL CORPORATIONS (§ 703*)—USE OF STREETS—DELIVERY WAGONS.

The driver of a delivery wagon may use any part of the street to stop in, etc., necessary in the performance of his work.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1509-1513; Dec. Dig. § 703.*]

3. MUNICIPAL CORPORATIONS (§ 702*)—USE OF STREETS—LAW OF THE ROAD.

Pol. Code, § 2931, providing that when vehicles meet each driver must turn to the right of the center of the road, only applies to vehicles in motion, and not to wagons stopping in the street on business.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 702.*]

4. MUNICIPAL CORPORATIONS (§ 706*)—RES IPSA LOQUITUR DOCTRINE—AUTOMOBILE COLLISION.

Where an automobile in defendant's exclusive control collided with plaintiff's milk wagon, which was standing in the street, which was clear, except as to the wagon and automobile, and was well lighted and in good condition, and the wagon also carried a reflecting light, and plaintiff was using due care and did not know of the automobile's approach until the collision, the res ipsa loquitur doctrine raises a presumption that the collision was caused by defendant's negligence in handling the automobile.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

5. MUNICIPAL CORPORATIONS (§ 706*)—DUTY TO PRODUCE—PARTY HAVING KNOWLEDGE.

Where an automobile, at night, in a well-lighted street 48 feet wide, ran into a delivery wagon standing at the curb, the circumstances required defendant to produce evidence showing his exercise of reasonable care, under the rule that a party peculiarly having within his power to produce evidence should be required to do so.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

6. MUNICIPAL CORPORATIONS (§ 706*)—STREETS—COLLISION WITH AUTOMOBILE.

Where a city ordinance prohibits a rate of speed on a street greater than 8 miles an hour, and the evidence showed that defendant was driving his automobile at the time of a collision at a speed of between 10 and 15 miles an hour, when 100 feet from the point of collision, the

jury could infer that he was exceeding the legal rate of speed, and hence was guilty of negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Joseph Bauhofer against Alexander K. Crawford. From an order granting a motion of nonsuit, plaintiff appeals. Reversed.

M. W. Simpson, for appellant. Reed, Black & Reed, for respondent.

KERRIGAN, J. This is an appeal by plaintiff from a judgment of nonsuit in an action for damages for personal injuries.

Briefly the facts disclosed by plaintiff's evidence are as follows: On February 13, 1909, the plaintiff was driving a horse and wagon, delivering milk to customers in the city of Alameda. He had come to a stop near the sidewalk, and was engaged in pouring milk from a large can on his wagon into another, when the defendant driving an automobile, collided with the wagon, and by so doing injured the plaintiff. The collision occurred on Park street, about midway between Eagle and Clement avenues, and defendant at the time was proceeding in a northerly direction toward the last-named avenue. Plaintiff's horse and wagon were standing on the left (east) side of the street and facing southerly. On the right side of the wagon, attached to the seat, was an ordinary "milk wagon lamp," in good order, with a reflector, and the lamp was burning. The roadway at this point from curb to curb is 48 feet wide, and was at the time of the collision in good condition. The accident occurred at 8 o'clock in the evening, and there was at the time a lighted, ordinary street arc light suspended about 25 or 30 feet above the middle of the crossing at the corner of Park street and Clement avenue. On this question one of the witnesses testified "there was light all around there," and that it was light enough at Eagle avenue and Park street for him to identify the defendant 50 feet away. Plaintiff testified in his own behalf that he drove along the right side of Park street, and did not cross over to the left side until in front of his customer's house, where the collision happened. The defendant, instead of going to the left, attempted to pass the wagon on the right-hand side, and as there was not room enough to do so the collision ensued. The street was clear at the time, there being no vehicles of any kind in the block, except the two involved, and the defendant was operating and in control of his automobile, which, just before the collision, was running between 10 and 15 miles per hour. At the close of plaintiff's

case, defendant moved for a nonsuit, upon the ground that plaintiff had failed to prove negligence on the part of the defendant. The motion was granted, and final judgment was entered, and to this order and ruling the plaintiff duly excepted.

[1-3] Preliminarily it may be well to state: (1) That the driver of a vehicle should proceed carefully and be on the alert, lest he collide with others. *Scott v. San Bernardino Valley, etc.*, 152 Cal. 610, 93 Pac. 677; *Wistrom v. Redlick Bros., Inc.*, 6 Cal. App. 671, 92 Pac. 1048. (2) That the left side of a street may be used by a truck to discharge its load, by a coach, buggy, or automobile to allow passengers to alight, or as a matter of convenience a funeral may be formed on that side of the street. So the driver of a delivery wagon may use any portion of the street necessary for him in the performance of his business or employment. The law of the state, as declared in section 2931 of the Political Code, applies to moving vehicles, and necessarily has no application to a case like the present, where the driver was delivering milk to a customer who resided on the left side of the street.

[4] Plaintiff contends that the accident was the direct result of defendant's negligence, and he relies chiefly upon the doctrine of *res ipsa loquitur* to make out his case. The rule thus invoked is laid down in the case of *Judson v. Giant Powder Co.*, 107 Cal. 549, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146, and a number of other California cases as follows: "When the thing which causes the accident is shown to be under the management and control of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have such management and control use proper care, it affords reasonable evidence, in absence of explanation by the defendant, that the accident arose from the want of ordinary care by the defendant." Under such circumstances, proof of the happening of the event raises a presumption of the defendant's negligence, and casts upon the defendant the burden of showing that ordinary care was exercised. We think the case at bar satisfies every element of this doctrine and comes within the rule. The automobile was in the exclusive control and under the management of the defendant; and automobiles when properly managed do not, in the ordinary course of things, collide with standing wagons. It is unlike the case of a runaway horse, in charge or not of his driver, causing injury, for in such a case it is as reasonable to infer that it was the negligence of a stranger as to assume it was that of the driver which caused the horse to run away. In cases of that kind, the rule fails, and the doctrine *res ipsa loquitur* cannot be invoked. *Rowe v. Such*, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760, and cases cited.

In *Rowe v. Such* the court held that no presumption of negligence arose from the mere fact that the horse ran away. There, when the driver was first seen, he was "in the air" and falling from his seat to the ground. The court said that whether he lost control of his horse through negligence was not shown, and that whatever caused the runaway was a matter of speculation, pure and simple, and it was as fair to presume that the cause was unavoidable as that it was fault of the driver. The court then quotes from the case of *Button v. Frink*, 51 Conn. 342, 50 Am. Rep. 24, as follows: "A man driving furiously along the street runs into my carriage and breaks it. Here the act indicates negligence on the part of the driver. Again, the defendant's horse is running furiously along the street, dragging the shafts of a carriage after him, and runs against and breaks my carriage. This indicates accident only, and not negligence."

[5] In the present case we cannot reasonably attribute the accident to the carelessness of a third person. The circumstances are more like the supposed case in *Button v. Frink*, supra, for the defendant was driving his motor car at from 10 to 15 miles an hour along the street, and he ran into the plaintiff's wagon, which was at a standstill. As in the supposed case, the act of the defendant, in itself unexplained, indicates negligence on his part. As already indicated, the record shows that the roadway was in good condition; there were no other vehicles in the block; the horse and wagon were standing where the plaintiff had a right to halt them. Moreover, the plaintiff was unaware of the approach of the automobile until the collision occurred. There was no want of care on the part of the plaintiff, and it would seem that the accident must have resulted from the negligence of the defendant, and not from that of some third party. We therefore think that this is a case for the application of the rule *res ipsa loquitur*, and also of the principal that he who has peculiarly within his power the means of producing evidence of reasonable care shall be required to do so.

In *Morris v. Strobel & Wilken Co.*, 81 Hun, 1, 30 N. Y. Supp. 571, the court's ruling is thus stated: "The mere falling of a sign-board from defendant's building into the street is evidence of negligence; the maxim *res ipsa loquitur* being applicable in such case." The court referred to several English cases, and, among others, to the case of *Byrne v. Boadle*, 2 Hurl. & C. 722, where the facts disclosed an injury caused by the falling of a barrel into a highway from the window of a shop; and in discussing the question of the proprietor's liability *Pollock, C. B.*, said: "There are many accidents from which no presumption of negligence can arise, but this is not true in all cases. It is the duty of persons who keep barrels in a

warehouse to take care that they do not roll out; and I think that such a case would beyond all doubt afford prima facie evidence of negligence. A barrel could not roll out of a warehouse without some negligence. So, in building or repairing a house, if a person passing along the road is injured by something falling upon him, I think the accident would be prima facie evidence of negligence."

In *Howser v. Cumberland & P. R. Co.*, 80 Md. 146, 30 Atl. 906, 27 L. R. A. 154, 45 Am. St. Rep. 332, the plaintiff was walking along a pathway outside the defendant's right of way, and was struck by cross-ties that fell from a moving train. In *Houston v. Brush*, 66 Vt. 346, 29 Atl. 380, the plaintiff, while driving along under defendant's elevated railway, was struck and injured by an iron plate, which fell from the structure. In *Dixon v. Pluns*, 98 Cal. 388, 33 Pac. 268, 20 L. R. A. 698, 35 Am. St. Rep. 180, and in *Knott v. McGilvray*, 124 Cal. 129, 56 Pac. 789, the plaintiffs, while proceeding along public sidewalks, were hurt by falling missiles. In each of these cases the doctrine under discussion was successfully invoked.

In the case of *Chicago Union Traction Co. v. Giese*, 229 Ill. 260, 82 N. E. 232, it was held (as correctly stated in the syllabus) as follows: "An injury caused by a street car leaving the track and striking a wagon in which plaintiff was riding is within the maxim *res ipsa loquitur*, and proof of the injury will justify a recovery, unless the defendant shows that it was not at fault." Commenting on the facts, and after quoting the maxim, the court in its opinion said: "All of the elements of the accident were within the complete control of appellant, and the result is so far out of the usual course of things that there is no fair inference that it could have been produced by any other cause than negligence." See, also, *Chico Bridge Co. v. Sacramento*, 123 Cal. 183, 55 Pac. 780.

[6] Passing to another point, it is tacitly conceded, and indeed it must be, that ordinance No. 405 of the city of Alameda prohibits a rate of speed on Park street greater than 8 miles an hour. The evidence shows that at a point 100 or 150 feet from the place of the collision the defendant was driving his automobile at a speed of between 10 and 15 miles an hour—not an excessive speed, but greater than that allowed by the local ordinance—and we think this circumstance is one from which the jury might reasonably have inferred that at or immediately prior to the collision the defendant was exceeding the legal rate of speed (*Olsen v. Levy*, 8 Cal. App. 487, 97 Pac. 76), and hence must be presumed to be guilty of negligence.

The judgment is reversed.

We concur: LENNON, P. J.; HALL, J.

16 Cal. App. 737

PEOPLE v. RAMERIZ. (Cr. 146.)

(District Court of Appeal, Third District, California. Aug. 1, 1911.)

CRIMINAL LAW (§ 1182*)—APPEAL—APPEARANCE FOR ACCUSED—EFFECT OF NONAPPEARANCE.

The appellate court is not bound to search the transcript for errors in the court's rulings, where accused does not appear by counsel.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3204, 3205; Dec. Dig. § 1182.*]

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Frank Rameriz was convicted of statutory rape, and from an order denying a new trial, he appeals. Affirmed.

Charles Light, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

CHIPMAN, P. J. Defendant was accused by information of the crime of rape upon a female under the age of 16 years, was found guilty and sentenced to imprisonment for the term of 25 years. Defendant moved for a new trial, which being denied, he appealed from the order. There is no appearance here on behalf of defendant, and the case is probably before us by operation of the statute then in force, which automatically brought the record up.

We do not understand that any duty is placed upon the court to search the transcript for possible errors, where the defendant fails to make an appearance by counsel. On the contrary, we feel at liberty to affirm the judgment and order without an examination of the testimony or rulings of the court. In the present case, however, we have read the testimony and noted the rulings of the court during the progress of the trial, and have also examined the instructions given to the jury. The defendant appears to have had a fair trial, the jury were fully and correctly instructed as to the law, and the evidence was sufficient to justify the verdict.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

16 Cal. App. 716

PEOPLE v. O'DONNELL (Cr. 151.)

(District Court of Appeal, Third District, California. July 31, 1911.)

1. BURGLARY (§ 41*)—EVIDENCE.

Evidence held to warrant a conviction of burglary in the second degree.

[Ed. Note.—For other cases, see Burglary, Dec. Dig. § 41.*]

2. BURGLARY (§ 46*)—INSTRUCTIONS—EVIDENCE.

Evidence that on the same afternoon that a burglary was committed defendant left with the proprietor of a saloon certain articles, including a door key and a gold dollar, the key and dollar being part of the property taken from the resi-

dence burglarized, was a sufficient predicate for an instruction on recent possession of stolen property.

[Ed. Note.—For other cases, see Burglary, Dec. Dig. § 46.*]

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Thomas O'Donnell was convicted of burglary in the second degree, and he appeals. Affirmed.

A. H. Hewitt, for appellant. Attorney General Webb and J. Charles Jones, for the People.

BURNETT, J. [1] This case may be disposed of with scant comment. The appellant was convicted of burglary in the second degree, and in the recital of the evidence we may follow substantially the opening statement to the jury, made by Mr. Schillig, the district attorney of Sutter county: On the 19th day of September, 1910, the residence of one Henry Van Tiger, of Yuba City, was entered and burglarized. The defendant had been employed on the premises in an almond orchard for ten days or two weeks, and he was familiar with the surroundings and knew that the members of the Van Tiger family were engaged in hulling almonds in the orchard and back of the barn. He quit his employment and was paid off on Saturday evening, the 17th of September, and on the afternoon of the 19th he was seen going towards the Van Tiger residence only a short distance away; about a half hour later he was seen returning. The same afternoon he went into a saloon in Marysville and left with the proprietor some articles, including an ordinary door key, and also exhibited to the latter a gold dollar. Such key and a gold dollar were a part of the property taken from said residence. After his arrest the appellant declared that he had no gold dollar in his possession while he was in that part of the country, or at any other time. He also denied that he was in the neighborhood on the 18th or 19th of September, stating that he left Marysville and went to Sacramento on the 17th, and remained there until the next Saturday, the 24th. The foregoing circumstances justify, we think, a rational inference that appellant committed the crime charged. *People v. Smith*, 79 Cal. 554, 21 Pac. 952; *People v. Cole*, 141 Cal. 88, 74 Pac. 547. We can see no merit in the contention that the court should have sustained the objection made to the evidence of appellant's statement to the district attorney. In the first place, it was not a confession, and besides it was clearly shown to have been made freely and voluntarily.

[2] The only other point suggested by appellant is that, by reason of the entire want of evidence as to the possession on his part of any of the stolen property, the court erred in giving the instruction upon that subject.

It is to be observed that the court guardedly refrained from invading the province of the jury, advising them that they might consider as a circumstance, if unexplained, tending to prove guilt, the possession of the stolen property by the defendant recently after the alleged commission of the offense, "if you find any such property to have been in his possession." The possession of the gold dollar, under the circumstances narrated by the witnesses, was a sufficient predicate for this instruction. The scarcity of the coin and the denial of its possession by defendant authorized the inference that it was a part of the stolen property.

We find no error in the record, and the judgment and order denying the motion for a new trial are affirmed.

We concur: **CHIPMAN, P. J.; HART, J.**

16 Cal. App. 671

BARTLETT SPRINGS CO. v. STANDARD BOX CO. (Civ. 816.)

(District Court of Appeal, First District, California. July 25, 1911.)

CONTRACTS (§ 10*)—CONSTRUCTION—MUTUALITY.

A contract, by which defendant agreed to sell and plaintiff agreed to purchase certain kinds of wooden boxes to the extent of plaintiff's demand therefor during the succeeding year, was not lacking in mutuality; plaintiff being bound thereby to purchase his requirements for the year from defendant, and defendant being bound to sell upon plaintiff's demand.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21-40; Dec. Dig. § 10.*]

Appeal from Superior Court, City and County of San Francisco; Thos. H. Graham, Judge.

Action by the Bartlett Springs Company against the Standard Box Company. From an order denying a motion for a new trial upon judgment for plaintiff, defendant appeals. Affirmed.

P. L. Benjamin, for appellant. Frank V. Bell, for respondent.

KERRIGAN, J. This is an action for damages for breach of contract. Plaintiff recovered judgment in the amount demanded. A motion for a new trial was made by the defendant, which was denied, and it is from the order denying such motion that this appeal is taken.

On March 5, 1906, the parties to this action entered into an agreement, by the terms of which the defendant was to sell and the plaintiff was to purchase certain kinds of wooden boxes to the entire extent of plaintiff's demand for the period of one year from the date of the contract. The market price of boxes increased, and the defendant only partially performed its part of the contract, filling but one comparatively small order, to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

wit, an order for 1,000 boxes. The plaintiff purchased elsewhere boxes as it needed them during the period covered by the contract, and in due time brought this action to recover from the defendant the difference between the contract price and the increased price which it was compelled to pay for such boxes. Defendant contends that the plaintiff under the contract was not bound in any way to take boxes from the defendant during the year mentioned in the contract, and that the latter could not have required the plaintiff to do so, and that therefore the agreement was lacking in mutuality, and was void.

We cannot agree with this view. By the agreement the defendant was to furnish and the plaintiff was to take all the boxes that it would need in its business during the time stated. Both parties were bound by the contract, and if the plaintiff had failed to carry out its obligations thereunder and had purchased elsewhere the boxes needed by it in its business for the year designated, it would have been liable to the defendant for any damages sustained by the latter. The authorities amply sustain this position. In *Nat. Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427, the court held that a contract, whereby a manufacturer of pig iron was to sell, and a user of that article was to purchase, all of certain iron that it might need in its business during a specified season, was a valid contract, observing: "It cannot be said that appellee was not bound by the contract. It had no right to purchase iron elsewhere for use in its business. If it had done so, appellant might have maintained an action for a breach of the contract. It was bound by the contract to take of appellant, at the prices named, its entire supply of iron for the year; that is, such quantity of iron, in view of the situation and business of appellee, as was reasonably required and necessary in its manufacturing business. A foundry may purchase its supply of coal for the season of the coal dealer. A hotel may do the same. * * * Such contracts are not uncommon, and we have never understood that they were void." See *Hercules Coal & M. Co. v. Central Investment Co.*, 98 Ill. App. 427. In the case of *Dailey Co. v. Clark Can Co.*, 128 Mich. 591, 87 N. W. 761, there were an offer and acceptance in writing, by the terms of which the plaintiff, who was in the canning business, was to purchase from defendant the tin cases which it might need in its business for a specified period. This was held not to be a mere option, but a valid contract binding both parties. There, as here, the plaintiff could not go outside to buy without violating the contract, and the defendant could not, without doing likewise, refuse plaintiff's demands. In the cases relied on by the defendant, the promisees were not obligated to purchase, nor bound in any way by the terms of the contracts. In *Hoffman v. Maffioli*, 104 Wis. 630, 80 N. W. 1032, 47

L. R. A. 427, it was held by a divided court that an accepted offer to furnish crushed rock and curbing at certain prices in such quantities as the defendant might *desire* did not constitute an enforceable contract. There the promisee "confessedly was not obligated," so the court said, "to take * * * under the contract all the stone to complete his contract, but only such quantities as he might desire." The reasoning in that case supports the case at bar. In *McCaw Mfg. Co. v. Felder*, 115 Ga. 408, 41 S. E. 664, the defendant accepted an offer by the plaintiff to furnish the defendant, at specified prices, all the boxes of a certain character the defendant might *want* for the period of one year. The court, making its decision turn on the word "want," said that the defendant had not agreed to purchase a single box; that it had not agreed "to *want* any boxes." Accordingly the agreement was held inoperative as a valid and binding contract. This case, we think, is authority against the defendant, for later on in the opinion the court, in discussing the refusal of the trial court to allow the defendant to amend its plea, by setting up an oral contemporaneous agreement whereby the plaintiff agreed to furnish the defendant and the defendant agreed to buy all the boxes necessary to pack the output of the factory of the defendant for the time specified, held (citing cases) that this agreement constituted a valid contract, which could be enforced by either party, and that the proposed amendment should have been allowed. So in *Bailey et al. v. Austrian*, 19 Minn. 535 (Gil. 465), the plaintiffs were to purchase and the defendant was to sell all the pig iron which the plaintiffs might want in their business at given prices for the time specified; but, says the court, in holding the contract nudum pactum, "they (the plaintiffs) did not engage to *want* any quantity whatever," or "of course to purchase any iron of defendant." This case is not only different from the case at bar in its facts, but it is practically overruled by *Ames-Brooks Co. v. Aetna Ins. Co.*, 83 Minn. 346, 350, 86 N. W. 344. See note, 9 Cyc. 330.

The effect of the cases on the point being discussed is correctly and well stated in 9 Cyc. 327, as follows: "There are many cases in which, although the offer is definite enough, yet the acceptor, by merely accepting, has really himself promised nothing in return, has not made himself liable for anything, so that, although one is bound, the other is not, and the engagement lacks what is called mutuality. In such a case there is not an enforceable agreement. The most frequent example of this is when one offers to supply another with such goods of a certain kind as he may choose to order or may 'wish' during a certain time, and the other accepts the offer. Here there is no consideration for the promise or offer, for the promisee has not bound himself to anything, and has incurred no legal liability at all. The correct view of

the case is that there is no agreement binding on the promisor, but simply an offer on his part, which may be accepted by giving an order until such time as it is actually withdrawn or expires by limitation of time. Where, however, the acceptance does really impose any obligation on the acceptor, then a consideration is present and a binding contract results; and this is so wherever the acceptor's freedom of action is in any way limited. It is not limited at all where he simply assents to the seller's offer to sell all the goods he may order or 'desire' during a certain time, for he has not promised to order, nor is he bound to do so; but it is limited where the offer is to supply him with all the goods of a particular kind which he may 'require' or which he may need during a certain time, for here, although it may be that he will neither need nor require any, yet if he does he has bound himself to buy them from the proposer, and has hence parted with his right to buy them from whom he pleases."

The defendant also contends that the contract was void because too indefinite; that the plaintiff was not ready, able, and willing to perform its part of the contract; that the plaintiff failed to prove any damages. We have examined each of these points, together with the one that the defendant was released from liability because it was impossible to perform the contract, and conclude that neither of them has any merit. Considering briefly the last-mentioned point (which is as meritorious as the others), it is sufficient to say that the defendant did not set up in his answer that the contract was impossible of performance. This was not an issue in the case, either according to the pleadings or the theory on which it was tried. There was no finding on this subject, nor does the defendant enumerate this as one of the particulars wherein the evidence is insufficient to justify the decision. It is also apparent from the record that this contention of the defendant is groundless, inasmuch as plaintiff was able to and did get the boxes as it needed them.

The order appealed from is affirmed.

We concur: LENNON, P. J.; HALL, J.

16 Cal. App. 666

JULES LEVY & BRO. v. A. MAUTZ & CO.
(Civ. 812.)

(District Court of Appeal, First District, California. July 25, 1911.)

1. APPEAL AND ERROR (§ 931*)—STATEMENT OF FACTS—FINDINGS—REVIEW.

In the absence of a statement of the case, the findings of the trial court are conclusive as to the facts found, and, if the conclusions deduced therefrom necessarily follow as a matter of law, the judgment must be upheld.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3762-3771; Dec. Dig. § 931.*]

2. SALES (§ 1*)—CONTRACT—CERTAINTY—DESIGNATION OF PRICE.

Under Civ. Code, § 1727, providing that a contract of sale must be certain as to the thing sold and designate the price to be paid therefor, an executory contract of sale, if uncertain and incapable of being made certain as to the price, is insufficient to sustain an action for damages by either party.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1, 3-5; Dec. Dig. § 1.*]

3. SALES (§ 78*)—CONTRACT—TERMS—PRICE—FAILURE TO FIX.

In general, where no price is fixed in a contract for the sale of a commodity, the law on delivery and acceptance of the thing sold implies an agreement to pay the reasonable value of the goods.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 206; Dec. Dig. § 78.*]

4. SALES (§ 1*)—CONTRACT—TERMS—PRICE.

Where the price of a commodity called for by a contract of sale, but not delivered, is to be subsequently ascertained by the valuation of others, or by agreement of the parties, the contract is incomplete and unenforceable until the price is so fixed and agreed on.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1, 3-5; Dec. Dig. § 1.*]

5. CONTRACTS (§ 15*)—ASSENT—MEETING OF MINDS.

The due execution of a contract requires the assent of at least two minds to each and all of the essentials of the agreement.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 61-66; Dec. Dig. § 15.*]

6. SALES (§ 1*)—CONTRACT—MEETING OF MINDS—TERMS.

Defendant agreed to purchase from a firm, to the business of which plaintiff succeeded, merchandise to the minimum amount of \$4,000 a year for five years, beginning August 1, 1911, and on failure so to do to pay the firm, at the end of each yearly period, 25 per cent. of the difference between the value of the goods actually purchased in any one year and \$4,000. The prices to be paid for the goods to be purchased and the terms and conditions on which the sales were to be made were not specified, but were to be ascertained and fixed from time to time by future agreement of the parties. *Held*, that there was no sufficient meeting of minds as to the price of the goods to be purchased, or the terms on which they were to be sold, so as to entitle plaintiff to recover damages for defendant's failure to purchase the required amount.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1, 3-5; Dec. Dig. § 1.*]

Appeal from Superior Court, City and County of San Francisco: John Hunt, Judge.

Action by Jules Levy & Bro. against A. Mautz & Co. Judgment for defendant, and plaintiff appeals. Affirmed.

Lloyd S. Ackerman, for appellant. Dinkel-spiel & Schlesinger and Bert Schlesinger, for respondent.

LENNON, P. J. This action was brought by the corporation plaintiff to recover the sum of \$329.93 as damages against the corporation defendant, for the breach of a contract, wherein the defendant agreed to purchase from Jules Levy and Max Levy, copartners, doing business under the firm name of Jules Levy & Bro., and their successors or assigns,

goods and merchandise such as Jules Levy & Bro. dealt in to the minimum amount of \$4,000 a year, yearly, for a period of five years beginning August 1, 1905. It was further stipulated in the contract sued on that if the defendant failed in any of the yearly periods specified therein, beginning with August 1st of any one year and ending July 31st of the next year, to purchase from Jules Levy & Bro. merchandise to the full amount of \$4,000 the defendant was to pay to them, at the end of such yearly periods, 25 per cent. of the difference between the value of the goods actually purchased in any one year and the sum of \$4,000.

The copartnership of Jules Levy & Bro., its successors and assigns, by the further terms of the contract, were obligated to sell to the defendant, for cash or such terms as might be from time to time agreed to by the parties to the contract, merchandise such as the defendant was then dealing in to the amount of \$4,000 a year, beginning August 1, 1905, for so long a time as Jules Levy & Bro. might remain in the lace goods business.

Prior to the execution of this contract, the defendant had made and delivered its promissory note to the firm of Jules Levy & Bro., apparently in payment of a pre-existing indebtedness, and one of the considerations for the contract sued on was, as appears from the recitals of the contract and the allegations of the plaintiff's complaint, the promise and agreement of Jules Levy & Bro. to forbear bringing suit against the defendant upon said promissory note until after the 1st day of January, 1906. On February 12, 1907, the copartnership of Jules Levy & Bro. was merged into the corporation plaintiff, and thereupon the said copartnership transferred and assigned all of its property, contracts, etc., including the contract or agreement herein sued on, to the plaintiff.

The due execution of the contract was not denied, and all the material allegations of plaintiff's complaint are specifically found in the language of the complaint to be true; but in addition the trial court found "that during the period of time the defendant is charged with having failed to purchase goods from the plaintiff that no goods of any kind or character were ever selected by the defendant from any merchandise belonging to the plaintiff or otherwise identified; that during said time the plaintiff and defendant never agreed upon any fixed terms of credit or other terms for the sale or purchase of goods, and no terms of credit were agreed upon between said parties, nor were prices agreed upon, and that the defendant had not ordered from the plaintiff, nor had the plaintiff delivered to the defendant, any articles except such as had been paid for and not the subject of the suit."

As conclusions of law from the findings of fact, the trial court found, among other things, and in effect that the contract sued on was void for uncertainty and incapable of

enforcement in this: That the prices to be paid for the goods, or the terms upon which the sales were to be made, were not specified in the contract, but were to be fixed by a subsequent agreement of the parties, and that no such agreement was ever made. Judgment was rendered and entered for the defendant, and the case comes here upon an appeal from the judgment and upon the judgment roll.

[1] The only point presented for consideration upon this appeal is that the findings do not justify the conclusions of law nor the judgment rendered thereon. In the absence of a statement of the case, the findings of the trial court are conclusive as to the facts found (*Woodmen of the World v. Rutledge*, 133 Cal. 644, 65 Pac. 1105), and if the conclusions deduced therefrom necessarily follow as a matter of law the judgment must be upheld. *Alhambra Water Co. v. Richardson*, 72 Cal. 598, 14 Pac. 379; *Bull v. Bray*, 89 Cal. 286, 26 Pac. 873, 13 L. R. A. 576; *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740; *Gill v. Driver*, 90 Cal. 72, 27 Pac. 64.

[2] It is elementary in law that a contract of sale must be certain as to the thing sold, and designate the price to be paid for it (*Civ. Code*, § 1727); and it is well settled that if an executory contract of sale is uncertain and incapable of being made certain in the essential particular of the price to be paid for the thing sold, neither of the parties can be held to its terms, nor recover damages for its breach, *Breckenridge v. Crocker*, 78 Cal. 533, 21 Pac. 179; *Association v. Phillips*, 56 Cal. 539; *Talmadge v. Arrowhead*, 101 Cal. 367, 35 Pac. 1000; *Nat. Bank v. Hall*, 101 U. S. 50, 25 L. Ed. 822; *Schenectady Stove Co. v. Holbrook*, 101 N. Y. 48, 4 N. E. 4; *Grafton v. Cummings*, 99 U. S. 106, 25 L. Ed. 366.

[3] It is true generally that where no price is fixed in a contract for the sale of a commodity the law, upon a delivery and acceptance of the thing sold, implies an understanding between the parties that a reasonable price is to be paid, and in such a case the contract will be deemed to be executed. In other words, in the absence of a fixed price, or an agreement as to the mode of ascertaining the value of the goods sold and delivered pursuant to the contract of sale, the purchaser will be held liable for the reasonable value of the goods. 1 *Mechem on Contracts*, § 206; *Benjamin on Sales* (7th Ed.) p. 91, § 85; *Taft v. Travis*, 136 Mass. 95; *Prenatt v. Runyon*, 12 Ind. 174.

[4] Where, however, the price of the commodity called for, but not delivered, is to be subsequently ascertained and fixed by the valuation of others, or by the agreement of the parties, the contract of sale is incomplete and nonenforceable until the price is so fixed or agreed upon. *Wittkowsky v. Wasson*, 71 N. C. 451; *Bigley v. Risher*, 63 Pa. 152; *Foster v. Lumberman's Mining Co.*, 68 Mich. 188. 36 N. W. 171; *Williamson v. Berry*, 8 How.

544, 12 L. Ed. 1170; Devane v. Fennell, 24 N. C. 36; Albemarle Lumber Co. v. Wilcox, 105 N. C. 34, 10 S. E. 871; 1 Mechem on Contracts, § 209; Wilken Mfg. Co. v. Lumber Co., 94 Mich. 158, 53 N. W. 1045; Bales v. Gilbert, 84 Mo. App. 675; Hutton v. Moore, 26 Ark. 382. In the case at bar the prices to be paid for the goods which were to be purchased yearly by the defendant, for a period of five years, as well as the terms and conditions upon which the sales of said goods and merchandise were to be made, were not specified in the contract, but were, as indicated by the contract and the findings of the court below, to be ascertained and fixed from time to time by the future agreement of the parties.

[5, 6] The due execution of a contract requires the assent of at least two minds to each and all of the essentials of the agreement; and it is only upon evidence of such assent that the law enforces the terms of a contract or gives a remedy for a breach of it. It is apparent from the findings that the minds of the parties in this instance never met upon the essentials of price and terms of payment; and therefore the trial court's conclusion of law that the contract in controversy was void and incapable of enforcement because of its uncertainty in the particulars stated was the only conclusion that could logically or legally be drawn from the findings of fact. This conclusion is decisive of the case, and makes it unnecessary for us to discuss or decide the questions as to whether or not the contract is lacking in mutuality, or was assignable.

The judgment is affirmed.

We concur: KERRIGAN, J.; HALL, J.

16 Cal. App. 718

PEOPLE v. KAFOURY. (Cr. 325.)

(District Court of Appeal, First District, California. July 31, 1911.)

1. HOMICIDE (§ 161*)—ASSAULT WITH DEADLY WEAPON—INTENT TO KILL—LOCATION, NATURE, AND EFFECT OF WOUND.

In a prosecution for assault with a deadly weapon, with intent to kill, complainant may testify as to the location, nature, and effect of a wound inflicted by one of the shots fired at her.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 202; Dec. Dig. § 161.*]

2. HOMICIDE (§ 86, 269*)—ASSAULT WITH INTENT TO KILL—ELEMENTS—INTENT—QUESTION OF FACT.

A specific intent to kill is an essential element of assault with a deadly weapon, with intent to commit murder, the existence of which intent is a question of fact to be determined from all the circumstances of the case.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 112, 563; Dec. Dig. §§ 86, 269.*]

3. HOMICIDE (§ 161*)—ASSAULT WITH INTENT TO KILL—EVIDENCE.

In a prosecution for assault with intent to kill, the nature of the assault and the location and character of the wound inflicted is relevant

and competent evidence of the existence of the intent necessary to support a charge of assault with a deadly weapon, with intent to murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 302; Dec. Dig. § 161.*]

4. CRIMINAL LAW (§ 365*)—EVIDENCE—RES GESTÆ.

Where, after accused had shot complainant and shattered her hip bone, he dragged her into an adjoining room, threw her on the floor, and with his knees on her chest choked her until she lost consciousness, a physician who attended her immediately after the assault was properly permitted to testify that she suffered a miscarriage as the result of both assaults, in a prosecution for assault with intent to murder; the second assault and its attending circumstances being essentially a part of the res gestæ of the first.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 807; Dec. Dig. § 365.*]

Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Abraham Kafoury was convicted of assault with a deadly weapon with intent to murder, and he appeals. Affirmed.

Burton J. Wyman, for appellant. Attorney General Webb, for the People.

LENNON, P. J. The defendant was convicted of the crime of assault with a deadly weapon, with intent to commit murder, and takes this appeal from the judgment and the order of the court denying his motion for a new trial.

The defendant did not offer himself as a witness, and the case was submitted to the jury upon the evidence produced by the people in support of the charge contained in the information. That evidence conclusively established a brutal, unprovoked, and murderous assault with a deadly weapon by the defendant upon the person of his sister-in-law, Mrs. Hadley Kafoury. Not a single circumstance tending to excuse or mitigate the crime is revealed in the record before us. The record shows that the defendant, who, for several months prior to the commission of the crime had resided in the home of his brother, in the city of Oakland, fired three shots from a pistol at the complaining witness. The first shot struck her in the hip, a little below the waist line, and shattered the bone. It was not due to any fault or lack of effort on the part of the defendant that he failed in his purpose to kill, but rather to the courage of the woman, who, upon the first shot being fired, grappled with the defendant in an endeavor to disarm him. During the struggle for the weapon, the defendant fired two more shots without effect. At this juncture, the complaining witness secured partial control of the weapon, and thereupon the defendant dragged her into an adjoining room, where he threw her to the floor, and then with his knees upon her chest, choked her until she lost consciousness. The defendant was prevented from executing his announced intention of killing the wo-

man by the interposition or neighbors, who were attracted to the premises by the screams of her children.

[1-3] The complaining witness, over the objection of the defendant, was permitted to testify as to the location, nature, and effect of the wound inflicted upon her by one of the shots fired at her. There was no error in this. A specific intent to kill is an essential element of the crime of assault with a deadly weapon, with intent to commit murder. The intent in such a case, as in all criminal cases where intent is an ingredient of the crime charged, is a question of fact to be determined from all the circumstances of the case. The nature of the assault, and the location and character of the wound inflicted, are relevant and competent evidence of the existence of the intent necessary to support a charge of assault with a deadly weapon, with intent to commit murder. *Jowell v. State*, 44 Tex. Cr. R. 328, 71 S. W. 286; *State v. Woodward*, 84 Iowa, 172, 50 N. W. 885; *King v. State*, 21 Ga. 220; *State v. Grant*, 144 Mo. 56, 45 S. W. 1102; *Williams v. Commonwealth*, 19 Ky. Law Rep. 1427, 43 S. W. 455.

[4] Dr. E. A. Majors, the physician who attended the complaining witness immediately after the assault, was permitted, against the objection of the defendant, to testify that at the time of the assault upon the woman she was three months with child, and as the result of the assault suffered a miscarriage. The defendant's motion to strike out this testimony was denied. We think, under the peculiar circumstances of this case, that the rulings of the trial court admitting this evidence may be sustained upon the theory that the nature of the assault, the circumstances under which it was perpetrated, and the consequences resulting therefrom, were relevant and competent evidence. The assault in this case was composed of a variety of incidents and results so intimately connected and blended with the use of a deadly weapon in the first instance as to make all, or any one of them, a part of the *res gestæ*, and all or any one of those incidents and results were relevant and competent, if they tended to elucidate, even in the slightest degree, the principal fact in issue, namely, the intent of the defendant to kill. The atrocity of the assault is some evidence of a malicious intent to kill. The words "malice" and "maliciously" import a wish to injure another, or an intent to do a wrongful act, established either by proof or presumption of law (Pen. Code, § 7, subd. 4); and the law presumes malice, where the circumstances of the crime indicate that it proceeded from the promptings of an abandoned and malignant heart. In the case at bar, the effect and consequences of the double assault committed upon the complaining witness indicate the force and violence of the assault, which in turn

manifests in some degree the intent with which the crime was committed. No question was raised, and none could have been successfully raised, at the trial as to the right of the people to show, as they did in this case, that, as the result of the shooting, the thigh bone of the complaining witness was shattered, and that she was and would be permanently lame in her walk. This was an incident arising immediately out of the commission of the crime, which tended to show the deadly force and violence of the shot fired at the complaining witness. The second assault and all of its attendant circumstances were essentially a part of the *res gestæ* of the first assault, and therefore we take it that the result and consequences of the second assault were equally as admissible as a part of the *res gestæ* as the result and consequences of the first assault. It was doubtless upon this theory that the Supreme Court of Texas affirmed the case of *Jowell v. State*, supra. That was a case where the charge was an assault with the intent to commit murder; and during the trial the physician who attended the assaulted person testified in effect that said person was in a very serious condition, and might never recover, and that his right arm was paralyzed. The objection was made there that the evidence of the subsequent paralysis of the prosecuting witness was immaterial and irrelevant, and shed no light upon the issues of the case; but the Supreme Court, in disposing of the point said: "The description of the wound, the location of the ball, and the production of paralysis were undoubtedly admissible."

The judgment and order appealed from are affirmed.

We concur: HALL, J.; KERRIGAN, J.

16 Cal. App. 738
PEOPLE v. SCHWEICHLER. (Cr. 155.)

(District Court of Appeal, Third District,
California. Aug. 1, 1911.)

1. PERJURY (§ 25*)—INDICTMENT—MATERIALITY OF EVIDENCE.

Under Pen. Code, § 118, providing that every person who, having taken oath to testify truly before a competent tribunal, states as true and material matter which he knows to be false is guilty of perjury, an indictment for perjury must show the alleged false statement to be material to the issue, either by showing an action at issue in a court of competent jurisdiction, and alleging that the testimony was willfully and feloniously false, and was material to the issue, or by setting forth the nature of the issue and the evidence given thereon, so that it may be seen that the testimony on which the perjury is assigned was material as a matter of law.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 82-89; Dec. Dig. § 25.*

For other definitions, see Words and Phrases, vol. 6, pp. 5305-5310; vol. 8, p. 7751.]

2. PERJURY (§ 11*)—"MATERIAL."

False testimony is "material," so as to be the subject of an assignment for perjury, when it is such as to be substantially important and to have influence on the issues, especially as distinguished from a mere formal requirement, and capable of properly influencing the result of the trial.

[Ed. Note.—For other cases, see *Perjury*, Cent. Dig. §§ 38-54; Dec. Dig. § 11.*

For other definitions, see *Words and Phrases*, vol. 5, p. 4404.]

3. PERJURY (§ 11*)—NATURE OF EVIDENCE—MATERIALITY.

That defendant testified falsely before an election board, on an examination of his qualifications as a voter, that he had worked for C. for 20 days last past, when in fact he had not worked for C. at all, was not material to the issue of his residence in the precinct, and was therefore insufficient to sustain an assignment of perjury.

[Ed. Note.—For other cases, see *Perjury*, Cent. Dig. §§ 38-54; Dec. Dig. § 11.*]

Appeal from Superior Court, Colusa County; H. M. Albury, Judge.

Theodore Henry Schweichler was convicted of perjury and appeals. Reversed, with directions to dismiss.

W. T. Belieu, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

BURNETT, J. Appellant was convicted of perjury and sentenced to the penitentiary for the term of two years. The accusation was that, in an investigation before the election board of Princeton precinct, in the county of Colusa, at the general election on November 8, 1910, he testified falsely concerning his qualifications as a voter in said precinct. The portion of the information deemed sufficient for the purpose of discussion is as follows: "That thereupon, at the time and place last aforesaid, the right of the defendant to vote at said election was duly challenged upon the ground that he, the said defendant, had not resided within the said precinct of Princeton the length of time prescribed by law in order that he might be entitled to vote at said election in said precinct. That the board of election of said Princeton precinct then and there having and had competent jurisdiction to hear, decide, and determine said challenge and proceeding, and was then and there fully empowered to administer the law in said challenge and proceeding. That it then and there became and was material to know, in the determination of said challenge, whether or not the said defendant had been a resident of said precinct of Princeton for and during the time required by law to constitute him a qualified elector of said precinct. And said defendant was then and there duly called as a witness in his own behalf upon the trial of said challenge. That thereupon one Vern D. Shaver, a duly appointed, qualified, and acting member of the board of election of said precinct

at said election, to wit, an inspector, and an officer authorized by law and competent to administer an oath to the said defendant in said proceeding, did then and there, to wit, on the said 8th day of November, 1910, at and in Princeton precinct, in Colusa county, state of California, administer an oath in due form of law to said defendant, and being so sworn as aforesaid to testify truly, he, the said defendant, did then and there, and in the trial of said challenge, willfully, knowingly, corruptly, falsely, and feloniously swear, take oath, say, and give in evidence among other things in substance as follows: That he, the said Theodore Henry Schweichler, had been working for one Mr. Cockerill for 20 days last past, whereas in truth and in fact as he, the said Theodore Henry Schweichler, then and there well knew he, the said Theodore Henry Schweichler, had not worked for the said Mr. Cockerill at all during any of the 20 days last past."

[1] It thus appears that the whole basis for the charge of perjury is found in the declaration under oath by defendant that "he had been working for 20 days last past for Mr. Cockerill," and the inquiry is easily suggested whether there is in the information a sufficient exposition of the materiality of this testimony to satisfy the statutory definition of the crime. Section 118 of the Penal Code provides that: "Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer or person, in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath, states as true any *material* matter which he knows to be false, is guilty of perjury." It being essential that the false statement shall be material to the issue, this quality must, of course, appear by proper averments in the information or indictment. *People v. Jones*, 123 Cal. 229, 55 Pac. 992. "In the absence of a statute to the contrary, it is well settled that an indictment for perjury must show conclusively that the testimony given or assertion made by defendant, and charged to be false, was material to the issue on the trial of which he was sworn." 30 Cyc. p. 1433.

[2, 3] It is equally well settled that there are two modes by which the materiality of the alleged false statement may be shown in the information: "(1) By setting forth the nature of the issue and the evidence given thereon, so that as a matter of law it may be said the testimony upon which the perjury is assigned is material to the issue. (2) By showing an action at issue in a court of competent jurisdiction, the testimony given, its willful and felonious falsity, coupled with the averment that it was material to the issue." *People v. Ah Bean*, 77 Cal. 12, 18 Pac. 815; *People v. Von Tiedeman*, 120 Cal. 131, 52 Pac. 155. In the information before us there

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

is no averment that the testimony given by appellant was material to the issue. The second above enumerated method is therefore eliminated from consideration, and, in order to uphold the pleading, it must be declared, as a matter of law, that the alleged false testimony was material to the issue. The issue was: Did appellant reside in Princeton precinct for 30 days preceding the 8th day of November, 1910? Must it be said that the testimony was relevant to this issue, and had a legitimate and effective influence on the decision of the question? Materiality is defined by Bouvier as "the property of substantial importance or influence, especially as distinguished from formal requirement. Capability of properly influencing the result of the trial." Whether appellant worked for Mr. Cockerill or some one else, or whether he worked 20 days or not at all, would not aid any tribunal in the least degree in arriving at a conclusion as to whether he was a resident of Princeton precinct. It must not be forgotten, of course, that, to determine the sufficiency of the pleading, we are confined to the testimony set forth. We have no right to assume that Mr. Cockerill resided in Princeton precinct, or any other circumstance known to the election board or developed by appellant's testimony that is not revealed by the information. We might conceive of a situation where it would be probably material, in the determination of the issue of residence, to inquire whether a witness worked for Mr. Cockerill at a certain time. As is well known, it often happens that evidence which, standing alone, would be rejected as entirely immaterial is quite important and material by reason of its connection with other evidence. For instance, when it has a legitimate tendency to prove or disprove any material fact in the chain of evidence, as in the case of *People v. Prather*, 134 Cal. 436, 66 Pac. 589, 863, where the materiality of the alleged perjured testimony, given upon the trial for larceny, appears from proof that it had a strong tendency to weaken the evidence going to the point of identification of the stolen property, which was a vital point in the case. In other words, it is enough if it be circumstantially material, although not in itself sufficient to establish the issue. 30 Cyc. p. 1419. But nothing of the kind appears in the case at bar. We are limited to the issue set out in the information, and our only inquiry is whether the statement that appellant worked for 20 days prior to the election for Mr. Cockerill—whoever he may be and wherever he may live—has any legal pertinency to the question as to appellant's residence in Princeton precinct. It would have been a simple matter to have alleged other circumstances, if they existed, whereby it could be seen that appellant's declaration had some logical connection with the issue, or it would perhaps have been more satis-

factory to have alleged that said testimony was material; but, since neither situation is presented, we feel satisfied it should be held that the information charged no offense, and that the cause should be reversed, with directions to dismiss the information, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J

16 Cal. App. 731

PEOPLE v. CURRIE. (Cr. 157.)

(District Court of Appeal, Third District, California. Aug. 1, 1911.)

1. CRIMINAL LAW (§ 210*)—COMPLAINT—VERIFICATION BY DISTRICT ATTORNEY.

The district attorney may swear to the complaint before the magistrate.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 419; Dec. Dig. § 210.*]

2. CRIMINAL LAW (§ 210*) — PRELIMINARY COMPLAINT.

The fairness of a criminal trial is to be determined by what took place at the trial, so that the fact that the district attorney made the complaint before the magistrate did not show that accused did not have a fair trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 419; Dec. Dig. § 210.*]

3. RAPE (§ 52*)—PROSECUTION—SUFFICIENCY OF EVIDENCE.

Evidence, in a statutory rape case, held to sustain a finding that prosecutrix's child was not begotten on prosecutrix a month before the time of the intercourse fixed by her, as claimed by defendant.

[Ed. Note.—For other cases, see Rape, Dec. Dig. § 52.*]

4. CRIMINAL LAW (§ 762*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

The court, in a statutory rape case, charged that if the jury were satisfied that accused had sexual intercourse with prosecutrix about the time alleged, and that she was then under the age of 16 years, and not his wife, they should convict, and that it was no defense that some other person may have had such intercourse, "as that is no defense, nor does it mitigate the offense of the defendant." Held, that the quoted part of the instruction could not have been construed as giving the court's opinion as to accused's guilt.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 762.*]

5. RAPE (§ 59*)—INSTRUCTIONS—REQUEST.

The court, in a statutory rape case, charged that a charge of this nature was particularly difficult to disprove; that no charge could be more easily made, and none more difficult to disprove, since the complaining witness and the defendant were generally the only witnesses, and the jury should be satisfied to a moral certainty and beyond a reasonable doubt, that a case was made out by witnesses, and corroborating evidence, if any, before they found accused guilty, if they did so; and further instructed that the law does not require that prosecutrix be supported by another witness or other corroborating circumstances, but does require that her testimony be examined with caution. Held, that it was not reversible error to refuse requested instructions warning the jury of the danger of finding a verdict of guilty upon the uncorroborated testimony of the prosecuting witness; the

instructions given being sufficient in that respect.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 88-100; Dec. Dig. § 59.*]

6. RAPE (§§ 54, 59*)—CORROBORATING EVIDENCE.

Evidence corroborating prosecutrix is not absolutely essential to a conviction, in a statutory rape case, so that requested instructions defining it, or requiring it to be connected with accused, were properly refused.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 83, 84; Dec. Dig. §§ 54, 59.*]

7. CRIMINAL LAW (§ 814*)—TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

If there was no evidence corroborating prosecutrix, in a statutory rape case, an instruction defining corroborating evidence was not necessary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1979-1985; Dec. Dig. § 814.*]

8. CRIMINAL LAW (§ 782*)—TRIAL—INSTRUCTIONS.

A requested instruction, in a statutory rape case, that it is a well-established axiom that it is better that many guilty ones escape, than that one innocent man be convicted, was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1881; Dec. Dig. § 782.*]

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Steve Currie was convicted of having sexual intercourse with a female under sixteen years, and he appeals from the order denying a new trial. Affirmed.

See, also, 14 Cal. App. 67, 111 Pac. 108.

L. N. Peter, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

CHIPMAN, P. J. Defendant was tried on an information accusing him with having unlawful sexual intercourse, on or about the 25th day of February, 1908, with the female named; she then being under the age of 16 years. He was convicted and sentenced to imprisonment for the term of 16 years and 6 months. Motion for a new trial was denied, and defendant appeals from the order. This is the second appeal of defendant, after having been twice convicted.

[1, 2] 1. Appellant's first point is that the complaint before the magistrate was sworn to by the district attorney "positively, not upon information and belief," and that "no depositions accompanied the filing of the complaint, and, the charge being a felony, the justice had no legal right to issue the warrant of arrest or hold the examination under such a state of facts." It is suggested as "a seeming legal impossibility that he [the district attorney] should know the facts of his own knowledge." There is nothing in the statute which disqualifies the district attorney from swearing to the complaint. The statute does not prescribe who shall make oath to the complaint. The argument that the defendant could not have, and did not

have, a fair trial because of the fact that the district attorney made the complaint and afterwards conducted the trial is without merit. His having made the complaint before the magistrate would not indicate necessarily any greater zeal or interest in the case than the subsequent filing of the information. The fairness of the trial is to be judged by what took place at the trial.

[3] 2. It is contended that the story told by the prosecuting witness is inherently improbable. We do not think it necessary to give publicity to her testimony. These salacious narratives of man's brutal instincts add little to our legal literature and should be kept out of the reports, where the points made do not imperatively demand giving the testimony. We cannot say that the undisputed story told by the prosecuting witness, accepted as true by two juries, contains any such improbabilities as at once to import disbelief in them, or to suggest that, in believing them, the jury showed that it acted under passion and prejudice. The prosecuting witness testified that the illicit act complained of happened on the 24th or 25th of February, 1908, and that she had never, either before or after, had sexual intercourse with defendant or any other person. It was in evidence that she gave birth to a child at Sacramento, on October 31, 1908, eight months and three days after February 25, 1908, and the attending physician testified that the child weighed eight pounds. He also testified, in reply to the question whether the child "had passed the full period of gestation," that "it was full nine months." He also testified that, "if it had not been a full nine-months child, there would have been peculiarities about the child or mother to show it was born sooner than provided for," and that "there were no such appearances." Upon this latter point it was testified by a physician in rebuttal that, if "it had not been a full nine-months child," there would not have been "any peculiarity about the mother or child to show that it was born sooner than provided for." This expert testimony submitted in defense tended to show that the child had been begotten a month prior to the time fixed by the prosecuting witness when the sexual intercourse took place. The rebuttal tended to show that, where the full period of gestation had not been reached, it could not be told, from any peculiarity of the mother or child, that the child "was born sooner than provided for." From this feature of the case we cannot say that the jury were governed by prejudice and passion in rendering their verdict, or that it would warrant a reversal.

[4] 3. Lastly, it is claimed that "the court failed to properly protect the rights of the defendant in the matter of the instructions to the jury." It is contended that the court

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

erred in giving the following instruction: "You are instructed that if you are satisfied from the evidence to a moral certainty and beyond all reasonable doubt that the defendant had sexual intercourse with one Gladys M. Cooksey, on or about the time alleged in the information, and that the said Gladys M. Cooksey was then under the age of 16 years, and not the wife of the defendant, it is your duty to find him guilty; and it is no defense that some other person may have had such intercourse, as that is no defense, nor does it mitigate the offense of the defendant." It is claimed that it was error to instruct the jury that "it was immaterial whether the prosecuting witness had improper relations with other men or not," and that the court expressed an opinion of defendant's guilt by the instruction, especially in the use of the phrase, "as that is no defense, nor does it mitigate the offense of the defendant." The court instructed the jury fully as to its duty to be guided by the evidence. We cannot see that the court could have been understood by the jury to have intended any opinion of its own as to the guilt or innocence of the defendant by the instruction complained of.

[5] It is urged as error of the court in refusing to give instructions marked 46 and 47, requested by the defendant. These instructions "cautioned and warned the jury of the danger of finding a verdict against the defendant for the crime of rape upon the uncorroborated testimony of the prosecuting witness alone, and unless there are facts and circumstances as shown by the evidence to corroborate it." *People v. Benson*, 6 Cal. 223, 65 Am. Dec. 506, and other cases, are cited. In the *Benson* Case, Chief Justice Murray said: "From the days of Lord Hale to the present time, no case has ever gone to the jury upon the sole testimony of the prosecutrix, unsupported by facts and circumstances corroborating it, without the court warning them of the danger of a conviction on such testimony." At the request of the defendant, the court instructed the jury: "That a charge of this nature is particularly difficult for a defendant to clear himself of. No charge can be more easily made, and none more difficult to disprove. From the nature of the case, the complaining witness and the defendant are generally the only witnesses. You should be satisfied to a moral certainty, and beyond a reasonable doubt, that the case is made out by witnesses and corroborating evidence, if any, before you find the defendant guilty, if you find him guilty." The court refused the requested instruction, "because substantially given in other instructions." The court also instructed the jury: "That the law does not require in this character of case that the prosecuting witness be supported by another witness or other corroborating circumstances, but does require that you examine her testimony with cau-

tion." The question is, Should the case be reversed because the court failed to more carefully and distinctly warn the jury of the danger of convicting the defendant on her testimony alone? We think the court went far enough in its cautionary signal to the jury to awaken in their minds the importance of carefully scrutinizing the testimony of the prosecuting witness, especially so, as the court stated the law to be, which defendant does not question, that a conviction could be found on the uncorroborated testimony of the prosecuting witness.

[6, 7] There were certain instructions requested by defendant and properly refused by the court, because they were directed solely to a definition of corroborating evidence, and that it must be connected with the defendant. As corroborating evidence was not indispensable, it was not error to refuse to define it, or to give instructions that it must be connected with defendant. Besides, defendant claimed that there was no corroborating evidence, which, if true, there was no call for a definition of such evidence. The jury were instructed that the pregnancy of the prosecutrix was not evidence of defendant's guilt. This was in fact the only circumstance that could be claimed as tending in any way to corroborate her.

Other instructions were refused because elsewhere substantially given, in which the record bears out the court.

[8] The only remaining instruction refused, of which complaint is made, was the familiar dictum thus stated, "that it is a well-established axiom that it is better that many guilty ones may escape, than that one innocent man be convicted." Its refusal was not error.

The order is affirmed.

We concur: HART, J.; BURNETT, J.

16 Cal. App. 722
HICKS v. DESMOND, City Clerk.
(Civ. 899.)

(District Court of Appeal, Third District,
California. July 31, 1911.)

ELECTIONS (§ 126*)—CITY OFFICER—TRUSTEES
—NOMINATION—"REPRESENTS."

Sacramento City Charter, § 8, as amended 1911, provides that the board of trustees shall consist of nine members, one from each ward, who shall be a resident of such ward, a trustee to which ward shall be elected by the qualified voters of the city, and each such elector shall be entitled to vote on the election of each trustee. Primary Election Act 1911 (St. 1911, p. 775) § 5, subd. 6, provides that, except in the case of a candidate to a nomination to a judicial office or a school office, nomination papers shall be signed as follows: By not less than 1 per cent. and not more than 2 per cent. of the voters of the party of the candidate seeking nomination within the state or political subdivision thereof in which the candidate seeks nomination. Section 7 of the charter declares that the legislative power of the city is vested in the board of trustees, and that each member of the board shall be a qualified elector at least

25 years of age, shall have been a citizen of the state and an inhabitant of the city three years, and "of the ward which he represents for at least one year next before the day of his election." *Held*, that the word "represents" was used in section 7, not to define the power or prescribe the duties or limit the territorial authority of a member of the board of trustees, but was employed to declare one of the several qualifications of eligibility of a member of the board; and, since, under the primary election law, candidates to be voted for within the city by the voters at large must be nominated by the voters at large, the charter should be construed as requiring the nominations of trustees by electors belonging to the political party of the candidate residing in the entire city, and not alone by the members of the candidate's political party within the ward from which the trustee is elected.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 126.*

For other definitions, see Words and Phrases, vol. 7, pp. 6107, 6108.]

Application by J. B. Hicks for writ of mandamus against M. J. Desmond, as City Clerk of the City of Sacramento. Demurrer to petition overruled, and application granted.

Hugh B. Bradford and Clinton L. White, for petitioner. J. R. Hughes, for respondent.

HART, J. This is an original application for a writ of mandate to compel the respondent to file the nomination papers of petitioner as a candidate for the office of member of the board of trustees of the city of Sacramento, for the third ward of said city. The respondent has interposed a general demurrer to the petition, and thus the question to be determined is presented.

The single proposition submitted for decision by this proceeding is whether the nomination of a candidate for the office of trustee of said city shall be made only by such electors belonging to the political party of which such candidate is a member as reside within the limits of the ward of which such candidate is a resident, or by all the electors of the entire city that are members of such candidate's political party. This question arises upon conflicting constructions of the meaning and intent of an amendment of section 8 of the charter of the city of Sacramento, which was, at the general municipal election held in said city in the month of November, 1909, submitted to and ratified by the electors of said city and approved by the Legislature of 1911. Said amendment, in so far as it is of interest to this inquiry, reads as follows: "The board of trustees shall consist of nine (9) members, one member from each ward, and he shall be a resident of such ward. The trustee from each ward shall be elected by the qualified voters of the city and each such elector shall be entitled to vote on the election of each trustee."

It will be observed that said amendment, while expressly providing that candidates for the office of trustee shall be voted for by

all the voters of the city, makes no specific provision as to the manner in which such candidates shall be nominated by the several political parties. It is therefore, contended by the respondent that nominations for trustee of said city must be made in accordance with the requirements of subdivision 6 of section 5 of the primary act of 1911, and that, under the terms of said subdivision of said section, properly construed, such nominations must be made by wards.

Section 5, subdivision 6, of the primary act of 1911 (Bancroft's Ed. Stats. 1911, p. 775), provides: "Except in the case of a candidate for nomination to a judicial office or a school office, nomination papers shall be signed as follows: By not less than one per centum and not more than two per centum of the voters of the party of the candidate seeking nomination within the state or *political subdivision thereof in which said candidate seeks nomination.*" (Italics ours.)

The argument of respondent is founded on his construction of section 7 of the charter of said city, which reads as follows: "The legislative power of the city of Sacramento shall be vested in a board of trustees, who shall hold office for the term of four years, subject to the exception stated in the next section. Each member of the board of trustees shall be a qualified elector at least twenty-five years of age, and shall have been a citizen of this state, and an inhabitant of the city, for at least three years, *and of the ward which he represents* for at least one year next before the day of his election."

The contention of the corporation counsel, representing the respondent herein, is that said section of said charter contemplates that a trustee shall be selected to specially *represent the ward* for which he is elected, and that he represents the city at large only in the discharge of a duty incidental to such office, and that thus it was intended that the boundaries of such ward should mark "the political subdivision of the state in which said candidate seeks nomination." From this construction of said section 7, it is argued that, since that section was a part of the city charter at the times that the amendment of section 8 of said charter was proposed to the voters and ratified by them, it is to be presumed that, in proposing and ratifying said amendment, it was so proposed and ratified with the terms of section 7 in mind, and that, if it was intended that a different rule should be followed in the nomination of a trustee from that contended for by the respondent, "a provision would have been inserted in said section 8, providing that trustees shall be nominated and elected by the electors of the city, instead of being silent upon that matter."

The position of the respondent, it will be noted, is planted largely upon the meaning

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of the word "represents," as it is employed in section 7 of the charter; but we are of the opinion that he gives the word as so used a different or much more restricted signification than it was intended by the framers of the charter to imply. It appears to our minds quite manifest that to construe section 7 of the charter as respondent understands its meaning the significance of the phrase as used in that section, "and of the ward which he *represents*," must be held to lie in an intention or a purpose of the framers of the charter to thus fix and limit the duties and official jurisdiction of a member of the board of trustees so that he is thereby intended to be, and in contemplation of said section is, a mere *district* or *ward*, rather than a *city*, official. The section is in our judgment incapable of such a construction.

It appears to us to be very clear, from the language of section 7, that the sole purpose of the provisions thereof is simply to prescribe the qualifications which a citizen must possess to render him eligible to membership of the board of trustees. There is nothing in the language of said section from which it may be implied that there was any intention to thereby prescribe or limit the duties of a member of the board of trustees. The obvious purpose of the framers of the charter in subdividing the municipality into districts or wards, and providing that the members constituting the governing or legislative body of said municipal government should be selected by wards, was to establish a scheme, fashioned after the plan of the legislative districts of the state, by which each portion of the city so divided and designated would thus receive as nearly as might be equal representation in matters of local legislation or regulation. In other words, the sole object in dividing the city into wards for the purpose of selecting members of the legislative body of the municipality was, manifestly, to prevent the happening of the contingency, possible under a scheme by which trustees could be selected, regardless of the location of their voting residences, of the selection of all the members of the board of trustees from one or perhaps two portions of the city, whereby other portions of the city might not have, in practical effect, that *special* representation in the matters of local legislation essential to the full and complete safeguarding of those interests peculiarly affecting their welfare. It is therefore very clear that the word "represents" in section 7 was used, not for the purpose of defining the power or prescribing the duties or of limiting in any degree the territorial authority of a member of the board of trustees, but, as before suggested, was therein employed solely for the purpose of declaring or defining one of the several qualifications of eligibility to membership of said board; that is, to designate the period of time during which a

citizen must have resided within the ward for which he may seek election to the office of trustee before, in that respect, he is eligible to exercise the duties of that office.

Nor do we perceive any merit in the argument that, had it been intended by the amendment of section 8 that candidates for the office of trustee should be nominated by the voters at large of the political parties to which such candidates may, respectively, belong, a provision expressly authorizing such manner of nomination would and should have been inserted in said amendment. At the time of the framing and the ratification of said amendment, it was provided by the general primary election law that "for any officer *voted for entirely within one city* * * *" the nomination papers should be signed "by at least three per centum of the party vote in at least one-fourth of all the election precincts within the district *in which the officer is to be voted for*. * * *" Subdivision D of subdivision 5 of section 5, Primary Election Law (Stats. 1909, p. 695). Thus it will be observed that when the amendment was framed and submitted to and ratified by the voters of the city of Sacramento there was no necessity for inserting in said amendment a provision expressly requiring the nomination for trustee to be made by the voters of the candidate's party in the city at large. The effect of the ratification and approval of the amendment was, by virtue of the provision of the primary act as it then existed, to require the nominations for that office to be made by the voters throughout the entire city. Indeed, at the time the amendment was framed, submitted, and ratified, the incorporation therein of a provision of that character would obviously have been regarded as supererogatory, since the general law of the state upon that subject had itself already provided that, where the candidate was to be voted for within the city by the voters at large, his nomination should likewise be made by the voters at large belonging to the political party to which he belongs; and therefore the silence of the amendment in that regard was doubtless *ex industria*, and very properly so. It thus becomes very clear, we think, that the purpose of the amendment and the intention of the voters in ratifying the same was to establish the city at large as an *election* district for each trustee for all the essential purposes of an election to public office under the general laws, by the provisions of which only may a citizen present his aspirations to the voters to serve the public in an official capacity. In other words, in view of the provisions of subdivision D of subdivision 5 of section 5 of the primary election law, as said provisions read prior to their amendment by the Legislature of 1911, it seems to us that no proposition could be farther removed from the realm of disputation than that the purpose in the minds of the framers of the amendment of section 8 of the charter and

the scope and effect thereof as it was ratified by the voters were to require a candidate for trustee to not only submit his candidacy as a nominee of his party for such office to the voters of the city at large, but, in order to secure the nomination for that office from the party of which he is a member, to first submit his candidacy for such nomination to those electors of the city at large that belong to or are members of his political party. We find nothing in the primary act, as it was amended by the Legislature of 1911, inconsistent with the construction thus placed upon the amendment of section 8 of said charter. As stated, said amendment, aided by subdivision D of subdivision 5 of section 5 of the act of 1909, fixed the boundaries of the city as the boundaries of the election district for trustee, and such district could not be changed, except by express language, or by language or a scheme so plainly inconsistent therewith as to effect a change by necessary implication. In other words, the provision in the act of 1909 is, in effect, that where the officer is to be voted for within the city—that is, voted for by the voters of the city at large—the nomination must be made by the voters in the city at large belonging to the party of the candidate; while the provision of the later act is merely that the nomination is to be made by the voters belonging to the candidate's party "within the political subdivision in which the candidate seeks nomination." It is therefore to be at once perceived that the provision in the act of 1911 does not, either expressly or by implication, repeal the effect of the former provision which, with the amendment of the charter in question, established the city as the election district for trustee; for the political subdivision (referred to by the provision of the later act) in which the candidate for that position "seeks nomination" is the subdivision which had theretofore been established in the manner suggested. If the provision in the act of 1911 declared that the candidate should secure to his nomination papers the specified number of signatures from the voters of his party within the district or subdivision which he was to be elected to *specialty represent*, or used other language of like import in that regard, then, obviously, a different proposition would be submitted, for in such case it could perhaps be said to appear reasonably clear that the intention was to change the election district for said office, so far as it concerned the nomination. But no such proposition is presented here, and, as stated, the language of the provision of the act of 1911 cannot, by any rational construction, be held to have changed the election district or the boundaries thereof for the nomination for the office of trustee of said city.

It may with no impropriety be added that, if the construction given the amendment of the charter by respondent is to be adopted,

it may readily be seen how the fulfillment of its obvious object could easily be circumvented. It will not, of course, be denied that the ultimate object sought to be attained by the amendment was to give to the voters of the city at large, rather than to confine the exercise of that right to the immeasurably smaller number of voters residing within each of the wards, the privilege of having something to say upon the most important question that can concern the administration of the affairs of a municipal government, viz.: The right to take part in the selection of those officers upon whom is bestowed almost the entire legislative and administrative power of such a government—those officers indeed, constituting the legislative body of the city, to whom is committed the all-important power of levying taxes upon the property of the citizen and of disbursing the public revenues, of adopting or rejecting regulations designed to promote and conserve public morals and public health, and, in short, of exercising a variety of powers directly affecting the personal and property rights of the inhabitants of the community embraced within the municipal jurisdiction. Most certainly it could not be said that the voters of the city at large were vested with the full measure of power in that regard, if the amendment in question may be so construed as to restrict them in the right to express their preferences for trustees to the mere act of voting at the general election for one of the candidates nominated for that office by a small percentage of the voters residing within a ward, since it would still be in the power of the voters of such ward, if they chose to do so, to so manipulate the nominations by the political parties as that individuals would thus be presented to the voters at large as candidates for that office who would not be, by reason of unfitness, in point of both character and ability, the choice of the voters of the city at large. In other words, if the construction of the scope of the amendment as respondent understands it is correct, the voters at large would be compelled to select either the one or the other of two or three nominees, neither of whom possessed the first qualification for the performance of so responsible and important public duties. Thus it is clear that the amendment, if construed in harmony with respondent's contention, might, and perhaps would, in many instances, result in conferring upon the voters of the city at large no greater or better advantages, in respect of the election of trustees, than they enjoyed prior to the adoption of the amendment. Nor, as has been suggested, would it be a reply to this proposition to say that, in the supposititious case, the voters of the city at large could secure relief by casting aside party lines and so proceed to select some capable and trustworthy citizen as a candidate, independently of a political party nomination for

the office, or, having that course open to them, that it could, therefore, well be maintained that the object of the amendment in question was not to clothe them with the right to participate in the nominations for trustee. For the policies and principles of our governments in this country, as is and has been immemorially true in other and older countries than this, have always, as a general rule, been worked out and crystallized into practical facts through the instrumentality of political parties which have thus become an essential part of our institutions. Indeed, in this state at the present time, as has been true for many years past, we have a positive or legislative recognition of these political partisan organizations in the laws regulating the methods of conducting primary elections or elections prosecuted within party lines. And most unquestionably it is not in accordance with the intent or the spirit of the primary law, or any local regulation framed in pursuance thereof, to so hamper the rights of electors who, from a conviction of principle, have identified themselves with a political party, as to drive them from their party, in order that they may be permitted to select men of fitness in all respects to represent them in the public service. On the contrary, the central purpose of recent legislation is to give to the voter full opportunity to express himself fully and *effectively* with regard to the men who shall be selected to stand as the nominees of the political party to whose principles and policies he conceives it to be his duty as a loyal supporter of good government to pledge his allegiance. Besides, common experience justifies the declaration that, as a rule, a majority of the members of a political party are disposed to religiously and often blindly adhere to party lines and so "stick to the ticket," notwithstanding that conditions may, for the sake of good government, imperatively demand an abandonment of party in the selection of public officials. But it is not necessary to further pursue an investigation for reasons, apart from those which are apparent on the face of the amendment in question itself, viewed by the light of the provision of the primary act of 1909 to which we have referred, disclosing that the object of said amendment of section 8 of the charter of Sacramento was to give the voters of that city at large the right to nominate, as well as to elect, trustees. It is, as we have declared, clear to us that such was the object of the amendment, and that it was fully accomplished.

For the reasons stated herein, the demurrer to the petition was heretofore overruled, and the prayer for a writ of mandate granted.

We concur: CHIPMAN, P. J.; BURNETT, J.

16 Cal. App. 783

HOGAN v. SUPERIOR COURT OF MERCED COUNTY et al. (Civ. 895.)

(District Court of Appeal, Third District, California. Aug. 8, 1911. Rehearing Denied by Supreme Court Sept. 27, 1911.)

1. PROHIBITION (§ 11*)—SCOPE OF WRIT.

Under Code Civ. Proc. § 1102, defining a writ of prohibition as the counterpart of a writ of mandate, arresting the proceedings of any tribunal, corporation, board, or person, whether exercising ministerial or judicial functions, when such proceedings are without, or in excess of, the jurisdiction of the tribunal, corporation, board, or person, the scope of such writ is limited to a trial of the question of jurisdiction, and cannot be extended to a review of errors of law committed by any tribunal, corporation, board, or person in a proceeding of which such tribunal, etc., had jurisdiction.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 36; Dec. Dig. § 11.*]

2. PROHIBITION (§ 3*)—CONVICTION BEFORE JUSTICE—REVIEW OF EVIDENCE.

Where petitioner was convicted of a misdemeanor before a justice, whether the evidence was sufficient to justify the verdict was reviewable only on appeal to the superior court, as provided by Pen. Code, § 1466, and could not be determined by a writ of prohibition.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4-19; Dec. Dig. § 3.*]

3. PROHIBITION (§ 10*)—JURISDICTION—REVIEW—INSUFFICIENT COMPLAINT.

Whether the complaint on which petitioner was convicted of a misdemeanor before a justice was insufficient to confer jurisdiction on the justice may be determined on a writ of prohibition to restrain the justice from carrying the sentence imposed, pursuant to such conviction, into effect.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 37-56; Dec. Dig. § 10.*]

4. INDICTMENT AND INFORMATION (§ 111*)—EXCEPTIONS.

Pen. Code, § 604, provides that every person who maliciously injures or destroys any standing crops, grain, cultivated fruit, or vegetables, "in any case in which a punishment is not prescribed by this Code," is guilty of a misdemeanor. *Held*, that since the exception with which such section concerns itself forms no essential part of the description of the crime defined, but merely deals with the punishment for the crime described, a complaint charging that petitioner did willfully, etc., injure and destroy a standing crop of grain, then the property of complainant, etc., was not fatally defective for failure to negative that the acts complained of constituted other crimes otherwise punishable, it being necessary to negative an exception in a statute only where it expressly exempts from its operation the commission of certain other acts than those mentioned therein, for which a punishment is otherwise or by some other enactment prescribed; and such exception is so incorporated with and becomes a part of the statute as to constitute a part of the definition of the crime.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 295-298; Dec. Dig. § 111.*]

5. CRIMINAL LAW (§ 304*)—JUDICIAL NOTICE—STATUTES.

Pen. Code, § 604, provides that every person who shall maliciously injure or destroy any standing crops, grain, cultivated fruits, or vegetables, in any case for which the punishment is not otherwise prescribed by the Code

is guilty of a misdemeanor. *Held*, that the courts will take judicial notice of the fact that the only other section of the Code, apart from section 602, subd. 3, which provides another and different punishment for a similar offense is section 600, which makes it an offense to destroy standing grain or grass by burning.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 706; Dec. Dig. § 304.*]

6. CROPS (§ 1*)—DEFINITION.

The word "crops" includes growing grain or grass.

[Ed. Note.—For other cases, see Crops, Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1755, 1756.]

7. INDICTMENT AND INFORMATION (§ 111*)—STATUTES—EXCEPTIONS.

Pen. Code, § 602, subd. 3, provides that every person who willfully commits a trespass by either maliciously injuring or severing from the freehold of another anything attached thereto, or the produce thereof, is guilty of a misdemeanor; and section 604 declares that every person who maliciously injures or destroys any standing crops, etc., in any case for which a punishment is not otherwise prescribed by the Code, is guilty of a misdemeanor. *Held*, that section 602, subd. 3, is distinguished from section 604, in that it prescribes a penalty for a trespass by which the freehold of another is maliciously injured in any of the ways expressly pointed out by such section and subdivision, or by any act within the contemplation of the language thereof, while section 604 is intended to punish the act of injuring or destroying, not the freehold itself, but the crops, grain, etc., growing thereon; and hence a complaint under section 604, charging that defendant did willfully injure and destroy a standing crop of grain, the property of complainant, situated, etc., was not factually defective for failure to allege that such destruction was not committed by means of trespass to the freehold, and therefore punishable under section 602, subd. 3.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 295-298; Dec. Dig. § 111.*]

8. CRIMINAL LAW (§ 260*)—MISDEMEANORS—CONVICTION BEFORE JUSTICE—REVIEW BY SUPERIOR COURT—JURISDICTION.

Under Pen. Code, § 1260, authorizing appeals from convictions before a justice to the superior court where, on such an appeal, the superior court was convinced that accused, who had been convicted of a misdemeanor before a justice, had not been accorded a fair trial, and that the sentence imposed was unreasonably severe, it had power to modify the judgment by reducing the sentence to such as would be reasonable and just, or grant a new trial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 260.*]

Petition by H. H. Hogan for a writ of prohibition against the Superior Court in and for Merced County and Hon. E. N. Rector, judge thereof. Demurrer to petition sustained, and alternative writ discharged.

Carroll Cook, for petitioner. F. G. Oslander and H. S. Shaffer, for respondents.

HART, J. This is an application for a writ of prohibition to restrain the respondents from making any order, other than to reverse or modify the same, in relation to a

certain judgment, rendered and entered in a criminal action against the petitioner by the justice's court of township No. 5 of Merced county, and from which an appeal has been taken to and is now pending before the respondent superior court.

The questions presented for discussion and decision are raised by a general demurrer, which has been interposed to the petition by the respondents. The averments of the petition disclose the following facts: On the 17th day of April, 1911, a complaint was filed in the justice's court of township No. 5, in the county of Merced, charging the petitioner with having violated the provisions of section 604 of the Penal Code. Said section reads as follows: "Every person who maliciously injures or destroys any standing crops, grain, cultivated fruits or vegetables, the property of another, in a case for which a punishment is not otherwise prescribed by this Code, is guilty of a misdemeanor."

The complaint upon which the petitioner was tried is in the following language: "That said Howard H. Hogan, on or about the 15th day of April, A. D. 1911, in the said county of Merced, state of California, did willfully, unlawfully, and maliciously injure and destroy standing crop of grain, then and there the property of the said Mary Collier, situated at the southeasterly part of section 5, Tp. 7 S., R. 10 E., in Merced county, California; said land and premises and crop being then and there the property of the said Mary Collier." On the 25th day of April, 1911, the petitioner, having previously been arraigned upon and entered a plea of "not guilty" to the charge thus preferred against him, was put upon his trial upon said complaint, and the jury by whom the facts were tried returned the following verdict: "We, the jury, in the above-entitled cause, find the defendant guilty as charged." Thereupon the justice of the peace, pronouncing judgment against petitioner, sentenced him to a term of six months in the county jail of Merced county.

As seen, the petitioner, in due time, took an appeal to the superior court of Merced county upon a statement of the case settled by the justice of the peace, as required by law. Section 1468, Pen. Code. The appeal subsequently came on for hearing before the respondents, and, after arguments thereon, the same was submitted for decision and taken under advisement. On the 16th day of June, 1911, the respondent, judge of the superior court, without making any order in the premises, filed a written opinion in which he announced that the conclusion at which he had arrived on said appeal was that he had discovered no substantial reason justifying an order, other than one affirming the judgment. Embodied in the petition herein is a portion of the written opinion referred to, and we shall here reproduce the same, not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

because, in our judgment, it has any bearing on the ultimate question submitted for decision by this court (that of jurisdiction), but solely for the purpose of making some suggestions which, under the circumstances of the case as it is presented here may be offered with no impropriety.

"The court has given this matter particular consideration, for the reason that it appears, very clearly, from the statement that the defendant was not, to say the least, 'in the hands of his friends' in the court below. The sentence of the court that the defendant be imprisoned in the county jail for the term of six months seems unreasonably severe. This is the maximum sentence of imprisonment that could be imposed; and the law contemplates that it shall not be imposed in cases like this, except where express malice clearly appears. The peace and dignity of the people of the state of California would probably not have been considered by the complaining witness to have been invaded by the defendant, and this case would therefore never have had any existence at all, if the defendant had granted her demand for the written agreement to furnish her lands with water. In such circumstances she would probably have accepted, most gladly, the defendant's offer to pay liberally for all damages done to the land and crop in making his repairs. There, I say, the sentence seems unreasonably severe. The peace and dignity of the people of the state of California are not considered when her officers employ the power placed in their hands to satisfy a private grudge of an individual or a neighborhood, however well founded that grudge might be. It will be necessary for this court to affirm the judgment, with the hope, nevertheless, that the judge of the court below may see fit to modify the same until the demands of justice shall be simply fully met, and not leave it so that the malice or revenge of any individual or community shall be satisfied."

The petition further alleges that the statement on appeal in said action to the superior court, which statement, it is averred, sets forth, in narrative form, the testimony given at the trial of said cause, "wholly fails to show that there was any testimony given at said trial tending to establish any of the material facts necessary to a conviction of the defendant as hereinafter set forth," following which allegation is a specific statement of the particulars wherein the evidence is insufficient to justify the conviction.

[1] The sole question which is presented or may be considered in a proceeding upon a writ of prohibition is one of jurisdiction. In the language of our Code (section 1102, Code Civ. Proc.), the office of the writ is to arrest "the proceedings of any tribunal, corporation, board or person, whether exercising functions judicial or ministerial, when such proceedings are without, or in excess of the jurisdiction of such tribunal, corpora-

tion, board or person." The general rule is and has always been, so far as we know, to the contrary, that neither this nor any other writ whose sole object is to try the question of jurisdiction can be made to subserve the purposes of a writ of error, or be extended in its corrective scope to the review of errors of law committed by any "tribunal, corporation, board or person," in a proceeding of which such tribunal, etc., has jurisdiction under the law. This rule has been, generally speaking, strictly adhered to, at least in California. In the very recent case of the Western Union Telegraph Co. v. Superior Court, etc., reported in 115 Pac. 1100, decided by this court, the question was, upon prohibition, whether the Postal Telegraph Company, a foreign corporation, was authorized by the law of this state to exercise the power of eminent domain. The contention of the petitioner in that case was that no such right was conferred upon foreign telegraph corporations, and that therefore no complaint could by any possibility be filed in the trial court which could give that tribunal jurisdiction to try a case for the condemnation of property by such a corporation. This court conceived that point to be well made, and so heard the proceeding, holding ultimately, however, that foreign telegraph corporations were, under certain conditions prescribed by the federal government, authorized to exercise the power of eminent domain in California. But the Supreme Court denied a petition for a hearing of the cause by that court after the decision of this court on the sole ground that, notwithstanding "that the capacity of a foreign corporation to exercise the power of eminent domain in this state is purely a question of law, it is (nevertheless) a question as much within the jurisdiction of the superior court as other questions of law arising in similar cases which are held to be reviewable here only on appeal." Manifestly, therefore, we must be prepared to say that the record before us shows that the respondents are without jurisdiction to render any judgment on the appeal, before we would be authorized to make or grant an order restraining them from doing so. We find no warrant for so declaring.

But counsel for the petitioner here strenuously insist that, in proceedings on prohibition, jurisdiction is not the only question which may be considered and determined, but that this court has the power, through the employment of that writ, to prevent the exercise, by an inferior tribunal, etc., of any judicial act contrary to law, and a number of California cases, as well as some from other jurisdictions, are cited as supporting that position; the theory upon which the argument proceeds being that the higher courts, by appropriate original proceedings which may be instituted therein, are thus given the power to exercise the power of

general supervision over and control of the proceedings in the subordinate courts, where there is no remedy in the ordinary course of law for the correction of errors committed in such proceedings. In other words, in substantial effect, the argument is that, where an inferior tribunal threatens to do an act which is contrary to law, such act may be prevented by the courts of last resort through the writ of prohibition, without regard to whether the act so threatened affects or concerns the jurisdiction of the court to do the threatened act or not. It is therefore contended that in this proceeding we are at liberty to review the evidence adduced in the justice's court, as the same is narrated in the petition here, for the purpose of determining its evidentiary value, and review and pass upon any and all the alleged errors committed by the justice's court in the trial of the cause.

[2] It is very clear that we cannot accept the theory thus advanced without extending the writ of prohibition far beyond any purpose it is designed to subserve. In the first place, it is to be remarked that the question whether the evidence upon which the jury in the justice's court convicted the petitioner is sufficient to justify the verdict is one which, obviously, cannot be reviewed in a proceeding of this character. That question was one entirely for the jury in the first instance, and if the charge be true that the evidence does not support the finding of the jury then the sole remedy for the correction of the error thus committed lies in an appeal to the superior court. Section 1466, Pen. Code. In other words, it is within the jurisdiction of the jury to return a verdict of guilty, whether the evidence warrants it or not; and equally it is within the jurisdiction of the superior court, on an appeal thereto from a judgment rendered in a criminal action cognizable by the justice's court, to decide whether there exists or does not exist any ground, whether arising upon the evidence or the rulings or the instructions, if any be given, for affirmance, reversal, or modification of such judgment; nor can said court be prevented from exercising such jurisdiction, or, in the exercise thereof, be required to decide the appeal in a particular way.

A distinction must be recognized between those cases, of which *Bruner v. Superior Court*, 92 Cal. 239, 28 Pac. 341, and *In re Shortridge*, 99 Cal. 526, 34 Pac. 227, 21 L. R. A. 755, 37 Am. St. Rep. 78, are exemplars, wherein the question of jurisdiction rests so essentially upon extrinsic facts that a review thereof is not only necessary, but proper, in order to determine that question, and those cases wherein the determination of the question of jurisdiction rests entirely on the power vested by the Legislature in the courts to perform certain definitely specified acts. In the *Bruner Case*, the

question of the court's jurisdiction to try the petitioner on a certain felony charge arose upon the question of the validity of the indictment upon which it was proposed to put him upon his trial; the validity of said indictment having been challenged on the ground that an elisor had been appointed to summons the grand jury by which the indictment was found and returned; it affirmatively appearing that the sheriff was in no way disqualified from summoning said jury. The question in that case was whether the court had jurisdiction to appoint an elisor for that purpose, in the absence of an affirmative showing that the sheriff was disqualified; and, of course, it was necessary, in order to determine that question, for the court, on prohibition, to ascertain the fact whether the sheriff was or was not so disqualified. In the *Shortridge Case*, the petitioner had been adjudged guilty of contempt of court for the violation of an order of said court, made in a divorce case, interdicting the publication of the testimony heard in said case. The petitioner, publisher of a daily newspaper at the county seat of the county in which the court proceedings were had, published a report of the testimony in violation of said order. There was no question in either of those cases, nor could there be, but that the court had jurisdiction to appoint an elisor and to punish for contempt, in proper cases. The question in both cases was not, therefore, whether, abstractly speaking, the subordinate courts had jurisdiction to do those things, but whether the facts therein disclosed were such as to authorize or justify those courts in exercising that jurisdiction. The real question, in other words, was whether the courts below had abused their discretion in the exercise of the general power or jurisdiction with which they are invested, or, to state the proposition in another way, whether those courts acted upon facts which could not put their jurisdiction as to such matters in motion. Thus it is to be perceived that the question of jurisdiction in those cases rested essentially upon extrinsic facts, and necessarily the courts issuing the writs therein were required to review and examine those facts for the purpose of determining whether the courts below had acted within or beyond their jurisdiction.

But, in the case at bar, no question can arise, either as to the jurisdiction of the justice's court to try the misdemeanor of which the petitioner has been convicted, or the appellate jurisdiction of the respondent superior court of the class of misdemeanors to which it belongs. Jurisdiction in both instances is definitely prescribed and fixed by the law itself, and therefore obviously no proof of facts extrinsic to the law is essential to warrant its exercise. Hence it is plainly to be discerned that there is a very great distinction, in their nature and pur-

pose, between the facts which it was absolutely essential for the Supreme Court to review and consider in the Bruner and Shortridge Cases and the facts which counsel for petitioner urge upon this court to review. In this case, the facts do not, as they could not, affect the question of jurisdiction, but entirely bear upon and relate to the merits of the case; that is, whether they are or are not sufficient to support the verdict rendered against petitioner in the justice's court. As stated in the beginning, that question is one that cannot be reviewed in a proceeding of this character, even if it were conceded that the evidence is insufficient to justify the verdict, without torturing the office of this writ.

We are now brought to a consideration of the only point to which we attached any importance upon the granting of the order for the alternative writ, viz.: That the complaint upon which petitioner was convicted does not state facts sufficient to constitute an offense under the terms of the section of the Penal Code upon which that pleading was drafted. The contention is that, if the complaint does not state a public offense, the judgment of imprisonment is void, and that therefore the respondents are without jurisdiction to make any order whatsoever on the appeal.

[3] It has been held that a complaint which purports to charge a misdemeanor of which justices' courts have jurisdiction, but which fails to state any offense known to the law, may, upon the conviction of the accused under the averments of such pretended pleading, be declared void on habeas corpus, and the accused discharged from custody. *Ex parte Greenall*, 153 Cal. 767, 96 Pac. 804. Since unlawful restraint of one's liberty, from which restraint he may be released through the writ of habeas corpus, involves, essentially, the question of jurisdiction, it follows, of course, that where, as here, the relief sought is to prevent the performance of an act which, it is alleged, would be in excess of the jurisdiction of the court, or where, as in the Shortridge Case, *supra*, such act has already been performed, the writ of prohibition, in the first-mentioned case, and the writ of certiorari, in the last-mentioned case, may be invoked to prevent the doing of or to annul, as the case may be, the act, the validity of which is thus challenged. But we think the complaint, with sufficient clearness, states the offense sought to be thereby charged.

[4] The specific claim of the petitioner is, however, that the complaint does not set forth all the facts essential to a proper description of the crime, as it is defined by section 604 of the Penal Code. That section, it will be remembered, provides that every person who maliciously injures or destroys any standing crops, grain, cultivated fruits, or vegetables, etc., "*in any case for which a punishment is not otherwise prescribed by*

this Code, is guilty of a misdemeanor." The argument is that the complaint, to have stated the offense defined by that section, should have alleged, and thus have shown, that the act charged against the petitioner by the complaint is one "for which a punishment is not otherwise provided" by the Penal Code. To sustain this contention, counsel refer us to the case of the *People v. Grinnell*, 9 Cal. App. 238, 98 Pac. 681, wherein an indictment, purporting to charge the defendant with the crime denounced by section 288 of the Penal Code, was held fatally defective, in that it did not, by appropriate or any averments, negative the exception prescribed in said section. Said section provides that "any person who shall willfully and lewdly commit any lewd or lascivious act other than the acts constituting other crimes provided for in part two of this Code upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent," etc. The indictment merely alleged that the defendant "did willfully and lewdly commit a lewd and lascivious act upon and with the body of a child under the age of fourteen years, * * * with the intent," etc. It will thus be noticed that the indictment contained no allegation which disclosed that the act charged against the accused was not one of those acts "constituting other crimes provided for" in another designated part of the Penal Code, and, as the language referring to the acts "constituting other crimes" was, essentially, partly descriptive of the crime attempted to be charged, the failure to state in the indictment that the act of the defendant did not come within those acts constituting "other crimes" resulted in a failure to properly describe the crime thus sought to be preferred against the accused, and therefore a failure to state a public offense. The rule in such cases is that, where a statute expressly exempts from its operation the commission of certain other acts than those mentioned therein, for which a punishment is otherwise or by some other enactment prescribed, and such exception "is so incorporated with and becomes a part of such statute as to constitute it a part of the definition of the crime," then the exception must be pleaded, in order to properly describe and state the defense. *Ex parte Hornef*, 154 Cal. 360, 97 Pac. 891; *People v. Grinnell*, *supra*, and cases therein cited.

[5, 6] But it is plainly manifest that the "exception" with which section 604 of the Penal Code concerns itself constitutes no essential part of the description of the crime therein defined. There is nothing in the language of said "exception" or in the substance thereof which can add anything to the language precedently used in describing the act which must be committed to constitute the crime, or in describing the intent which must accompany such act to consummate it. In other words, said language or the proposition it expresses is descriptive in no sense or de-

gree, either of the act or the condition of mind which must be present in the commission thereof. Nor does it describe any act or acts constituting a crime under other enactments which, if perpetrated by the accused, would, as in the case of section 288, have the effect of removing his conduct as charged in the complaint from within the purview of said section. The "exception" merely deals with the matter of the punishment for the crime described by said section. It simply means, in other words, that one who may be convicted of the offense of maliciously injuring or destroying any standing crops, etc., shall, in case there is no other or different punishment specifically prescribed for such act by some other section or sections of the Penal Code, be punished as a misdemeanor by the infliction of the penalty prescribed by section 19 of said Code. And the courts will take judicial notice of the fact that the only other section of the Code, apart from subdivision 3 of section 602, which we shall later examine, which provides another and different punishment for an offense bearing any resemblance to that described by section 604, viz., section 600, provides that the destruction, etc., must be by means of "burning," an element without the averment of which the crime denounced by that section would not be stated, or bring the act of destroying the "standing grain or grass" within the terms and penalty of said section; whereas, in a case under section 604, the injury or destruction may be by any other means than by burning. If the complaint should allege that the growing grain or grass, both of which are included within the word "crops," had been destroyed by means of burning, readily it would appear that the act charged was a felony under section 600 of the Code, and not the misdemeanor defined by section 604 thereof.

[7] It is contended, however, that the "standing crop of grain" alleged in the complaint to have been injured and destroyed by petitioner could have been injured and destroyed by the commission of a trespass under subdivision 3 of section 602 of the Penal Code, and it is therefore insisted that the acts set forth in said complaint constitute a case in which a punishment is otherwise prescribed by said Code; hence, in order to have stated an offense under section 604, the complaint should have contained averments disclosing that the acts of which the petitioner was thereby accused were not the acts referred to in said subdivision of section 602. Said section and subdivision provide: "Every person who willfully commits any trespass by either: * * * 3. Maliciously injuring or severing from the freehold of another anything attached thereto, or the produce thereof, * * * is guilty of a misdemeanor." The foregoing provision is manifestly broader in its scope than section 604, and it may be conceded may include within its purview the act which, maliciously perpetrated,

constitutes the crime denounced by the last-mentioned section. But it appears to be very clear that the paramount purpose of subdivision 3 of section 602 is to prescribe a penalty for any *trespass* by which the *freehold* of another is maliciously injured in any of the ways expressly pointed out by said section and subdivision thereof, or by any act fairly and reasonably within the contemplation of the language thereof; while the purpose of section 604 is to punish the act of injuring or destroying, not the freehold itself, but the crops, grain, etc., growing thereon. Subdivision 3 of section 602 in other words, clearly comprehends any character of injury to the *freehold*. For illustration, a malicious injury to a house or other structure attached to the freehold, which would constitute an injury to the freehold itself, or the severing or removal, maliciously, of the earth or soil itself, would be punishable under the terms of said section. In order, then, to bring the act of injuring or destroying "standing crops, grain, cultivated fruits or vegetables," as defined by section 604, within the terms of said subdivision of section 602, it would be necessary to show, by direct averment, that such act was a trespass by which a thing attached to the freehold, or "the produce thereof," was maliciously injured or severed therefrom. It is therefore very plain that there is, as between section 604 and subdivision 3 of section 602 of the Penal Code, so marked a distinction, both in the respective purposes of said sections and the language by which the crimes respectively denounced thereby are defined, that the statement of the one in a complaint in the language of the statute (and in either case the language of the section could be substantially followed in the statement of the crime therein defined) would as readily disclose the section upon which the complaint was founded as would the proper statement of the crime of manslaughter in an information or indictment disclose that murder was not charged. For illustration, if it were intended to charge the act of injuring or destroying standing grain as a trespass under subdivision 3 of section 602, the charging part of the complaint, following the language of that enactment, would read something like the following: "That did then and there willfully and unlawfully commit a trespass upon the freehold of John Doe, as follows, to wit, by then and there maliciously severing from the said freehold of said John Doe certain standing grain, to wit, wheat, then and there standing and growing on and attached to the said freehold of said John Doe, said wheat so standing and growing being then and there the produce thereof." On the other hand, the language of a complaint drawn under section 604, following the language of that section, would not specifically charge a trespass. Indeed, it would be improper to do so, since the crime therein defined is not so designated; but it would be sufficient to merely al-

lege, as the complaint here alleges, that the accused had maliciously injured or destroyed certain standing crops or grain, etc. Thus, it being clear that the crimes under the two sections are materially different, it is manifest that the averments of the complaints under said sections, to properly state the offenses therein defined, must necessarily be different in material particulars; and therefore a judgment of conviction under either section could be pleaded and sustained without the aid of evidence *de hors* the complaints in any action prosecuted for the same act under the other section. It may, moreover, be stated that the effect of the judgment in either case, so far as the punishment is concerned, would be precisely the same, since the penalty prescribed by both sections is as for a misdemeanor.

We have now considered all the points which we deem essential to notice in the determination of the only question which is involved in a proceeding of the nature of the one presented here, with the result, as is manifest, that we have discovered no ground upon which we would be authorized to interfere with or obstruct the exercise by respondents of a jurisdiction with which the law invests them; but it is not conceived to be improper, under the remarkable circumstances of this case as they are disclosed by the petition, to make some observations which are neither pertinent to the issue presented here nor, consequently, necessary to a decision thereof.

[8] In his written opinion, an excerpt from which is given herein, the learned judge is constrained, from his examination of the record on appeal to the court over which he presides, to denounce the verdict as the result, not of a fair and just consideration of the evidence by the jury, but of a "private grudge" against the petitioner "of an individual or a neighborhood"; that the prosecution would never have been instituted, "if the defendant had granted her [the prosecuting witness] demand for the written agreement to furnish her lands with water;" that, had such agreement been made by petitioner, "she would probably have accepted, most gladly, the defendant's offer to pay liberally for all damages done to the land and crop in making his repairs;" that there was an absence of express malice in the act charged against the petitioner, and that therefore the sentence by which the petitioner must, if he can secure no relief from the consequences thereof, be imprisoned in the county jail for the period of six months, "is unreasonably severe." In short, the irresistible implication from the judge's opinion is that the petitioner was treated outrageously in his trial before the justice's court, and that his trial, conviction, and the sentence thereupon imposed would constitute a more appropriate chapter in the history of the judicial infamies of Lord Chief Justice Jeffries than the record of a trial of a

criminal action in an American court. Yet, in the face of all this, the judge has announced that no reason appears from the record on appeal which would justify any other course by the superior court than the making of an order affirming the judgment—a judgment which, according to his view, is "unreasonably severe," and which, if his criticism of the proceedings leading thereto be justified, cannot be the crystallization of that fair and impartial trial to which, under our system, the meanest individual is entitled, but the offspring of malice and revenge.

It is, indeed, difficult to reconcile the opinion of the judge with the action which he declares his court feels constrained to take in the disposition of the appeal. If the verdict of the jury or the sentence imposed upon petitioner, or both, were brought about in the manner as indicated in his written opinion (and we may assume that his criticisms of the trial of petitioner are justified by his examination of the statement or record on appeal), then it is unquestionably the plain duty of the court (a duty, however, the exercise of which is discretionary in the respondent, court, and which, therefore, this court has no power to control) to grant the petitioner a new trial; or, if, notwithstanding the expressions in the judge's opinion as to the character of the trial, the court is in any doubt as to whether a reversal should be ordered and a retrial of the case had, then, if the judgment is, as he so characterizes it, "unreasonably severe," to modify said judgment by making the sentence one that will be reasonable and just—a power vested by section 1260 of the Penal Code in the superior court as the court to which alone appeals may be taken from judgments rendered in criminal cases by justices' courts, and, obviously not, as the judge seems to believe, a power exercisable by justices' courts, which courts lose jurisdiction of criminal cases triable therein the very moment that judgment in such cases is pronounced.

We have thus expressed our convictions as to the duty of the respondents in this case, because we have been greatly impressed with the startling views expressed by the judge with regard to the character of the trial accorded to the petitioner by the justice's court, and, furthermore, because, if said trial was such as it is declared to have been by the judge of the superior court, an appeal to which is the only remedy afforded a citizen convicted of a crime triable in justices' courts, it would be a blot upon the judicial annals of this state, or of any other civilized community where such a trial might take place, to permit its result to remain undisturbed, when there is vested in the appellate court ample power to set it aside, and so give the petitioner an opportunity to be tried according to due process of law. It must be understood, we may repeat, that the foregoing suggestions are ventured upon the assump-

tion that the judge's characterization of the trial and sentence of the petitioner is justified by the record on appeal, which, in this proceeding, we are not at liberty to review, except in so far as it or any portion thereof might affect the question of the jurisdiction of respondents.

In accordance with the views herein expressed, the demurrer to the petition will be and it is hereby sustained, and the alternative writ of prohibition discharged.

We concur: **CHIPMAN, P. J.; BURNETT, J.**

16 Cal. App. 687

C. GANAHL LUMBER CO. et al. v. WEINSVEIG.

PEALER v. SAME. (Civ. 978.)

(District Court of Appeal, Second District, California. July 27, 1911. Rehearing Denied by Supreme Court Sept. 25, 1911.)

1. MECHANICS' LIENS (§ 132*)—RIGHT TO LIEN—COMPLETION OF BUILDING.

Possession taken by the owner, upon abandonment of the work by the contractor, for the purpose of completing a building, is not the occupation or use contemplated by Code Civ. Proc. § 1187, providing that occupation or use of a building by the owner shall be deemed equivalent to a completion thereof for the purpose of filing liens.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 198-201; Dec. Dig. § 132.*]

2. MECHANICS' LIENS (§ 132*)—MATERIALMEN'S LIENS—ABANDONMENT BY ORIGINAL CONTRACTOR—FILING OF CESSATION NOTICE—EFFECT.

Code Civ. Proc. § 1187, requires the owner, within 10 days after completion of a building, or within 40 days after cessation of labor upon any unfinished building, to file a notice stating the date the building was completed, or, in case of cessation of labor thereon for 30 days, the actual date of such cessation, and also requires every lien claimant, except the original contractor, at any time after the completion of the building and within 30 days after the filing of the notice of completion or cessation by the owner, to file for record a claim containing a statement of his demand, etc. *Held* that, where the owner took possession of the building four or five days after the work was abandoned by the original contractor, merely for the purpose of completing the abandoned work and not to occupy and use it, the owner could not, by filing a notice of cessation after the abandonment, deprive claimants of their right to liens for materials furnished, notices of which were properly recorded within the time allowed after completion of the building.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 132.*]

3. APPEAL AND ERROR (§ 1175*)—DISPOSITION—RENDITION—NECESSITY OF OTHER FINDINGS.

Upon refusal of a judgment denying materialmen's liens because the evidence did not sustain a finding that the owner took possession of the building as completed when the work was abandoned by the original contractor, the appellate court cannot adjudicate a lien to such materialmen; a retrial being necessary to per-

mit findings on the question of the date of completion.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1175.*]

Appeal from Superior Court, Los Angeles County; **W. R. Hervey, Judge.**

Consolidated actions by **C. Ganahl Lumber Company** and others and by **O. F. Pealer** against **M. Weinsveig** to enforce materialmen's liens. From a judgment denying a lien, plaintiffs named appeal. *Reversed.*

G. C. De Garmo and **Wm. T. Blakely**, for appellants. **J. L. Murphey**, **A. M. Norton**, **Percy R. Wilson**, **J. W. Ballard**, **Lloyd W. Moultrie**, and **John H. Foley**, for respondent.

JAMES, J. Seven actions brought in the superior court to enforce liens alleged to be then existing in favor of the several plaintiffs against the property of defendant **Weinsveig** were consolidated, and trial was had in the consolidated action. The trial court determined that several of the lien claimants were entitled to have liens enforced against the property of said defendant, and a large sum of money which was deposited in court by defendant **Weinsveig**, and which represented the balance due to **Reeve**, the contractor, was ordered distributed among the successful plaintiffs. The appellants here, three in number, were not allowed to participate in the distribution of this fund, and the court determined that they were not entitled to enforce liens, but that they were entitled to judgment against the contractor only, for the amounts of their several claims. The appeal is from the judgment. So much of the evidence as was thought sufficient to illustrate the errors assigned by appellants is presented in the form of a bill of exceptions.

[1] By the findings of the court, it is shown that a contract was entered into between defendant **Reeve**, as contractor, and defendant **Weinsveig**, as owner, for the erection of a three-story frame building on the property owned by said **Weinsveig**; that this contract and the specifications for the doing of the work were duly recorded in the office of the county recorder, and the contractor proceeded with the erection of the building until December 4, 1907, when he gave notice to the owner that he would not proceed further with his contract and abandoned the same; that the building was not then completed, and that after the 4th day of December, 1907, said **Reeve**, the contractor, did no work nor caused any to be done upon the building; and that he furnished no further material for use upon the same. The court further finds that on the 10th day of January, 1908, the owner filed in the office of the county recorder a notice in writing, stating that the work on the contract had ceased on the 4th day of December, 1907,

and that the contractor had abandoned his contract. There is a further finding that, on December 10, 1907, defendant Weinsveig, the owner, took possession of the building and occupied the same, and that he ever since has occupied and used the building. It is found that the allegations of the complaints of the several appellants with respect to the amounts of their claims are correct, and it is found further that notices of lien were filed for record on behalf of the appellants Ganahl Lumber Company and Frick-Fleming Hardware Company on the 2d day of March, 1908, and that a notice of lien on the part of appellant O. F. Pealer was filed on the 20th day of March, 1908. These notices of lien were in due and regular form. The only findings made by the trial court which are attacked by appellants are those numbered 7, 8, 10, 10½, and 12, and it is contended that these findings are not supported by the evidence. No finding was made by the trial court showing when the building was completed. An issue is made by the pleadings, as between the appellants Ganahl Lumber Company and Frick-Fleming Hardware Company and defendant Weinsveig, as to the date upon which the building was completed; but that issue was left undetermined by the court. As between appellant Pealer and defendant Weinsveig, it was alleged by Pealer and admitted by Weinsveig that the building was completed on or about the 7th day of March, 1908, and, further, that notice of completion was recorded by Weinsveig as owner on the 10th day of March, 1908. The notice of lien of appellant Pealer was, as found by the court, filed on March 20, 1908. From the findings it cannot be ascertained as to whether or not the building was ever completed after Reeve abandoned his contract on the 4th of December, 1907. It is said in the briefs of counsel that the trial court determined that appellants here were entitled to no lien because of their failure to record a notice within 30 days after defendant Weinsveig had recorded, on January 10, 1908, a notice stating that work had, on the 4th day of December, 1907, ceased upon the building. If finding 10½, which recites that "on December 10, 1907, the defendant Weinsveig took possession of said building and occupied the same, and ever since said December 10, 1907, has occupied and used said building," was intended, and we think that it bears that interpretation, to determine the date of the completion of the building, then it is a finding material to the issues. There is no evidence in the record, however, tending to support it; on the contrary, the evidence shows that Weinsveig took possession of the building only for the purpose of prosecuting the work as designed to be done under the contract with Reeve. He testified as follows: "There was no stoppage (of the work) for 30 days at any time from the time

we started on the premises until I accepted the building. There was only about six days. We started work immediately after it was turned over to us. We started in between five or six days after." It is very evident that the finding of the court refers to the date upon which Weinsveig assumed charge of the work upon the building, but the evidence does not sustain that portion of the finding which recites that the owner, from the 10th day of December, 1907, occupied and used the building. The concluding portion of section 1187, Code of Civil Procedure, provides that occupation or use of a building by the owner shall be deemed equivalent to a completion thereof; but the occupation and use intended to be described in that section is certainly not the occupation such as would be created by the owner assuming to proceed with the work of constructing an unfinished building, where the contractor had abandoned his contract. There is no evidence shown to the effect that there was any cessation of labor upon the structure for a period of 30 days; the only cessation shown being that which extended over three or four days. There was no such cessation of work, therefore, as would, under the provisions of section 1187, just cited, start the time running for the filing of notices of lien for work done or materials furnished prior to the date of abandonment of the contract by the contractor.

[2] The case of *Robison v. Mitchel et al.*, 114 Pac. 984, is determinative of the proposition that in a case where the facts are as here shown the owner cannot, by the filing of a notice of cessation of labor after abandonment by the contractor of his contract, deprive lien claimants of their right to enforce their liens, notices of which were properly recorded within the time allowed by law after completion of the building. The court in the case cited has given very full consideration to the matter adverted to, and we think that the application of that decision to this case fully settles the point suggested. If the building was completed on the 1st day of March, as alleged by the plaintiffs Ganahl Lumber Company and Frick-Fleming Hardware Company, then the notices of lien filed by these parties on the 2d day of March, 1908, were filed in time. In the Pealer case, under the facts admitted by the pleadings, the date of completion was the 7th day of March, 1908, and the notice of lien recorded on the 20th day of March was filed within 30 days after the building was completed, and in time. As we have before mentioned, the finding of the court that the building was occupied and used by Weinsveig at and subsequent to the 10th day of December, 1907, finds no support in the evidence shown in the bill of exceptions.

[3] We do not think that the other points urged by appellants call for extended notice or discussion. In our opinion, they are with-

out merit. The contract as made between the contractor and owner appears to be regular and valid, and there was no deviation from any of the terms thereof as to the manner of doing the work, or as to the quantity or kind of materials provided to be furnished and used. We cannot adopt the suggestion of counsel for respondent Weinsveig that upon a reversal of the judgment it will be proper to here fix the rights of appellants and provide that they should participate in the fund deposited for the benefit of the lien claimants in the court below. The evidence does not sustain the findings in the particular we have noticed, and therefore other findings must be made, and this can be done only upon a retrial of the action.

The judgment is reversed.

We concur: ALLEN, P. J.; SHAW, J.

16 Cal. App. 637

SPEAR v. UNITED RAILROADS OF SAN FRANCISCO et al. (two cases).
(Civ. 842, 844.)

(District Court of Appeal, Third District, California. July 24, 1911. Rehearing Denied Aug. 23, 1911. Denied by Supreme Court Sept. 22, 1911.)

1. WITNESSES (§ 268*)—CROSS-EXAMINATION.

Where the conductor of a street railway car testified, in an action against the street railway company for personal injuries to plaintiff from a collision, as to the immediate circumstances surrounding the accident, it is not proper cross-examination to ask him how long the motorman had been on the road, and whether he was being educated to the work of a motorman.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948; Dec. Dig. § 268.*]

2. STREET RAILROADS (§ 113*)—COLLISION—EVIDENCE.

In an action against a street railway company for personal injuries to plaintiff, evidence that the motorman had been but three or four weeks on defendant's road, that it was his first trip on that car, and that he was being educated to the work of a motorman is inadmissible, as relating to the motorman's competency, and not to the issue, which is his negligence at the particular time the injury occurred.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 113.*]

3. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR.

Evidence in an action against a street railway for personal injuries to plaintiff from a collision, that the motorman had been on the road only three or four weeks, that it was his first trip on that car, and that he was being educated to the work of a motorman, if irrelevant, is harmless, in view of other evidence that the motorman had been in the employ of railroads in another state, that he had experience on trolley cars, and that he was employed by the company for three or four months.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.*]

4. EVIDENCE (§ 317*)—HEARSAY—CONVERSATIONS WITH THIRD PERSON.

Testimony of a witness, in an action against a street railroad for injuries to the plaintiff from a collision, that the motorman did not turn off the power, and that witness had told the motorman to shut off his power and stop the car is hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

5. EVIDENCE (§ 473*)—OPINION EVIDENCE—MATTERS OF FACT OR CONCLUSIONS.

The declaration of a witness, in an action for injuries to plaintiff from a collision with a street car, that the motorman did not turn off the power, shown to be a conclusion of the witness from the speed of the car, is not the expression of an opinion on a matter of expert testimony, but is an inference of fact drawn by the witness from other facts, not involving any special skill, and inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2220-2233; Dec. Dig. § 473.*]

6. APPEAL AND ERROR (§ 231*)—OBJECTIONS TO EVIDENCE—GROUNDS OF OBJECTION.

A party objecting to the admission of evidence or a motion to strike out testimony should state the grounds of his objection or motion; otherwise he cannot complain on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1299; Dec. Dig. § 231;* Trial, Cent. Dig. §§ 223-227.]

7. NEGLIGENCE (§§ 119, 124*)—INJURIES TO TRAVELER—EVIDENCE AS TO NEGLIGENCE OF CODEFENDANT.

Where the complaint, in an action against a street railway company and an express company for personal injuries resulting from a collision between a car and an express wagon, alleges negligence against each of the defendants, the express company, which, by declining to deny negligence on the part of the street railway company, in effect avers it, may introduce evidence as to the street railway company's negligence.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. §§ 119, 124.*]

8. STREET RAILROADS (§ 113*)—EVIDENCE—RELEVANCY—EVIDENCE AS TO ANOTHER TRANSACTION.

Testimony of the driver of an express wagon, in an action against the express company and a street railway company for injuries to plaintiff from a collision between his wagon and a car, as to whether he turned out for a car at a certain street, and whether that car gave him any warning, is inadmissible on the issue as to whether the motorman on another car a short time after, at the place of the accident, was chargeable with negligence in failing to give warning, since it is without relevancy to such issue.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 113.*]

9. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS—CURE BY VERDICT.

An instruction, in an action against a street railway company and an express company for personal injuries from a collision between a car and an express wagon, that, if the driver of the express wagon was negligent in driving too near the track, but that, if the motorman was aware of the dangerous situation of the express wagon, and had a clear opportunity, by reasonable care, to have avoided the collision, but failed to do so, and plaintiff's injuries were the direct consequence of such failure, verdict should be against the street railway and in favor of the express company, if erroneous, is not

prejudicial, in view of a verdict against both defendants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4230; Dec. Dig. § 1068.*]

10. STREET RAILROADS (§ 118*)—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

Where it appeared that the plaintiff, while driving a team on the north track, was injured by a collision on the south track, whereby the horses of an express team became frightened and ran into his team, and that the road in front of plaintiff was clear, and that he saw the car coming from the end of the block and might have gotten his team out of the way, and saw it in time to shout to the driver of the express wagon, and to pull his team to one side, the refusal of an instruction as to plaintiff's contributory negligence is error.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 268; Dec. Dig. § 118.*]

11. TRIAL (§ 217*)—INSTRUCTION AS TO DUTY OF JURY—CAUTION AS TO FAIRNESS.

The refusal of the trial court, in an action against two corporations for personal injuries, to instruct against the undue influence of sympathy, and an exhortation to regard the law with equal favor towards a corporation and an individual, is not prejudicially erroneous, since the trial judge has a large discretion, and is not required to go beyond the essential legal principles involved in the action.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 483, 485; Dec. Dig. § 217.*]

12. TRIAL (§ 260*)—REQUESTS—INSTRUCTIONS—ALREADY GIVEN.

A requested instruction covered by an instruction already given is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

13. STREET RAILROADS (§ 118*)—ACTION FOR INJURIES—INSTRUCTIONS—RINGING BELL.

In an action against an express company and a street railroad company for personal injuries resulting from a collision between a car and an express wagon, where it might be contended from the evidence that the failure to ring the bell was not negligence, the refusal of an instruction, requested by the street railway company, that it was not the duty of a motorman to ring his bell, except to give the usual signal for starting, and except where his car is about to cross an intersecting street, and that there was no duty to ring his bell midway in the block, and that failure to do so did not of itself constitute negligence, is error.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 258-267; Dec. Dig. § 118.*]

14. TRIAL (§ 203*)—INSTRUCTIONS—REQUESTS—ISSUES OR THEORIES OF CASE.

In preparing instructions, each party may assume any reasonable hypothesis in relation to the facts, and ask the court to declare the law as applicable to it; and it is error to refuse, merely because the case supposed does not include some other hypothesis equally rational.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477-479; Dec. Dig. § 203.*]

15. TRIAL (§ 296*)—NEGLIGENCE—INSTRUCTIONS—CURE.

In an action against a street railway company and an express company for personal injuries resulting from a collision between a car and an express wagon, the danger of a misapplication of an instruction, asked by the railway that it was not the duty of a motorman to ring his bell, except at starting, and when about to cross an intersecting street, and that there was no duty to ring the bell midway in the block, and failure to do so did not constitute negligence, is avoided by an instruction, given

at the request of the express company, that it is the duty of the motorman to look ahead for any vehicles which may be on or dangerously near the track, and, if he sees such vehicle ahead, to give warning, slow down, and put his car under control, in order to avoid a collision.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-718; Dec. Dig. § 296.*]

16. TRIAL (§ 210*)—INSTRUCTIONS—PROVINCE OF COURT AND JURY—CREDIBILITY OF WITNESS.

A charge that, where any witness has willfully sworn falsely as to any material matter, it is the duty of the jury to distrust his entire testimony may be properly given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 490-494, 501; Dec. Dig. § 210.*]

17. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS COVERED BY THOSE GIVEN.

Where requested instructions have been substantially covered by instructions given, their refusal is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

18. TRIAL (§§ 358, 359*)—FINDINGS—CONSTRUCTION.

Though there be apparent inconsistency between some of the special findings and the general verdict, yet if, as a whole, such inconsistency is not necessarily to be implied, the verdict must stand; and, if findings are open to double construction, that construction will be adopted which upholds the general verdict; and, though the general verdict should be set aside, if a special finding is absolutely inconsistent with it, inconsistency of special findings with one another would not necessarily require that a general verdict be set aside.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 856-860; Dec. Dig. §§ 358, 359.*]

19. STREET RAILROADS (§ 119*)—FINDINGS OF FACT—INCONSISTENCY.

In an action against an express company and a street railroad company for injuries to plaintiff, who was driving on one of two double tracks, and was injured by the horses of an express wagon becoming frightened and running into his team after the wagon was struck by a car on the other track, the inconsistency between a finding that the express wagon would not have been struck had it not turned to cross the other track, and that the track was clear of obstruction, and a finding as to what the motorman did or did not do, or could have done, after seeing the dangerous position of the wagon, in that, if the wagon was in a dangerous position, the track could not have been clear of obstruction, does not require that a verdict against the street railway company be set aside.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 119.*]

20. TRIAL (§ 366*)—SPECIAL INTERROGATORIES—OBJECTION AND AMENDMENT.

Objection to the form of a special interrogatory should be made at the time the issues are submitted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 875-878; Dec. Dig. § 366.*]

21. TRIAL (§ 352*)—INTERROGATORIES—ASSUMING FACTS.

A special interrogatory, submitted in an action against a street railway company and an express company for personal injuries resulting from a collision between a car and an express wagon, as to what the motorman did or did not or could have done after seeing the "dangerous position of the wagon," while assuming the dangerous position of the wagon, is not prejudi-

cial, in that the assumption was one which no one could dispute.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 840-845; Dec. Dig. § 352.*]

22. APPEAL AND ERROR (§ 1070*)—HARMLESS ERROR—SPECIAL INTERROGATORIES—REQUESTS FOR SPECIAL FINDINGS.

A street railway company, defendant in an action for personal injuries, caused by the collision of its car with the wagon of an express company, also made party defendant, cannot complain that special issues as to its negligence were submitted to the jury at the instance of the express company, rather than at the request of the plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1070.*]

23. DAMAGES (§ 185*)—EVIDENCE—EXTENT OF INJURY.

Evidence, in an action for personal injuries, held sufficient to show that the plaintiff's loss of voice was caused by injuries received.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 185.*]

24. APPEAL AND ERROR (§ 981*)—NEW TRIAL (§ 99*)—DISCRETION OF LOWER COURT—NEWLY DISCOVERED EVIDENCE.

The ruling of the lower court upon the motion for a new trial for newly discovered evidence is largely left to the discretion of the trial judge, and his decision will not be disturbed, except in case of manifest abuse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3876; Dec. Dig. § 981; *New Trial, Cent. Dig. §§ 201, 207; Dec. Dig. § 99.*]

25. NEW TRIAL (§ 108*)—NEWLY DISCOVERED EVIDENCE—MATERIALITY.

A street railway company, moving for a new trial for newly discovered evidence after verdict against it, in an action for personal injuries, caused by a collision of its car with the wagon of an express company, also made party defendant, showed that the filing of the complaint was the first information that it had of the accident, and that, owing to the destruction of its accident records by fire, the name of the motorman was not learned until 16 days before the trial, and he was not located until after the trial, although every effort had been made to do so, and the facts recited in the motorman's affidavit entirely negatived any implication of negligence on the part of the railway company. Held that such evidence might affect the result, and a new trial should have been granted.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 226, 227; Dec. Dig. § 108.*]

26. NEGLIGENCE (§ 15*)—CONCURRENT NEGLIGENCE—JOINT LIABILITY.

Where the joint negligence of two or more persons results in injury to another, and the negligence of each of such persons is a concurring proximate cause of such injury, then each is liable in damages for the injuries so caused by the joint acts of all, irrespective of whether one was more or less negligent than the others, or that his negligence preceded or followed the negligence of the others.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 18; Dec. Dig. § 15.*]

27. NEGLIGENCE (§ 83*)—CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE.

Where it is shown that two parties have contributed to an injury to a third, then, notwithstanding the act of one may have been wanton and reckless, and that of the other simply manifesting a want of ordinary care, the doctrine of the last clear chance will not operate in favor of either to relieve him of liability

for injuries to the third who was not himself chargeable with contributory negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115; Dec. Dig. § 83.*]

28. APPEAL AND ERROR (§ 930*)—PRESUMPTION—VERDICT.

The complaint, in an action for personal injuries, brought against a street railway company and an express company, alleged that the driver of the express company's wagon was negligent in attempting to cross the street railway track without ascertaining whether a car was in proximity to the wagon, and the jury so found, and also found that the express company's wagon would not have been struck by the car, if it had gone in a straight line, without turning out for the plaintiff; and further found that the motorman saw the dangerous situation of the wagon in time to have avoided a collision, but that he did not slow down; but no specific finding was made as to whether the negligence of the driver of the express wagon ended when he turned toward or upon the track. Held that, in the absence of a special finding as to when the negligence of the express driver ended, it would be assumed, in support of a general verdict for plaintiff, that the driver, after turning upon the track, in the exercise of ordinary care, could have turned off again before the collision, and thus have avoided the injury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755-3761; Dec. Dig. § 930.*]

29. APPEAL AND ERROR (§ 930*)—FINDINGS—CONCLUSIVENESS.

On appeal from a general verdict for plaintiff, the findings of the jury will be considered in the light most favorable to the plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755-3761; Dec. Dig. § 930.*]

30. NEGLIGENCE (§ 83*)—CONTRIBUTORY NEGLIGENCE—INJURY AVOIDABLE.

The negligence of an injured person ceases to be the proximate cause of his injury when another has opportunity to prevent it, and, with knowledge of his exposed situation, negligently refuses to do so.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115; Dec. Dig. § 83.*]

31. STREET RAILROADS (§ 118*)—ACTION FOR INJURIES—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

An instruction that it is the duty of any person traveling upon a street railroad track, or in such close proximity as to be in danger of being struck by an approaching car, to use ordinary care to ascertain whether a car is approaching, and to get out of its way, is properly given, since the term "ordinary care" is implied, in defining the duty to get out of the car's way.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 118.*]

32. STREET RAILROADS (§ 98*)—CONTRIBUTORY NEGLIGENCE—CROSSING TRACKS.

One going upon a street railroad crossing in a city, where a collision is likely to produce serious injury, without looking in both directions along the street to ascertain whether any cars are approaching, and, if so, their rate of speed and distance from the crossing, would not be in the exercise of that reasonable care which requires the exercise of vigilance proportioned to the danger encountered.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 204-209; Dec. Dig. § 98.*]

33. STREET RAILROADS (§ 117*)—CONTRIBUTORY NEGLIGENCE—APPROACHING CARS.

It is not negligence per se for a person to attempt to cross a street railway when a car is approaching.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

34. STREET RAILROADS (§ 99*)—DRIVERS OF VEHICLES — ASSUMING MOTORMAN'S PERFORMANCE OF DUTY.

A traveler has the right to assume, until his senses, exercised with reasonable diligence, inform him to the contrary, that the persons operating street cars will use ordinary care, give the usual signals, and keep the usual lookout ahead; but where the driver of an express wagon negligently goes upon a street car track in front of an approaching car a reliance upon the motorman's care to avoid collision is no defense to an action by a third person, who was not at fault, for injuries resulting from a collision between the car and the wagon.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 209-216; Dec. Dig. § 99.*]

35. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS.

Where a personal injury case is submitted to the jury on erroneous instructions, but there was no evidence which would have sustained a finding in defendant's favor under the view of the law most advantageous to him, the abstract error furnishes no ground for reversing a verdict against the defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4230; Dec. Dig. § 1068.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Robert Francis Spear, in which, after his death. Mary J. Spear, executrix, was substituted as plaintiff, against the United Railroads of San Francisco and Wells Fargo & Co. Judgment for plaintiff against both defendants, with appeals on separate records by the United Railroads of San Francisco and Wells Fargo & Co. Judgment against the United Railroads of San Francisco reversed, and judgment against Wells Fargo & Company affirmed.

Pillsbury, Madison & Sutro, for appellant Wells Fargo & Co. Wm. M. Cannon, A. A. Moore, and Stanley Moore, for appellant United Railroads of San Francisco. Ira S. Lillick, for respondent.

BURNETT, J. The action was brought by Robert Francis Spear to recover damages for personal injuries sustained by him as the result of a collision between an east-bound car of said railroad and a wagon of Wells Fargo & Co. going in the same direction, the horses thereby becoming frightened and crashing into the wagon which said Spear was driving in an opposite direction, throwing him to the ground and severely injuring him. A general verdict against both defendants was rendered by a jury. There were also findings upon certain special issues, which were submitted at the request of the defendants. Plaintiff consented to a reduction of \$1,500 from the amount of the

verdict, in accordance with a conditional order of the trial court, on the motion for a new trial, and thereupon said motion was denied. In the meantime said Robert Francis Spear had died, and his executrix was substituted as plaintiff in the cause.

The following may be stated as embracing the material facts of the case: On April 17, 1906, the said Robert Francis Spear was driving a regular mill wagon on the north side of Bryant street, in San Francisco, in a westerly direction towards Oak Grove avenue, which is a short street midway between Fifth and Sixth streets. The United Railroads owns and operates a double-track line of electric cars on Bryant street, and the south wheels of Spear's wagon were in the center of the two rails of the north track. At the same time, Thomas McCourtney, an employé of Wells Fargo & Co., was driving a second size rack wagon, which is a wagon with slats on top, down Bryant street from Sixth street in an easterly direction. The south wheels of his wagon were between the north rail of the south track and the south rail of the north track, and the north wheels were between the two rails of the north track. The position of the wagon was such that it would not have been struck by a car passing it on the south track. Without either looking or listening for an approaching car, the driver of Wells Fargo & Co.'s wagon changed his course by starting to drive towards and upon the south track as a car was approaching thereon behind said wagon. The track was clear of obstructions until the express wagon changed its course. About the same time that the driver turned towards and upon said south track, the collision occurred between his wagon and the car, causing the injury as aforesaid. Each defendant has appealed on a separate record from the judgment and the order denying its motion for a new trial, but we deem it advisable to consider in one opinion, the appeals of both defendants. Each defendant seeks to exculpate itself and inculpate the other. In fact, the trial seems largely to have been a contest between the two defendants as to which was liable for the injury; it being conceded by each that a sufficient showing was made against the other to entitle plaintiff to recover.

First, the Appeal of the United Railroads.

Herein it is contended that the court erred: (1) In admitting and in refusing to strike out certain evidence; (2) in giving the jury certain instructions; (3) in refusing certain instructions requested by appellant; (4) in receiving the general verdict in view of the fact that the special findings made by the jury were inconsistent with said general verdict; (5) in submitting certain special issues, designated "c," "d," and "f," to the jury at the request of defendant Wells Fargo

& Co.; and (6) in refusing appellant's motion for a new trial. Concerning these, we express our views in the order in which the points are presented.

Oscar Bargewell, the conductor on the car, was called as a witness by appellant, and in his direct examination he testified as to his recollection of the immediate circumstances surrounding the accident. On cross-examination, after stating that Herman was the name of the motorman, he was asked: "How long had he been on the road?" The question was objected to on the general ground, and also that it was not cross-examination and outside of the issues. The objection was overruled, and the answer received, "About three or four weeks." Over like objections he was permitted to answer quite a number of questions along the same line, and finally he was asked this question: "But as to where he was broken in, or how many days he was broken in, or what runs he made, you only know that from hearsay, don't you?" and he answered: "That is all." Appellant then moved to strike out this testimony "as to that matter, except what occurred when he appeared in the car house." The motion was denied; the court saying: "I cannot strike out the testimony about breaking the man into the duties of the position. What do you want to strike out?" Counsel replied: "His testimony as to the number of runs he had made and the time occupied in breaking him in." The motion was again denied, whereupon counsel for appellant said, "I want to strike out that there was one week of instruction and two weeks of experience," and as to this the motion was thereupon granted.

[1-3] As admitted by appellant, there was thereby much of the objectionable testimony removed from the consideration of the jury, but the following questions and answers remained: "Q. How long had he been on the road? A. About three or four weeks. Q. It was his first trip on that car? A. Yes, sir. Q. During the three weeks that he had worked for the company, was he not being educated to the work of a motorman? A. Yes, sir." It is indisputable that said questions were not within the limits of proper cross-examination, and they should not have been allowed for the additional reason that they concerned the experience and competency of the motorman. The purpose of the interrogatories was, clearly, to impress the jury with the fact of the inexperience and incompetency of the motorman in order that they might more readily reach the conclusion that the accident was due to his negligence. The evidence would naturally have weight with the jury. The effect of the testimony would be the same as though the witness had been allowed to declare that the motorman was without experience and training in the duties of his position. Such evidence is held to have no relevant bearing up-

on the issue, which is, Was the motorman negligent at the particular time of the occurrence in controversy? The rule is stated in section 65 of Wigmore on Evidence as follows: "A few courts have shown an inclination to admit, exceptionally, the character of a person charged with a negligent act (contributory negligence of a plaintiff) as throwing light on the probability of his having acted carelessly on the occasion in question, provided that the other evidence leaves the matter in great doubt, or that the other evidence is purely circumstantial, or (as sometimes put) that there are no eyewitnesses testifying. The mainstay of this exceptional doctrine seems to have been the obiter suggestion in *Tenney v. Tuttle*, 1 Allen [Mass.] 185. Such evidence is no doubt likely to be of some probative value in such cases, and under the above limitations is hardly contrary to the ordinary policy of avoiding confusion of issues. As a matter of law, however, the doctrine is maintained in a few jurisdictions only, and has been expressly repudiated in many." The exceptional doctrine has been repudiated in this state. *Towle v. Pacific Improvement Co.*, 98 Cal. 342, 33 Pac. 207. In the *Towle* Case the judgment was reversed because the trial court permitted the defendant to introduce evidence that the driver, who was in charge of a team, was a good, first-class driver, careful in handling horses, and that during the four years he had been in the employ of defendant he had never been guilty of any mismanagement or carelessness in the care or conduct of the team. As authority for the decision, the court relied upon the rule as stated in section 407 of *Deering on Negligence*, as follows: "Whether the act or omission of the defendant is actionable negligence is to be determined by the character of the act or omission, and not by the defendants' character for care and caution. Evidence that the defendant is a careful, prudent, and cautious man, is inadmissible to negative his want of ordinary care. Upon the question of the negligence of the engineer at the time of collision of two trains, evidence of the incapacity of the engineer or of his being subject to fits is immaterial." However, it is stated by the Supreme Court that such evidence is admissible in cases where the utmost care is required, and when the defendant is held liable for injuries resulting from the slightest negligence. It is difficult to see the distinction in principle. If evidence of character or competency is admissible to show the "utmost" care or slight degree of negligence, it would seem to be relevant to the issue of a less degree of care or of greater negligence. The difference is as to the quantum of proof required, and not as to the materiality or relevancy of the evidence. But, in view of the other evidence in the case it does not seem at all probable that the jury were influenced by this objectionable testimony. It appears without contradiction that the motorman was

at one time in the employ of railroads in Colorado, that he had experience as a motorman on trolley cars in Philadelphia in 1890, when they were first put in use in that city, and that he was constantly employed by appellant from December, 1905, to the time of the accident. In face of this showing, it would be rather a reflection upon the fairness or intelligence of the jury to hold that the said testimony of the conductor was prejudicially erroneous.

[4, 5] Henry Coffman, a witness called by Wells Fargo & Co., was near the scene of the accident, and, after stating that the car struck the wagon the second time, he was asked: "Whereabouts?" His answer was: "It hit it along about the front wheel, and that knocked Wells Fargo's driver off his seat; and it was shoving the wagon along, and then I jumped out in the street and told the motorman to shut off his power and stop the car." Appellant moved "to strike out what the witness told the motorman." The motion was denied. The witness afterwards stated that "the power was not off then." When asked upon cross-examination: "Then how could you say that the motorman did not turn off the power?" the witness answered: "I do not know, unless it was the rapid rate of speed that he was going at." Being further asked: "So it is a conclusion on your part, is it, from the rapid rate of speed he was going?" he answered: "Yes, sir." The motion was then made "to strike out all of the testimony of the witness showing that the motorman did not turn off the power." The court, after asking this question, "Could that speed have been maintained for that distance if no power was on?" and eliciting the answer, "No, sir," denied the motion. It is clear that what the witness told the motorman was not responsive to the question, and it was manifestly hearsay. The declaration of the witness that the motorman had not turned off the power was undoubtedly not the expression of an opinion on a matter of expert testimony, but it constituted the inference of a fact drawn by the witness from other facts, not involving any special skill or training "in any science, art, or trade," but within the common observation of all men. The proposition is so simple as to need probably the citation of no authority. However, appellant has furnished us two cases to which we may briefly refer. In *Alabama, etc., Ry. Co. v. Burgess*, 114 Ala. 587, 22 South. 169, in a case involving a railroad accident, it was held that the lower court properly excluded the statement of the witness Cullen, who was a passenger on the train, "that he knew that the brake was put on, because of the sudden stopping of the train after the whistle was blown"; the court stating that this was the mere conclusion of the witness from facts to which he had already testified. The question is set forth with fullness and precision in *Sapenfield v. Main St., etc., Ry.*, 91 Cal. 48, 27

Pac. 590. Therein it is declared that the "general rule is that witnesses must testify to facts, and not to opinions, and that whenever the question to be determined is the result of the common experience of all men of ordinary education, or is the inference from particular facts, the inference is to be drawn by the jury, and not by the witness." It is undoubtedly true that the particular fact to which the foregoing relates was of prime importance to appellant. The jury found that the motorman could have averted the collision, had he used all the means at his command, after discovering the dangerous situation of the express wagon. This special finding was probably the feature of the case that led to the general verdict against the railroad, and the said finding in turn may have been based upon, or at least influenced by, the said testimony as to the failure of the motorman to shut off the power before the collision.

[6] But it is a just rule of practice to require a party making an objection to a question or moving to strike out testimony to state the grounds of his objection or of his motion. This is only fair to the trial judge, and it imposes no hardship upon the complaining party. Without the assistance of counsel, it would be unreasonable to expect the most wise and prudent judge to avoid error in the stress of a hotly contested trial involving complicated questions of law and fact. There was no compliance with this requirement in the instance under review, and therefore we think appellant should not now be heard to complain. In *Howland v. Oakland C. St. Ry. Co.*, 110 Cal. 513, 42 Pac. 983, the general principle is discussed as applied to the objection made to the admissibility of evidence. Therein it is said: "If, however, we were to assume that the question is open to the criticism now urged, we do not think the objection could avail defendant here, for the reason, as claimed by respondent, that it was not taken in the court below. * * * Appellant should have pointed out the particular defect which rendered the question either incompetent, irrelevant, or immaterial, or wherein it was not a proper hypothetical question, that the objection could have been intelligently ruled upon, and, if necessary or proper, obviated. * * * This is not laying down a merely technical rule. It is one which has its foundation in the proper consideration of what is due to the court and adverse counsel in the trial of a case." Of course, the court may sustain an objection or grant a motion upon any sufficient ground, although not specified by the party in whose favor the ruling is made, but it is not required to do so. In *Clark v. Huber*, 25 Cal. 599, the principle is stated as follows: "The error alleged here is the exclusion of the defendant's testimony. The respondent is at liberty to suggest any ground that he may choose, to show that the ruling is right, whether advanced in the discussions below

or not. If the testimony had been admitted, and Clark had appealed, he would have been required to confine himself to objections specifically taken at the trial and stated in the record. The distinction is between the case of a party seeking to reverse a judgment and that of a party resisting the attempt."

[7] We think appellant is wrong in the contention that "the court erred in permitting the witnesses of the defendant Wells Fargo & Co. to testify as to negligence on the part of the defendant United Railroads of San Francisco." The basis of the claim is two-fold—first, that there is no allegation in the answer of the defendant Wells Fargo & Co. as to negligence on the part of its codefendant, the United Railroads, and, secondly, that, "where two defendants are charged as being concurrently negligent, the negligence of one defendant is no defense to the other." 29 Cyc. 487; *Shearman & Redfield on Negligence*, § 31. It is true that in the answer of Wells Fargo & Co. there is no affirmative allegation of the negligence of the railroad, but in said answer there is no denial of the averments in the complaint as to the United Railroads' negligence. It should not be held necessary for the company to repeat the allegation which has been made by the plaintiff and which, by declining to deny, Wells Fargo & Co. has in effect averred. Manifestly, concurrent negligence is inconsistent with sole and exclusive negligence. The allegation of the former, however, does not preclude one of the parties, who has denied any negligence on his own part, from introducing evidence having a tendency to show that the accident was due solely to the negligence of the other party. That, no doubt, was the purpose of the testimony of which complaint is made. Without reviewing it, we may say, however, that it rather supports the theory of concurrent negligence; and therefore the latter objection of appellant is without merit. But, regardless of these suggestions, the evidence was within the issues made by the pleadings; it was directly in support of plaintiff's allegations against appellant; and it would be a harsh rule that would demand a reversal of a just judgment in favor of plaintiff for the sole reason that legal evidence was offered by a codefendant, rather than by plaintiff himself.

[8] Thomas McCourtney, the said driver for the express company, on redirect examination, was interrogated as follows: "Q. You turned out for a car between Seventh and Eighth streets. Did that car give you warning?" The court overruled an objection to the question that it was "incompetent, irrelevant, and immaterial, and not connected with this transaction." The objection, we think, should have been sustained. What was done by another motorman, on another car, at another time, would have no relevancy to the issue whether the motorman on the occasion in controversy here was chargeable

with negligence. Respondent does not seriously defend the ruling, but she invokes the doctrine that the admission of irrelevant evidence is not ground for reversal, when it appears to be of slight consequence. *Hudson v. Hudson*, 129 Cal. 141, 61 Pac. 773; *People v. Wynn*, 133 Cal. 72, 65 Pac. 126. There is much force, however, in the suggestion of appellant that "the error was prejudicial, as the jury may have inferred from it that the bell was not rung by the motorman of the car which collided with the wagon, because he had heard it when it had been rung on the other occasion. The evidence on this point was conflicting, and the jury, doubtful as to its determination. The jury, after being directed to retire again, returned a finding to special issue 6, to the effect that the bell on the car was not rung prior to the collision with the express wagon." It may be that the judgment should not be reversed for this ruling alone; but we cannot resist the conclusion that the error was a serious one, as it is impossible to determine what may have been its effect upon the minds of the jurors.

[9] Appellant complains of this instruction: "If you should believe from the evidence that the driver of Wells Fargo & Co. was guilty of negligence in driving too near, or upon, the track of the railroad company, but you should also believe from the evidence that the motorman of the car of the railroad company was aware of the dangerous situation of the express wagon, and that the motorman had a clear opportunity, by the exercise of proper care, to have avoided the collision, but negligently failed to do so, and as a direct consequence of such negligence plaintiff was injured, then your verdict, if in favor of plaintiff, should be against the United Railroads of San Francisco alone and in favor of Wells Fargo & Co." The instruction seeks to apply what is familiarly known as the "last clear chance" doctrine, and is admittedly a correct statement of that rule. It is contended, however, that it has no application to a case like this, where two parties are charged with separate and concurrent negligence. The discussion of this question may be deferred till we reach the consideration of the special findings of the jury. It is sufficient to say now that the instruction could not possibly have prejudiced appellant. The only objection to the instruction is, not that it fails to state the law correctly as far as appellant's liability is concerned, or that there was no evidence justifying it, but that the hypothesis assumed does not necessarily exonerate Wells Fargo & Co. from actionable negligence. The answer is, of course, that the jury either disregarded the objectionable portion, or else rejected the whole of the instruction as not pertinent to the facts shown by the evidence. This is demonstrated by their action in finding a verdict against Wells Fargo & Co., as well as against appellant. For

like reason we attach no decisive significance to the apparent conflict between this instruction and the direction given by the court in response to an inquisitive juror, as follows: "Q. In case the jurors think from the evidence that both were negligent, but that one was more negligent than the other, how about such a case? The Court: If you should find that the negligence of both parties jointly and concurrently—that is, both together—caused the result, then they would both be liable. If they both assisted by their negligence in producing the result, they would be jointly liable." It is not disputed that the rule is that the jury are bound to accept all the propositions of law as given them by the court for their guidance, and if the instructions on a material point are repugnant and contradictory it is usually impossible for the jury to decide which to follow, and after the verdict it is equally difficult to determine that they were not influenced by the one that was erroneous. *Sappenfield v. Main St. Ry.*, 91 Cal. 48, 27 Pac. 590. But it will not be denied that this is subject to that other rule which has been denominated "the rule of reason." So viewing it, we think appellant has no cause for complaint as to this point. Conceding that, notwithstanding there is no right of contribution between joint tort-feasors, appellant is concerned in having the jury adopt the theory of a joint liability, rather than find a verdict against the railroad alone, still, considering all the instructions together in the light of the verdict actually rendered, we can see no reason for attaching to this point the importance claimed by appellant.

[10] The court refused to give the following instruction requested by appellant: "I instruct you that when the negligence of the injured party contributes to the injuries complained of the law will afford no redress, and if, therefore, you find in this case that the plaintiff was negligent, and such negligence contributed to the injuries complained of, I instruct you that he cannot recover against either of the defendants. In order to avoid injury to himself, the plaintiff was bound to have exercised reasonable care to avoid the same, and he was bound to use such care and diligence as a reasonable and prudent man would have exercised under like circumstances." It is not denied that this is a correct statement of the rule of contributory negligence, and that this defense was pleaded in appellant's answer; but the court's action is sought to be justified on the ground that there was no evidence whatever that plaintiff failed in any respect to exercise reasonable care and diligence. Of course, if there was any substantial evidence from which the jury might have concluded that the plaintiff was negligent, it was error for the court to refuse the instruction. While we are entirely satisfied that it cannot be held, as a matter of law, that plaintiff was guilty of contributory neg-

ligence, and while we may go further and say that the most reasonable view is that he was entirely free from fault, yet we think it must be said that the question is open to candid disputation, and therefore a proper one to submit to the jury. As we have seen, the plaintiff was driving his team up the street on one car track; the express wagon was coming down the street between the two tracks, and as it turned out to pass the plaintiff it was struck by a car from behind. The circumstances shown by the evidence, which seem to point the instruction, are related by appellant as follows: "The plaintiff might have gotten his team out of the way, and thus have avoided the accident. The road in front of him was clear. He saw the car coming from the time it left Sixth street. He saw the express wagon start to cross to the right between 60 and 200 feet away, and said, 'He is going to get it.' He saw the car coming in time to holler to the driver of the express wagon. When he saw Wells Fargo's wagon coming, he pulled to one side. The car hit the wagon 200 feet away from him. He could have turned in between the outside track and the sidewalk. He had passed the junk wagons before he came near Wells Fargo's wagon. He did not think anything was going to happen, and was going along as usual, because he thought he could stop the car quick enough. He did not look for trouble. He tried to get out of the road. The street was clear beyond the junk wagon. The plaintiff did not stop his wagon, nor make any effort to stop it. There is nothing to interfere with the plaintiff going up the north side of the street." It is quite rare that the court should not submit to the jury, under proper instructions, the question of contributory negligence, and we think there was some room here for the application of the doctrine.

[11] We think the refusal of the court to give the proposed instruction containing a caution against the undue influence of sympathy, and an exhortation to regard the law with equal favor towards the corporation and the individual, was not prejudicially erroneous. Such an instruction has been given in many cases, and no one would deny that it embodies a just principle. In *Bachert v. Lehigh Coal, etc., Co.*, 208 Pa. 362, 57 Atl. 765, it is declared: "In the part objected to, the lower judge told the jury that their verdict should be founded in the evidence, and cautioned them not to be influenced by sympathy or prejudice, and in clear and distinct, but emphatic, language, admonished them that a disregard of the instruction might lead to a setting aside of their verdict. * * * It was the right of the judge to give this caution, and in view of the passion and prejudice that grew out of the labor troubles in the anthracite coal regions in 1902, and which existed at the time of the trial, it may be said to have been his duty to charge as he did." But we

cannot assume that any such condition existed in the case at bar, and, granting that it was an average jury of American citizens, we are disinclined to hold that they needed any such direction. Many such ethical and didactic suggestions might be made, without impropriety, to the jury, but a wise discretion as to that must be left to the trial judge, who is not required to go beyond the essential legal principles involved in the action.

[12] The proposed instruction as to the manner in which the testimony of witnesses generally should be viewed was sufficiently covered by instruction No. 2, given at the request of plaintiff.

[13-15] Appellant requested the court to give the following instruction: "It is not the duty of a motorman to ring his bell or gong, except to give the usual signal for starting, and except when his car is about to cross an intersecting street. There was therefore no duty imposed upon the motorman to ring his bell or gong between Oak Grove avenue and Fifth street, and if he failed to do so such failure did not of itself constitute negligence." The request was based upon ordinance No. 1380 of the city and county of San Francisco, providing that, "It is not the duty of a motorman to ring his bell or gong, except to give the usual signal for starting, and except when his car is about to cross an intersecting street." The argument is that, in view of this law, it would be negligence per se for the motorman to fail to ring the bell or gong at starting or at a crossing, but not at any other time, in accordance with the principle announced in *Schmidt v. St. Louis Ry. Co.*, 163 Mo. 645, 63 S. W. 834, wherein it is declared: "There is no statute making it the duty of the gripman to sound the gong or bell at the approach of a street crossing, and there is no law making a failure to do so negligence per se. Such failure becomes negligence only when the circumstances render the ringing of the bell necessary, and, if the circumstances are in dispute, whether the occasion is such as calls for the sounding of the bell, it is a question of fact for the jury." There is no doubt that the instruction related to one of the vital points in the case, and, since it might be plausibly contended from some of the evidence that the failure to ring the bell was not negligence, the instruction, we think, should have been given. The rule is as stated in *People v. Taylor*, 36 Cal. 255, that: "In preparing instructions, each party may assume any reasonable hypothesis in relation to the facts, and ask the court to declare the law as applicable to it, and it is error to refuse, merely because the case supposed does not include some other hypothesis equally rational. * * * Every instruction which correctly declares the law applicable to the case which it supposes, if the case can be rationally inferred from the testimony, should be given." The danger of a

misapplication of said instruction by the jury was avoided by instruction No. 13, given at the request of Wells Fargo & Co., that: "It is the duty of the motorman to look ahead for any vehicles which may be on or dangerously near the track over which his car is passing, and, if he observes such vehicle ahead, to give warning, slow down, and put his car under control, in order to avoid a collision." The two instructions would have fairly presented the law and left it to the jury to determine whether the circumstances were such as to require the ringing of the bell, notwithstanding that the failure to do so is not necessarily proof of negligence.

[16] The court might well have given the requested instruction: "If any witness examined before you has willfully sworn falsely as to any material matter, it is your duty to distrust his entire testimony." *People v. Stevens*, 141 Cal. 492, 75 Pac. 62. But, if a juror believed that any witness had so sworn, such juror would not be like the average man if he did not "distrust his entire testimony," without any direction from the court to that effect.

[17] Certain other instructions, hypothetical in character and covering appellant's theory of the facts, were also requested and refused. It cannot be said that they are inconsistent with every rational inference from the evidence, but we think they were substantially covered by the instructions which were given by the court.

[18] There is no inconsistency, in our opinion, between the special findings and the general verdict. The phraseology of some of the questions submitted to the jury is open to criticism, but we can see therein no prejudicial error. The rule is as stated in *Antoniano v. Southern Pacific Co.*, 9 Cal. App. 731, 100 Pac. 877, that the court should not strain the language of a finding to make out a case of conflict. "The findings should be reconciled if it can reasonably be done, and be so construed *ut res magis valeat quam pereat*—i. e., that the end may be promoted, rather than destroyed." *Clementson on Special Verdicts*, p. 137, says: "Though there be apparent inconsistency between some of the special findings and the general verdict, yet, if, taking the findings as a whole, such inconsistency is not necessarily to be implied, the verdict must stand. Obscurities and apparent inconsistencies are to be given weight in favor of rather than against the general verdict. If the findings are open to double construction, that construction will be adopted which upholds the general verdict. A general verdict upon issues and evidence properly submitted is presumed to have decided every fact or deduction therefrom essential to support it; while a special finding must be limited and controlled by its specific terms." The argument of appellant is addressed largely to the consideration of the inconsistency of the special findings with

one another. Conceding the soundness of the contention, it would not necessarily follow that the general verdict should be set aside. This would ensue if a special finding is absolutely inconsistent and irreconcilable with the general verdict; but this might not be the case, although two special findings were inconsistent with each other, since one or both might be immaterial or concerning a probative matter. We think the most that can be said is that some obscurity has resulted from the special findings.

[19] The principal objection is that the finding of the jury that the wagon would not have been struck if it had not turned, and that the track was clear of obstruction, are inconsistent with "special issues, c, d, and f, as to what the motorman did or did not or could have done after seeing the 'dangerous position' of the wagon, because, if the wagon would not have been struck, and if the track was clear of obstructions, then the position of the wagon could not have been dangerous." The point is that a wagon in a dangerous position is an obstruction. 21 Am. & Eng. Ency. of Law, p. 763. The inconsistency is more apparent than real. Applying the foregoing principles, we must hold that the question, "Did the motorman running the car of the defendant United Railroads see the *dangerous* position of the defendant Wells Fargo & Co.'s wagon in time to have slowed down his car and avoided a collision?" refers to the position of the wagon after the driver had turned to cross the track. It is not disputed that it was then in a dangerous position, and an obstruction to the free passage of the car.

[20, 21] It is also claimed that the foregoing special issue, designated "c," "assumes as a fact that the wagon was in a position which was dangerous, and such that the car could have been slowed down and the collision avoided, had it been seen by the motorman in time." This goes to the form of the interrogatory, and the objection should have been made at the time the issues were submitted. Besides, while it does assume that the wagon was in a dangerous position, it is not prejudicial to assume what no one can dispute. While the question is somewhat complex, it left to the jury to determine whether the motorman actually saw the dangerous position of the wagon, and whether, after seeing it, he could have avoided the collision.

[22] We think it too clear for argument that appellant has no cause for complaint that the said special issues were submitted to the jury at the instance of Wells Fargo & Co., rather than on the request of plaintiff.

[23] We think there is no merit in the contention that a new trial should have been granted for the reason "that the evidence was insufficient to show that the plaintiff's loss of voice was a result of the injuries alleged to have been caused by the defendant

United Railroads." As pointed out by respondent, Dr. Barbat testified that "Mr. Spear contracted bronchitis as a direct result of the accident, and lost his voice as a direct result of the bronchitis," and Dr. Toner testified that "the injuries sustained by the plaintiff resulted in his present loss of voice." And while, as to the negligence of appellant, the case is a close one, we think it cannot be said that there is an entire absence of evidence in any respect to support the verdict.

[24, 25] The ruling of a lower court, it may be observed, upon the motion for a new trial upon the ground of newly discovered evidence is very rarely interfered with by an appellate tribunal. The matter is largely left to the discretion of the trial judge, he being the judge of the value and effect of the evidence; and the rule is not to interfere with his decision, except in case of manifest abuse. It must be admitted, though, that appellant here made an exceptionally strong showing upon this ground, and it is difficult to resist the conclusion that the motion should have been granted. Harry Herman, who was the motorman at the time of the collision, was not present at the trial. In the language of appellant, "There can be no question of the sufficiency of the showing as to why this witness was not produced. All of the accident records of the United Railroads were destroyed in the fire [the great fire of April 18, 1906]. The filing of the complaint was the first information that the defendant United Railroads had of the accident. The names of the conductor and motorman were not learned until 16 days before the trial, and the motorman was not located until after the trial, although every effort had been made to ascertain these facts. The whole of the plaintiff's case, as far as this defendant is concerned, consists of the testimony of various witnesses as to the acts and failure to act of the motorman. The testimony of the motorman as to these facts, although cumulative, is nevertheless of so overwhelming a character, as to render a different result probable, not so much because of the testimony itself, but because it would be the testimony of the actor, and therefore of infinitely greater probative value." Of course, it harmonizes with common observation and experience that "probability of a higher degree of attention and interest gives rise to a presumption of considerable force that a person's recollection of his act and of attendant circumstances is more definite and trustworthy than another person's recollection of it, especially if it was an act done in the performance of a duty, or if the other person's testimony is little more than an expression of opinion or judgment." Moore on Facts, § 783. Ordinarily the court is justified in looking with suspicion upon newly discovered evidence, but this case seems to be out of the ordinary. The facts recited in Herman's affidavit entirely negative any implication of negligence on the part of appellant,

and, while a jury might not give full faith to his testimony, it appears just that appellant should have the privilege of affording them the opportunity to do so.

Wells Fargo & Co.'s Appeal.

The point to which appellant Wells Fargo & Co. devotes most attention, and upon which it seems largely to rely for a reversal, is that the company was entitled to judgment on the special findings. The principle invoked is stated by the Supreme Court of Kansas in *Colwell v. Parker*, 81 Kan. 295, 105 Pac. 524, as follows: "In an action for negligence, where the jury returned a general verdict for the plaintiff, and special findings, including the finding that the defendant was negligent, and another finding that the direct cause of the plaintiff's injuries was the negligence of another, from which it is apparent that the negligence of the defendant was wholly unrelated to the direct, proximate cause of the injury, the defendant is entitled to a judgment on the findings notwithstanding the general verdict." In accordance with this principle, it is the contention of appellant that the special findings returned by the jury here show conclusively "that the negligence of the United Railroads of San Francisco was the sole proximate cause of the collision and of the injuries which resulted therefrom, and that the negligence, if any, of Wells Fargo & Co. was not a proximate cause, sole or concurring, of the collision, but was a prior and remote cause thereof, which did nothing more than furnish the condition or give rise to the occasion by which the collision and the resulting injuries were made possible."

[26] It is admitted, however, that, "where the joint negligence of two or more persons results in injury to another, and the negligence of each of such persons is a concurring proximate cause of such injury, then each is liable in damages for the injuries so caused by the joints acts of all, irrespective of whether one of the defendants was more or less negligent than the others, or that his negligence preceded or followed the negligence of his codefendant." It is claimed, though, that the verdict should be against the railroad alone, in view of the following considerations: The express company's negligence, as alleged in the complaint, consisted in the attempt made by the driver of its wagon "to cross said track without stopping, looking, or ascertaining whether or not a car of defendant United Railroads was in close or other proximity to it." As to this, two questions were submitted to the jury, to each of which the answer was, "No." These are the questions: "Did the driver of the express wagon look or listen for the approach of the car before starting to drive toward or across the tracks on which the car was approaching (if he did start so to do)?" and "Would the wagon of defendant Wells Fargo & Co. have been struck by the car of the

defendant United Railroads of San Francisco if said wagon had kept on going in a straight line, without turning out for plaintiff?" Whereas the acts of negligence of the other defendant, which were covered by the complaint, are seen in the findings of the jury, which, to some extent, we have already noticed, to the effect that the motorman saw the dangerous situation of the wagon in time to have slowed down his car and have avoided the collision, and that he did not slow down or use the means in his power, whereby he could have averted the accident. The argument is therefore made that not only was the negligence of the railroad last in point of time, but that it was the proximate, and consequently the sole, cause of the injury. It amounts substantially to a contention, as already stated, for the application of what has not been inaptly called "the last clear chance" doctrine.

[27] But, strictly considered, this doctrine can be invoked only in favor of the person who is injured. It implies "contributory" negligence on his part, and generally speaking, is operative in those cases where, notwithstanding his want of ordinary care, another wantonly or with knowledge of his danger carelessly or recklessly injures the one who is in jeopardy. Under those circumstances, the one so acting is held to be liable, although the other has carelessly placed himself in a position of danger. The law is just and humane, and will not tolerate the principle that the mere carelessness of one shall excuse or justify the wantonness or criminal recklessness of another, which causes injury. But the case is quite different when the question arises between two parties who are jointly charged with negligence. In such case, it is only necessary to show that both contributed to the injury, notwithstanding the act of one may have been wanton and reckless and that of the other simply manifesting the want of ordinary caution. This question was involved in *Cordiner v. Los Angeles Traction Co.*, 5 Cal. App. 401, 91 Pac. 436, and therein it is said: "Appellant seeks to apply the well-established principle that 'he who last has a clear opportunity of avoiding the accident, by the exercise of proper care to avoid injuring another, must do so.' *Esrey v. Southern Pacific Co.*, 103 Cal. 541 [37 Pac. 500]. This rule is only applicable to cases where the defense is based upon the contributory negligence of plaintiff, due to his want of care in placing himself in a position of danger, and where he may, notwithstanding his negligence, recover from a defendant, who, by the exercise of proper care, could have avoided the injury. We are unable to perceive why this rule should apply to plaintiff, who was in no way chargeable, by imputation or otherwise, with negligence; nor are we referred to any authority which supports the proposition. Indeed, all the authorities recognize the right of recovery against either or both

of the defendants whose concurring acts of negligence united in producing the injury. 1 Shearman and Redfield on Negligence, p. 122; 1 Thompson on Negligence, p. 75; Doeg v. Cook, 126 Cal. 213 [58 Pac. 707, 77 Am. St. Rep. 171]; Tompkins v. Clay St. Ry. Co., 66 Cal. 163 [4 Pac. 1165]; Pastene v. Adams, 49 Cal. 87."

[28] But, aside from the foregoing somewhat technical consideration, it is apparent that appellant's contention should not prevail. As suggested by respondent, the jury made no special finding upon the question as to whether or not the negligence of the driver of the express wagon ended or culminated when he turned toward or upon the track. As there is no special finding upon the question, it must be assumed, in support of the general verdict, that said driver, after turning upon the track, in the exercise of ordinary care, could have turned off again before the collision, and thus have avoided the injury.

[29] Indeed, viewing the findings of the jury and the evidence in the record, as we must, in the light most favorable to respondent, the conclusion is irresistible that appellant's negligence was a proximate, concurring, if not the sole proximate, cause of the injury. It thus appears that said negligence continued till the time of the injury, and had it not been for this negligence the accident would not have happened. In other words, it was an active, continuous, contributing cause, and therefore at least a necessary element of the *proximate* cause of the injury. We are at a loss to understand what element is lacking to render appellant liable. In reference to this point, we agree with the views of Hon. John Hunt, the trial judge, who, in his opinion denying the motion to enter judgment for appellant, said: "Now the injury suffered by plaintiff was not self-inflicted; it resulted either from the negligence of the defendant the express company or from the negligence of the defendant the railroad company, or from the negligence of both. Under such conditions it cannot be that an innocent party injured in consequence of such negligence, is remediless. In this case it is admitted that the car struck the wagon, and that the wagon, in consequence of the impact, struck the plaintiff's wagon, and that the plaintiff was thereby injured. These acts of negligence may be said to have been concurrent and simultaneous in point of time, although neither of those acts, standing alone, would have occasioned the result. If the wagon of the express company had not been driven upon the railroad track, it would not have been struck, and the plaintiff would not have been injured. If the motorman on the car had not been negligent, the collision would not have ensued, and the plaintiff would not have been injured. It was the combination of the negligent acts of the two defendants that occasioned the result; and therefore inquiry is

immaterial into the precise degree or extent of the negligence of each of the parties defendant, or, the relation, in point of time, of such acts of negligence, or whether they were concurrent or successive, independent or joint, or whether one proximately contributed to the result more than the other. The rule of law upon this subject is well expressed in the Slater Case, 64 N. Y. 138, where it was said, although the act of each defendant alone might not have caused the injury, there is no good reason why each should not be liable for the damage caused by the different acts of all. In the Pastene Case, 49 Cal. 87, lumber had been negligently piled by defendants' servants. The driver of a wagon, who was a stranger to the defendants, negligently drove his horse against the lumber pile, causing it to fall and injure the plaintiff. The negligent act of the defendants' servants in that case in piling the lumber, and the negligent act of the driver in colliding with it, were in point of time and relation, separate, and not interdependent, acts, and yet the court held that the negligent act of piling the lumber was, in effect, a concurring cause in producing the result, and the defendants were accordingly held, although, in point of time at least, the negligence of the driver might be claimed to have been the proximate cause of the plaintiff's injury. In the Turntable Case, 91 Cal. 296 [27 Pac. 666, 25 Am. St. Rep. 186], and in other cases, the Pastene Case has been cited as authority. Under the ruling in the Pastene Case, the negligent act of the driver, in driving upon and along the railroad track, continued down to and at the time when the car collided with it, and thus the negligence of the defendants was joint and concurrent, and for the consequences thereof both defendants are responsible. In Thompson on Negligence, § 75, it is said, 'If the concurrent or successive negligence of two persons combined result in an injury to a third person, he may recover of either or both, and neither can interpose the defense that the prior or concurrent negligence of the other contributed to the injury,' and in support of that doctrine the author cites a number of authorities."

In Forsyth v. Los Angeles Ry. Co., 149 Cal. 572, 87 Pac. 26, in an action for damages caused to a passenger on a street car by a collision between the car and a heavy wagon, wherein the contention was made by the railroad company that the negligence of the driver of the wagon was the proximate cause of the injury, the Supreme Court said: "But the deceased was not guilty of any contributory negligence, and if the negligence of the railway company was a cause of the damage it has no defense to this present action in the fact that the negligence of the storage company also contributed to that damage. This appellant must show that it was not guilty of any negligence which, in whole or in part, caused the injury."

[30] But the principle is too well settled to require the citation of other authorities. We cannot undertake to review the cases cited by appellant, but most, if not all of them, involved the question whether the contributory negligence of the injured party or the subsequent negligence of the defendant was the proximate cause of the injury, and a not unreasonable tendency is manifested to hold liable the party who was chargeable with the later and grosser negligence. It is apparent that in many of the cases cited the terms "proximate cause" and "contributory negligence" are not used with precision, and the grounds of some of the decisions are open to serious controversy; but, in general, they illustrate the "last chance doctrine," and hold, as stated in *Indianapolis St. Ry. Co. v. Schmidt*, 35 Ind. App. 202, 71 N. E. 663: "That the negligence of the plaintiff ceases to be the proximate cause of the injury when the defendant has opportunity to prevent it, and, with knowledge of the exposed condition of the plaintiff, negligently refuses to do so."

[31, 32] Appellant complains of the following instruction, given at the request of the United Railroads: "It is the duty of any person traveling upon or partly upon a street railroad track, or in such close proximity to it as to be in danger of being struck by an approaching car, even though proceeding in the same direction of the car, to use ordinary care to ascertain whether a car is approaching, and to get out of the way of said car." The latter portion of the instruction is somewhat subject to criticism, but the phrase "ordinary care" is implied, and the jury could have understood the instruction only as meaning that it is the duty of a person, under the circumstances mentioned, "to use ordinary care to ascertain whether a car is approaching, and to use ordinary care to get out of the way of said car." Even if we were to concede that this states the rule too favorably to the railroad company, if the action had been brought against it by Wells Fargo & Co., still it is not too exacting in favor of a third party, who is injured by the failure of the driver to observe it, and it is a correct general statement of the law. In *Barker v. Savage*, 45 N. Y. 191, 6 Am. Rep. 66, it is said: "Reasonable care requires, in all cases, the exercise of vigilance proportioned to the danger encountered. To enter upon a street crossing in a city where the moving vehicles are numerous, and a collision with them likely to produce serious injury, without looking in both directions along the street to ascertain whether any are approaching, and, if so, their rate of speed, and how far from the crossing, would not only be the omission of reasonable care for his own safety, but an act of rashness." There is no substantial difference between this instruction and the rule as stated in *Holmes v. South Pacific Coast Ry. Co.*, 97 Cal. 161, 31 Pac.

834; *Barley v. Market St. Cable Ry. Co.*, 110 Cal. 320, 42 Pac. 914, and *Hamlin v. Pacific Electric R. Co.*, 150 Cal. 776, 89 Pac. 1109.

[33] The jury could not have understood the language as importing an exclusive right in the railroad company to the use of the track. Any such implication was obviated by instruction No. 31, which we have already considered. It may be said, also, as to the latter part of the instruction complained of, that it necessarily follows from the rule requiring the person "to use ordinary care to ascertain whether a car is approaching." The only purpose of exercising this care is that he may be in a position to "use ordinary care" to avoid a collision; in other words, "to get out of the way of the car." The cases cited by appellant (*Clark v. Bennett*, 123 Cal. 278, 55 Pac. 908; *Campbell v. Los Angeles Traction Company*, 137 Cal. 567, 70 Pac. 624; and *Scott v. San Bernardino Valley, etc., Co.*, 152 Cal. 611, 93 Pac. 677) simply hold that it is not negligence per se for a person to attempt to cross a street railway when a car is approaching—a proposition which no one should dispute. Otherwise, as stated in one of the cases, "he could never attempt to cross such a track in the crowded parts of a city, where there is practically always an approaching car."

[34] The court did not err in omitting from one of the instructions requested by appellant the following clause, "and the driver of Wells Fargo's wagon had a right to assume that this would be done [that is, that the motorman would give warning and slow down] at the time of the accident complained of, if a car should approach him from behind. If there were obstructions on the right-hand or south side of the street at the time mentioned, or if that portion of the street was full of chuckholes, the driver had the right to take the middle or northerly side of the street, in order to have a clear way." It cannot be the law, because it is not reasonable that one's negligence, whereby another is injured, is excusable because the former assumed that a third party would do his duty. One, without fault himself, can recover for injury caused by the negligence of another, whether or not the latter mistakenly assumed that a third party would exercise proper care. Indeed, in the *Scott Case*, cited by appellant, it is said: "He cannot rely wholly on the care of others, nor, on that account, neglect to use the precautions which the particular situation demands of him. * * * The rule should be that the traveler has the right to assume, until his senses, exercised with reasonable diligence, inform him to the contrary, that the persons operating street cars will use ordinary care, give the usual signals, and keep the usual lookout ahead." As to the latter portion of the instruction, it is sufficient to say that it was properly rejected, because it did not fit the evidence. Considering the instructions

as a whole, we are satisfied that appellant has no just cause to complain. They certainly stated the law as favorably to the express company as it had a right to demand, and, altogether, they gave to the jury a fair and just notion of the law upon the points discussed. *Stephenson v. Southern Pacific Company*, 102 Cal. 143, 34 Pac. 618, 36 Pac. 407.

[35] Finally, there is another consideration which seems a complete answer to nearly, if not to all, of appellant's contentions. The bill of exceptions of the express company purports only to give "all the evidence introduced at the trial tending in any way to support or justify the verdict of the jury in the particulars hereinafter specified by defendant Wells Fargo & Co. as the particulars in which said verdict was not justified by the evidence." When we turn to those particulars, we find they all relate to the capacity of plaintiff to earn money, his employment, the extent of his injury, and the amount to which he has been damaged, while all the alleged errors which are argued in the brief relate to the subject of negligence. What is the result? Simply, that we must assume that the evidence was such that the errors, if any, were without prejudice, for it surely cannot be said that any of them would be prejudicial under any conceivable state of facts within the issues. Furthermore, if necessary to support the judgment, we should assume that the case was tried upon the theory that such evidence was within the issues. At most, then we would have a case of abstract error, and what was said in *Hamlin v. Pacific Electric Ry. Co.*, supra, in reference to an erroneous instruction, would apply here to all the points made by appellant: "He was therefore not harmed by the action of the court in submitting this question to the jury on erroneous instructions, since there was no evidence which would have sustained a finding in his favor under the view of the law most advantageous to him. Under these circumstances, error in the instructions furnishes no ground for reversal. *Green v. Ophir, etc., Co.*, 45 Cal. 522; *In re Briswalter* [72 Cal. 107, 13 Pac. 164; *Hughes v. Wheeler*] 76 Cal. 230 [18 Pac. 369]; *Edwards v. Wagner*, 121 Cal. 376 [53 Pac. 821]."

We have thus devoted much time and space to the various contentions of the parties. We deemed it proper to do so, as they are important, and they have been argued exhaustively and with apparent sincerity by learned counsel, and in view of the contingency of a new trial.

We have no doubt that the judgment and order should be reversed as to the United Railroads and affirmed as to Wells Fargo & Co., and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

(16 Cal. App. 748)

PEOPLE v. THOMPSON. (Cr. 310.)

(District Court of Appeal, First District, California. Aug. 2, 1911.)

1. CRIMINAL LAW (§ 511*)—TESTIMONY OF ACCOMPLICE — CORROBORATION — SUFFICIENCY.

The testimony of an accomplice to justify a conviction need not be corroborated as to all the essential elements of the offense; but, where the corroborating evidence, considered by itself, tends to connect accused with the commission of the crime, a conviction is warranted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127-1137; Dec. Dig. § 511.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. CRIMINAL LAW (§ 511*)—EVIDENCE OF ACCOMPLICE—CORROBORATION.

On a trial for murder by abortion, evidence *held* to sufficiently corroborate the testimony of an accomplice to justify a conviction.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 511.*]

3. HOMICIDE (§ 241*)—MURDER BY ABORTION—EVIDENCE—SUFFICIENCY.

On a trial for murder by abortion, evidence *held* to show, as required by Pen. Code, § 274, that the operation was not necessary to save decedent's life.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 241.*]

4. CRIMINAL LAW (§ 448*)—EVIDENCE—ADMISSIBILITY.

On a trial for murder by abortion, the testimony of a witness, knowing what placental tissue is, that after accused and decedent had been in accused's operating room she saw such tissue there in a vessel, is not expert testimony, but is admissible as testimony to a fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1035-1039, 1041-1043, 1048-1051; Dec. Dig. § 448.*]

5. CRIMINAL LAW (§ 785*)—TRIAL—INSTRUCTIONS.

A requested instruction that, if a hypothetical question asked an expert embraced a statement, not supported by evidence, the opinion of the expert is valueless, is properly refused, because embodying no principle of law.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 785.*]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Robert Thompson was convicted of murder in the second degree, and he appeals. Affirmed.

J. J. Greely, T. I. Fitzpatrick, and Robert Ferral, for appellant. Attorney General Webb, for the People.

KERRIGAN, J. The defendant, charged with murder, was tried and found guilty of murder in the second degree. He prosecutes this appeal from the judgment.

The defendant relies on four points for a reversal of the judgment.

[1] 1. It is admitted that Marie Messerschmidt, on whose testimony the actual commission of the offense was established, was an accomplice; and defendant contends that her testimony was not corroborated as to some of the material elements of the crime. But the rule does not require, as seems to be thought by defendant, that the accomplice shall be corroborated in all the essential elements of the offense. On the contrary, it is sufficient if the corroborating evidence, considered by itself, tends in some way to connect the defendant with the commission of the crime. In *People v. Bunkers*, 2 Cal. App. 197, 205, 84 Pac. 364, 368, Mr. Justice McLaughlin, considering the same question, said: "While corroborating evidence must create more than a mere suspicion, it is not required that it be absolutely convincing. Nor need it extend to every fact

and detail covered by the statements of the accomplice. It is sufficient if, standing alone, it tends to connect the defendant with the crime." In *People v. Leavens*, 12 Cal. App. 178, 106 Pac. 1103, Mr. Justice Cooper, commenting on the rule declared by section 1111 of the Penal Code, said: "The actual commission of the offense may be established by the evidence of the accomplice; but the law, in order to protect innocent men from being convicted, provides that the evidence of the accomplice alone shall not be sufficient to justify a conviction, but that there must be other independent evidence which 'tends to connect the defendant with the commission of the offense.' The evidence, outside of that of the accomplice, need not be sufficient to establish the guilt of the defendant, but it must in some way tend to implicate the defendant and connect him with the transaction and with the crime." In another case it is said: "It (the corroborating evidence) 'need not be strong; it is sufficient if it tends to connect the defendant with the commission of the offense, though, if it stood alone, it would be entitled to but little weight.' Nor need it extend to every fact and detail covered by the statements of the accomplice." *Eppinger v. Kendrick*, 114 Cal. 620, 46 Pac. 613.

[2] In the case at bar we have facts and circumstances in abundance corroborating the accomplice and connecting the defendant with the commission of the offense. The testimony of the accomplice, Marie Messerschmidt, a nurse, showed that the defendant, at San Francisco, on April 9 and 10, 1910, performed a criminal abortion on one Eva Swan; that Eva Swan remained at the home and office of the defendant, under the joint care of the witness and the defendant, until the 21st of that month, when, as the result of the operation, she died; whereupon the defendant placed her dead body in a trunk, and on the evening of the 21st he and one Willie Saack hired an expressman, with whose aid they removed the body to a vacant house at No. 350 Eureka street, in San Francisco, and after two nights' work succeeded in burying the body under the floor of the basement of the vacant house, which had been rented for that purpose. Previous to this the defendant had shown the witness a bottle of acid, which he said he was going to pour over the dead woman's face, so that she could not be identified. This witness further testified that in the month of May she and the defendant went to Highland Springs, where, a few days after their arrival, the defendant was visited by two men from San Francisco, who, the defendant told her, had learned of the burial of Eva Swan from Willie Saack, and who were trying to blackmail him.

The evidence in the case corroborating the accomplice, and which tends to establish the

defendant's connection with the crime, is as follows: Paul Parker, a witness for the people, testified that he called and saw Eva Swan twice at 1293 Golden Gate avenue, but that on April 14th, when he called again, he did not see her, and was told by the defendant that she was too ill to receive visitors. The defendant also told the witness that Eva Swan's sister had sent \$200 with which to pay the expenses of caring for Eva Swan in some sanatorium to which she would be sent for proper treatment. C. F. Large, a druggist employed in a drug store located near the place of business of the defendant, testified that on or about the 19th or 20th of April he sold to him a large bottle of nitric acid, which bottle was similar to one in size and other respects found by officer M. V. Burke with the buried body of Eva Swan. Evelyn Bean, who lived all the month of April in the immediate neighborhood of No. 350 Eureka street, testified that on or about the 23d of April she saw the defendant with another man at said premises. G. A. Pike testified that he visited the defendant at Highland Springs about the middle of May, and there told the defendant that some boys, in digging around the basement of the Eureka street house, had found a condition of things that aroused their suspicions; that he advised the defendant to raise \$300 to send the boys East; to which proposition the defendant replied that he did not have the money, but that likely he would be able to give the boys something to do, and in that way keep them quiet. The house at Eureka street had, according to the testimony of another witness, been rented for one month; and in this conversation at Highland Springs the defendant requested Pike, so Pike testified, to rent the house for another month. Here we quote from the record: "Q. What did he (defendant) say about the house on Eureka street? A. He said, 'Are you willing to go out and rent the house for me for another month?' and I said, 'Yes.' He said, 'Don't you think that would give the acid plenty of time to get in its work?'" The witness had a subsequent conversation with the defendant in a saloon in San Francisco, at which Willie Saack and Ben Gordon were present, in which Pike again advised the defendant to raise \$300 and send away the boys who had, as he pretended, learned about the interment of the body. The witness further stated that at this time he told the defendant he would need a little money, and that, although the defendant was not indebted to him, he gave him \$30. Ben Gordon testified that he with Pike visited the defendant at Highland Springs in May; that towards the last of the following September he demanded \$18 of the defendant; that the defendant called him a "son of a bitch," gave him two dollars, and told him to get out of town, or he would shoot him, or "rip" him "wide open with lead;" that thereupon he

left the defendant, saying, "I am liable to fool you."

From the testimony of other witnesses, it is learned that the defendant is not a licensed physician, although he was known as "Dr. Grant," and when the officer called at his place of business on September 23d to arrest him he said that he was not "Dr. Grant," but was waiting for him; whereupon the officers called in Ben Gordon (who was waiting nearby), when the defendant was identified and arrested. According to the testimony of Detective Edward J. Wren, the defendant, on the day after his arrest, denied that he had ever been in or around the premises 350 Eureka street; that upon being brought from his cell into the presence of Miss Messerschmidt to listen to a statement of the case by her he ran away, and upon being forced to return tried to persuade her "not to talk." She, however, said that he was the man who "performed the operation on Eva Swan at 1293 Golden Gate avenue," and that he was also the man "who put the body of Eva Swan in the trunk." The defendant listened to these accusations and remained silent.

From this brief statement of the evidence it is so apparent that defendant's contention is without merit that comment is unnecessary. We therefore pass to the next point.

[3] 2. Defendant claims that the evidence introduced by the people fails to show, in accordance with section 274 of the Penal Code, that the operation was not necessary to save the life of Eva Swan. Conceding, for the sake of argument (as was done in *People v. Balkwell*, 143 Cal. 259, 76 Pac. 1017), that it was for the prosecution, and not the defendant, to establish this fact, the fact was established in this case. The evidence of the people in part shows that the deceased was 23 years of age and in good health at the time of the operation; that when she died the defendant cut her body into parts, covered it with a corrosive acid, and buried it clandestinely, as before narrated. These facts and circumstances, together with his conduct when arrested and when accused of the crime by Miss Messerschmidt, lead irresistibly to the inference that the operation was not performed to save the life of the deceased.

[4] 3. The witness Messerschmidt testified that she knew what placental tissue was, and that after the defendant and the deceased had been in defendant's operating room at Golden Gate avenue she saw such tissue there in a vessel. This was not expert testimony; it was testimony as to a fact. But, even if it be regarded as expert testimony, still the contention of the defendant that the witness was not qualified to give such testimony is unavailing, for the evidence in the case is ample to show that she was sufficiently experienced and informed on the subject to be regarded as an expert.

[5] 4. The defendant assigns as error the court's refusal to instruct the jury that, if a hypothetical question propounded to an expert witness embraced a statement which was not supported by the evidence, the opinion of the expert in answer thereto would be valueless. The instruction, if given, would have simply told the jury what their own common sense would have informed them; and as it embodied no principle of law the refusal to give the instruction was not error. It has been repeatedly so held in this state. *People v. Kirby*, 114 Pac. 794 (decided by this court February 2, 1911); *People v. Barthleman*, 120 Cal. 7, 52 Pac. 112; *People v. Methever*, 132 Cal. 326, 64 Pac. 481.

The judgment is affirmed.

We concur: LENNON, P. J.; HALL, J.

(16 Cal. App. 771)

PEOPLE v. PERRY. (Cr. 153.)

(District Court of Appeal, Third District, California. Aug. 8, 1911.)

CRIMINAL LAW (§ 1130*)—APPEAL—BRIEFS.

The appellate court need not search the record to determine whether the trial was without prejudice to accused's substantial rights, where no assignments of errors are made by brief.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2965-2970; Dec. Dig. § 1130.*]

Appeal from Superior Court, Nevada County; Geo. L. Jones, Judge.

Arnett F. Perry was convicted of obtaining money by false pretenses, and he appeals. Affirmed.

Fred Searls, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

HART, J. The defendant was convicted of the crime of obtaining from one Ed. Arthur the sum of \$500 by false and fraudulent representations and pretenses. The appeal to this court is from the judgment and the order denying defendant's motion for a new trial.

No brief has been filed in behalf of the defendant, and, therefore, if there were errors made in the trial of the cause which would merit special consideration by this court, we have not been apprised of them.

This court is not required, in the absence of special assignments, in some form, of alleged error, to search the record for the purpose of determining whether the trial in the court below was in all respects conducted without any prejudice to the substantial rights of the accused.

We have, however, taken the pains to carefully read the stenographer's transcription of the testimony, and we have from such investigation discovered no reason for ques-

tioning its sufficiency to justify and support the verdict.

The judgment and order are, accordingly, affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(16 Cal. App. 773)

RIDGELY v. ABBOTT QUICKSILVER MINING CO. et al. (Civ. 701.)

(District Court of Appeal, Third District, California. Aug. 8, 1911.)

MORTGAGES (§ 468*)—FORECLOSURE—APPOINTMENT OF RECEIVER—GROUNDS.

Where there was nothing to show that the owners of personal property about a mine were unable or unwilling to protect it, a receiver should not be appointed, pending foreclosure of a mortgage thereon.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1374, 1375; Dec. Dig. § 468.*]

Appeal from Superior Court, Lake County; Geo. H. Buck, Judge.

Action by Edward Ridgely, as trustee, against the Abbott Quicksilver Mining Company and others. From an order removing one receiver and appointing another, defendants appeal. Affirmed in part, and reversed in part.

H. B. Churchill, J. W. Cochrane, and R. P. Henshall, for appellants. C. M. Crawford and H. V. Keeling, for respondent.

BURNETT, J. The appeal is from an order of the superior court of Lake county removing one Matthew T. Wilson from the office of receiver in the above-entitled cause, and appointing in his place one Euvelle Howard.

Respondent has presented no argument, either orally or by brief. This may be for the reason that appellants' contention was deemed unanswerable, or probably respondent did not feel inclined to incur any additional expense, since, according to the evidence, the property is merely of nominal value. This court should have been apprised, however, by respondent of his attitude or been afforded the advantage of his views upon the questions herein involved. On account of his remissness, he would have no cause for complaint if the order were reversed without any examination of the record. We have, however, considered with some care the points made by appellants.

It seems that, on March 27, 1903, the plaintiff brought suit to foreclose upon certain bonds, secured by a mortgage upon the real property involved herein. On the same day, one Riley A. Boggess, was, ex parte, appointed a receiver of the property. On October 2, 1903, a final decree of foreclosure was entered, at which time Boggess was in possession as receiver, and he so continued

In possession until he was removed on December 7, 1908, on the petition of one of the appellants herein. On the removal of Boggess, the said Matthew T. Wilson was appointed receiver. On July 27, 1909, on the petition of Boggess, the court made the order removing Wilson and appointing Howard to the position.

From an examination of the record, we are convinced that the court was justified in removing both Boggess and Wilson. The only question is whether it should have made another appointment. In this connection it may be said that no suggestion is made impeaching in any manner the character or competency of Howard; but it is contended by appellants that the court was without authority to make another appointment, for the reason that the judgment was "outlawed at the time the order was made," and "no showing whatever was made that would justify the appointment of a receiver." We consider it necessary to notice only the second ground specified by appellants. The only evidence tending to support the claim that there should be a receiver for the property is found in the testimony of H. V. Keeling, a well and favorably known attorney of Lake county. His testimony, however, is essentially the expression of his opinion as to the propriety of such an appointment, rather than the recital of facts that would justify the order. He said, indeed, that "there is still remaining certain personal property at the Abbott mine, consisting of wood and some mining machinery, the exact character and value of which are unknown to him at this time, which requires the care and attention of a receiver." He also testified that he, as attorney for Boggess, had entered into certain negotiations with two gentlemen named Winters and Garner, purchasers of the mine at the tax sale, for the purchase of their interest, and they had expressed themselves as willing to make satisfactory arrangements with Mr. Boggess, when he should come from the East. There is nothing in his testimony, however, opposed to the inference that the parties who were directly interested in the preservation of the property were capable and willing to do everything that the witness opined should be done. It was said, in *De Leonis v. Walsh*, 148 Cal. 255, 82 Pac. 1048, that, "of course, a party to an action should not against his will be subjected to the onerous expense of a receiver, unless when one may be lawfully appointed, and his appointment is obviously necessary to the protection of the opposite party."

Without further discussion, we conclude that it does not sufficiently appear that it was necessary to appoint another receiver, in order to protect any one's interest in the property. The order of removal of Matthew

T. Wilson as receiver is affirmed. The order appointing Euvelle Howard receiver is reversed.

We concur: CHIPMAN, P. J.; HART, J.

(16 Cal. App. 781)

CARLEY et al. v. VALLECITA MINING CO. (Civ. 802.)

(District Court of Appeal, Third District, California. Aug. 8, 1911.)

1. APPEAL AND ERROR (§ 681*)—RECORD—DISCRETION OF COURT—DENYING AMENDMENT.

Where the record does not show that, when a demurrer to the complaint was sustained, plaintiffs asked leave to amend the complaint, or suggested wherein they could amend it, an abuse of the trial court's discretion in denying leave to amend is not shown.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 681.*]

2. APPEAL AND ERROR (§ 805*)—ABANDONMENT OF APPEAL.

Appellants' briefs did not state wherein the complaint was not demurrable, or show that it was sufficient to withstand the demurrer, merely stating that the cause of action was not amenable to the demurrer, but if it was that plaintiffs should have had leave to amend. Respondent's brief showed wherein the complaint was demurrable to which appellants did not reply, and the appellate court would have to consult 66 folios of the complaint in passing upon the question. *Held*, that appellants will be taken to have abandoned their appeal, except as to the point that they should have been allowed to amend the complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3174, 3175; Dec. Dig. § 805.*]

Appeal from Superior Court, Calaveras County; A. I. McSorley, Judge.

Action by Catherine Carley and others against the Vallecita Mining Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

Snyder & Snyder, for appellants. Bishop, Hoefler, Cook & Harwood, for respondent.

CHIPMAN, P. J. The relief prayed for by plaintiffs is based on three separate causes of action. A demurrer to the first cause of action was overruled, and was sustained as to the second and third alleged causes of action without leave to amend. Defendant answered the first cause of action, and on the issues thus formed the case went to trial. The judgment reads: "And the said plaintiffs having abandoned said action upon the trial and before the final submission of the case, and the court having thereupon dismissed said action, * * * it is ordered * * * that the said plaintiffs take nothing by this their said action, * * * and the said action is hereby dismissed." Plaintiffs appeal on the judgment roll.

The following constitutes the entire statement found in appellants' brief: "We respectfully invoke the consideration of the

court to the complaint and demurrer thereto set forth in the transcript from folio 3 to folio 69. We submit that the second and third causes of action of the complaint are not amenable to the objections raised by the demurrer, and that, if the demurrer was properly sustained, leave should have been granted plaintiffs to amend said second and third causes of action."

[1] The record fails to show that plaintiffs asked leave to amend or to suggest wherein they could amend their complaint or desired to do so. In such a case we cannot say that the court abused its discretion in denying leave to amend. *Kleinclaus v. Dutard*, 147 Cal. 252, 81 Pac. 516. We are asked to examine 66 folios of the complaint to discover some ground for reversing the order sustaining the demurrer to the second and third alleged causes of action. We are given no aid in this search. In no single particular is it suggested that the grounds of the demurrer were not well taken. In no particular is it shown that the complaint was sufficient to meet the objections raised by the demurrer. We are simply told that these causes of action "are not amenable to the objections raised by the demurrer," but, if they are so amenable, plaintiffs should have had leave to amend. Such method of following up an appeal is neither fair to the respondent nor to the appellate court. We feel ourselves fully justified in treating the appeal as practically abandoned. Respondent, however, has, with unnecessary elaboration anticipated every imaginary point which appellants could suggest in support of the complaint, and, we think, has shown that the complaint is deficient in many essential respects. To this very exhaustive treatment appellants make no reply.

[2] No reasonable conclusion can be reached other than that appellants have abandoned their appeal except upon the single point that they should have been given leave to amend. As already stated, this point has no merit.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

16 Cal. App. 754

NICHOLSON v. NICHOLSON. (Civ. 851.)

(District Court of Appeal, Third District, California. Aug. 3, 1911.)

APPEAL AND ERROR (§ 1024*)—FINDINGS—CONCLUSIVENESS.

Where, on the motion to change the place of trial of an action for divorce from S. county to F. county, defendant averred that he resided in F. county, and plaintiff in her affidavit specifically declared that defendant was a resident of S. county, and positively denied defendant's averments, and orally testified that both parties considered S. county as their home, the evidence was conflicting, so that a

denial of the motion would not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3836; Dec. Dig. § 1024.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Carrie Etta Nicholson against John R. Nicholson. From an order denying a motion for a change of venue, defendant appeals. Affirmed.

Wm. A. Bowden, for appellant. Benj. K. Knight, for respondent.

BURNETT, J. This is an appeal from an order denying defendant's motion for a change of the place of trial of an action for divorce. Appellant claimed to be a resident of Fresno county; whereas the complaint was filed in Santa Cruz county, the place of respondent's residence. If the court below had granted the motion, there is no doubt an appellate court would hold that the order was justified by the showing made by defendant. But the affidavit and oral testimony of respondent clearly make it a case of conflicting evidence and, under the well-established rule, the decision of the trial judge is controlling here.

Appellant is not entirely accurate in the assertion that "the affidavit of plaintiff, in so far as it attempts to deny the statement of defendant that he resided in Fresno, is made upon information and belief." It is true that she declared "that affiant is informed and believes, and upon such information and belief states the fact to be, that defendant is only temporarily residing at Coalinga, and that he will not long remain there, and that he is likely at any time to depart from the state of California," but, as to that portion of appellant's affidavit declaring "that at the time of the commencement of said action he was and yet is a resident of the county of Fresno," respondent positively denied the same, and "every part thereof." She proceeded further to state facts (which we deem it unnecessary to detail) that, as a matter of law, justified the court in concluding, in the language of respondent, that "the affidavit of the defendant made herein is not in good faith," and that he was simply sojourning temporarily in Fresno county, without any intention of making it his permanent abode. In her oral testimony she stated that both parties considered Santa Cruz as their home; that "we have no other home. I know that the defendant has no fixed place of abode, other than the county of Santa Cruz. I know that the motion to have this case tried elsewhere is not made in good faith on the part of the defendant. He only wants to have it transferred to cause me annoyance and trouble, and to prevent the court from awarding me alimony." While some of her declarations are mere inferences, yet sufficient facts are related, in our opinion, to bring

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the case within the following decisions: Creditor, etc., v. Welch, 55 Cal. 469; Hastings v. Keller, 69 Cal. 606, 11 Pac. 218; Daniels v. Church, 96 Cal. 13, 30 Pac. 798; Ludwig v. Harry, 126 Cal. 377, 58 Pac. 858.

The order is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

16 Cal. App. 756

PEOPLE v. SPENCER. (Cr. 320.)

(District Court of Appeal, First District, California. Aug. 5, 1911.)

1. INDICTMENT AND INFORMATION (§ 183*)—VARIANCE.

Where the information, in a prosecution for drawing a bank check with intent to defraud, charged accused with having drawn a check on the National Bank of Commerce, doing business in the city of Seattle, and the evidence showed that the check was drawn on the National Bank of Commerce of Seattle, but there was no other bank by a similar name, the variance is immaterial.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 573; Dec. Dig. § 183.*]

2. CRIMINAL LAW (§ 535*)—EVIDENCE—CONFESSIONS—ADMISSIBILITY—PROOF OF CORPUS DELICTI.

While an accused's confessions or admissions are inadmissible until there has been proof, not necessarily conclusive, of the corpus delicti, which includes all of the elements of the crime, in a prosecution under Pen. Code, § 476a, making it a crime for any person to utter a bank check with intent to defraud, knowing that he has not sufficient funds or credit to meet it, where it appeared that defendant reported he had on deposit in the bank upon which he drew a check over \$20,000, and when the check was presented a few days later it appeared that he had less than \$200, those facts warranted an inference that he did not have sufficient credit with the bank to meet the check, and so his confessions and admissions were admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1225, 1226; Dec. Dig. § 535.*]

3. CRIMINAL LAW (§ 1038*)—APPEAL AND ERROR—PRESENTATION OF GROUNDS OF REVIEW IN COURTS BELOW—NECESSITY.

In a prosecution under Pen. Code, § 476a, making it a crime for any person to utter or draw a bank check with intent to defraud, knowing at the time that he has not sufficient funds or credit to meet it, the court read the whole section to the jury, save the last sentence, which defines credit. *Held*, that accused having requested no instruction defining the word "credit," he cannot complain on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2646; Dec. Dig. § 1038.*]

Appeal from Superior Court, City and County of San Francisco; Wm. P. Lawlor, Judge.

L. E. Spencer was convicted of drawing and uttering a bank check with intent to defraud, and he appeals. Affirmed.

James M. Hanley, for appellant. Attorney General Webb, for the People.

KERRIGAN, J. The defendant was convicted of the crime of drawing and uttering a bank check with the intent thereby to defraud Watson, Pond & Riddle, a corporation.

The prosecution was had under section 476a of the Penal Code, which section reads as follows: "Every person who willfully, with intent to defraud, makes or draws, or utters, or delivers to another person any check or draft on a bank, * * * knowing at the time of such making, drawing, uttering or delivery that he has not sufficient funds in or credit with such bank, * * * to meet such check or draft in full upon its presentation, is punishable by imprisonment in the state prison. * * * The word 'credit' as used herein shall be construed to be an arrangement or understanding with the bank * * * for the payment of such check or draft."

Briefly the facts of the case are these: The defendant represented to Watson, Pond & Riddle that he had \$20,000 on deposit in the National Bank of Commerce of Seattle, Wash.; that he expected to have there in a few days \$75,000 more; that he was also the owner of rent-producing properties in Seattle, and was related to some of the officials of said bank. On the strength of these pretenses, Watson, Pond & Riddle, on April 28, 1910, as a matter of accommodation, gave the defendant its check for \$725, and took in exchange therefor his sight draft on said bank for a like amount. When this draft was presented—which was done as soon as practicable—payment was refused on account of lack of funds.

The evidence tends to sustain the theory of the prosecution that the defendant had put in operation a scheme by means of which he sought, first, to work his way into the good graces of certain San Francisco business men by a number of fair exchanges of his drafts for their checks, and then later, if he succeeded in gaining their confidence, to defraud some of them of large sums of money. However this may be, from a number of transactions similar to this one, each comparatively small in amount, the district attorney selected this (the largest) one on which to base the prosecution. In due time the case came on for trial, evidence was introduced by the people, and on behalf of the defendant witnesses testified as to his good reputation, but he did not himself take the stand. Upon his conviction a motion for a new trial was made and denied, and the defendant was sentenced to imprisonment in the state prison for a term of three years, whereupon he took this appeal, which is from the judgment.

The defendant relies for a reversal of the judgment on three points: (1) That there is a variance between the allegations of the information and the proof; (2) that the confessions and admissions were admitted before the corpus delicti was established; and (3)

that the court erred in giving an instruction to the jury defining the offense charged.

[1] (1) As to the question of variance, the information charges that the draft in question was drawn on the "National Bank of Commerce, doing business in the city of Seattle, state of Washington," and the evidence shows that it was in fact drawn on the National Bank of Commerce of Seattle. Defendant claims that such a variance is fatal. But the evidence also shows that there is no other National Bank of Commerce in Seattle, or any other bank there of similar name, and that this one is called by and does business under both names. We therefore hold that defendant's position on this point cannot be maintained. Such a variance would not be regarded as material in a criminal prosecution, even in the name of the defendant (*People v. Oreileus*, 79 Cal. 178, 21 Pac. 724), nor in that of the injured party (*People v. Hughes*, 29 Cal. 262). In the last case, under an indictment charging arson for the purpose of defrauding the Hartford Insurance Company, evidence that the name of the company was the Hartford Fire Insurance Company did not constitute a fatal variance. See, also, *People v. Leong Quong*, 60 Cal. 107; *People v. Armstrong*, 114 Cal. 570, 573, 46 Pac. 611.

[2] (2) As to the second point, defendant contends that, independently of his extrajudicial statements and confessions, the evidence fails to establish the corpus delicti, in that it does not show that he had not sufficient credit at the bank, and that therefore the court committed error in admitting such confessions and statements. The rule on the subject is stated in *People v. Simonsen*, 107 Cal. 345, 40 Pac. 440, as follows: "The corpus delicti involves the elements of crime; and, in order to prove it, all of the elements of the crime must be made to appear before defendant's confessions or admissions are admissible for any purpose; and they cannot be used to establish any necessary element for the commission of the crime." But here the defendant represented that he had on deposit in the Seattle bank \$20,000; that within a few days he expected \$75,000 more; yet when his draft was presented for payment a few days later he had on deposit approximately only \$200. These facts, together with the circumstance that the check was dishonored, were quite sufficient to warrant the jury in drawing the inference that the defendant did not have sufficient credit with the bank to meet the draft, and consequently justified the court in admitting proof of the extrajudicial statements of the defendant without further evidence to establish the corpus delicti. The authorities support this view. In *People v. Montgomery*, 114 Pac. 792, the defendant was charged with an assault with a deadly weapon, with intent to kill; and in order to permit the verdict to stand it was necessary that the proof in the case should show that the gun with which the assault was made was loaded. There was no direct

proof that the gun was loaded, but the defendant, after quarreling with the prosecuting witness, left the premises, and soon thereafter returned with the gun, which he pointed at him, threatening to kill him. These circumstances, with the fact that he persisted in remaining about the premises, and threatened others, were held sufficient to justify the jury in drawing the inference that the gun was loaded. In the cases of *People v. Eppinger*, 105 Cal. 36, 38 Pac. 538, and *People v. Terrill*, 133 Cal. 120, 65 Pac. 303, it was held that the absence of a certain name from the city directory was sufficient, in the case of forgery, to show that it was the name of a fictitious person. In *Commonwealth v. Locke*, 14 Mass. 294, the court said: "The burden of proving affirmatively that the sale or intended sale was in violation of law, by negating the authority or license of the person by whom it was made or intended, was placed upon the government; but the court rightly ruled that it need not be proved by direct evidence, but might be inferred from circumstances."

On this question of the degree of proof necessary to establish the corpus delicti before permitting proof of the defendant's extrajudicial statements or confessions, we think the case of *People v. Jones*, 123 Cal. 65, 55 Pac. 698, is particularly in point. There the evidence showed that four detached buildings were burned; and the court held that this fact tended to show that the buildings were separately fired, and therefore sufficiently established the incendiary character of the fire to admit evidence of the confession. The court described this evidence as weak and unsatisfactory, and in the course of the opinion said: "A distinction must be taken between the evidence which upon the whole case would justify a conviction, and that degree of proof of criminal agency in the burning of the buildings for the purpose of letting in evidence of the confessions or admissions of the defendant. To justify a conviction, the jury must be satisfied beyond a reasonable doubt of the existence of every fact necessary to constitute the offense, and to identify the defendant as the perpetrator; but it is not necessary that the evidence of the criminal act should be of that conclusive character in order to justify the admission of the defendant's confessions."

[3] (3) Finally, the defendant insists that the court erred in not reading the whole of section 476a of the Penal Code. The court read all of that section, except the last part, which defines the word "credit." In view of the fact that throughout the trial, in various ways, the defendant contended that there was no evidence sufficient to establish the lack of credit with the bank, it would seem that the court should have read, not a part of the section, but the whole of it. *People v. Tapia*, 131 Cal. 647, 63 Pac. 1001. But the jury must have understood the meaning of a word of such common use. Moreover, the

record discloses that the district attorney read the section to the jury, and in such a way as to call their special attention to the last clause thereof. In any event, the defendant requested no instruction defining the word "credit"; hence he cannot be heard to complain.

The judgment is affirmed.

We concur: LENNON, P. J.; HALL, J.

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THOMAS v. WENTWORTH HOTEL CO.
et al. (Civ. 985.)

(District Court of Appeal, Second District, California. June 13, 1911. Rehearing Denied July 13, 1911.)

1. CORPORATIONS (§ 84*)—SUBSCRIPTION TO STOCK—RELEASE—CONSENT.

A stockholder may not be released from liability on his contract of subscription without the consent of his fellow stockholders, as well as that of the creditors of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 296-327; Dec. Dig. § 84.*]

2. CORPORATIONS (§ 84*)—INSOLVENCY—PREFERENCES TO CREDITORS—TRUST FUND DOCTRINE.

The subscribed capital stock of a corporation, both paid and unpaid, is a trust fund which the stockholders and creditors have the right to insist shall not be reduced, diminished or impaired, except with their consent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 296-327; Dec. Dig. § 84.*]

3. CORPORATIONS (§ 84*)—SUBSCRIPTION TO STOCK—RELEASE.

The rights of a creditor of a corporation do not permit him to interfere and prevent a stockholder from altering his relation toward the corporation, with respect to his membership therein as a holder of its shares; and a solvent stockholder may make a valid agreement with the corporation, securing first the consent of all the other stockholders thereto, by which he may surrender his stock and be released on a subscription contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 296-327; Dec. Dig. § 84.*]

4. CORPORATIONS (§ 229*)—RETIREMENT OF SUBSCRIBER—RIGHTS OF CREDITORS.

Although an agreement between a solvent stockholder and the corporation, with the consent of all the other stockholders, by which the stockholder is to surrender his stock and be released on a subscription contract, be binding upon the corporation, it may not prevent existing creditors from having recourse against the retiring stockholder, to compel contribution from him, in satisfaction of their claims, in an amount proportionate to the unpaid balance of his subscription.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 876; Dec. Dig. § 229.*]

5. CORPORATIONS (§ 84*)—POWERS OF DIRECTORS—SURRENDER OF SHARES.

The power of consenting stockholders to accept a surrender of the shares of a subscriber may not generally be exercised by a board of directors, in the absence of authority given them by the charter or by-laws of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 296-327; Dec. Dig. § 84.*]

6. CORPORATIONS (§ 84*)—POWERS OF DIRECTORS—COMPROMISE AND RELEASE.

While general authority is not reposed in a board of directors to accept a retransfer of stock

from a subscriber, and so terminate his relation as a shareholder, they may make compromises with the subscribers whose liability is questioned, who are insolvent, or who are of doubtful financial responsibility; and under this exception the action of directors in making an agreement with subscribers, who through losses were unable to take and pay for all the shares subscribed for by them, releasing them from liability as to one-half of the amount subscribed for in consideration of certain cash payments, was within the authority of the directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 296-327; Dec. Dig. § 84.*]

7. CORPORATIONS (§ 84*)—ESTOPPEL TO DENY AUTHORITY—RELEASE OF SUBSCRIBERS.

Directors of a corporation, by vote reciting the inability of subscribers to stock to take and pay for all the shares subscribed for, agreed with such subscribers that in consideration of payment of certain sums in cash they would be released as to one-half of the amount subscribed for. The payments were made, the contract fully executed, the released subscribers thereafter treated as stockholders, the surrendered stock resold to other subscribers, and the whole transaction was in good faith, and was not repudiated by any stockholder. *Held*, to warrant the conclusion that all stockholders acquiesced in such action, and were estopped from objecting to the authority of the directors, even if the release was beyond their power.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 296-327; Dec. Dig. § 84.*]

8. CORPORATIONS (§ 84*)—SUBSCRIPTION TO STOCK—COLLATERAL AGREEMENT—"NOVATION."

The agreement was in effect a "novation," which, under Civ. Code, § 1531, is made by the substitution of a new obligation, between the same parties, with intent to extinguish the old obligation; and the fact that payment of a part of the money required to be paid by the released subscribers was deferred did not have the effect of continuing them in their relation as stockholders, for the full amount of their subscription, until the final payment had been made.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 84.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4848-4851; vol. 8, p. 7733.]

9. CORPORATIONS (§ 229*)—LIABILITY OF STOCKHOLDERS—CORPORATE DEBTS—EFFECT OF RELEASE BY CORPORATION.

A corporation, on October 5, 1906, executed its note for \$22,500, and, on November 16th, another note for \$25,000. On August 23d, before any payment had been made on the subscription agreements of certain subscribers, the corporation had adopted a resolution reciting the inability of certain subscribers to take and pay for all the stock they had subscribed for, and proposed to compromise with them as to one-half the amount of their subscription, in consideration of certain cash payments, which were made by the subscribers according to agreement, and, on October 10th, after the execution of the corporation's first note, other subscribers were released by a similar compromise agreement; both agreements being made in good faith. *Held*, in an action by the holder of notes to enforce payment by the corporation and by the subscribers concerned in the compromise agreements, that on October 5th, when the first note was executed, the subscribers who were parties to the agreement of August 23d, owned and were liable on only one-half of the shares originally subscribed for, and that the subscribers who were parties to the agreement of October 10th, owned and were liable for the indebtedness of \$22,500 on the full number of shares represented by their subscription in agreements, and as to

the indebtedness later incurred they were liable on only one-half the number of shares originally subscribed for.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 876; Dec. Dig. § 229.*]

10. CORPORATIONS (§ 414*)—BORROWING MONEY ON NOTES—PROVISION FOR ATTORNEY'S FEES.

Under a resolution of a corporation's board of directors that its managing officers make arrangements for borrowing money, and that the president and secretary be authorized to execute promissory notes therefor, but which did not give express authority to such officers to bind the corporation by contract to pay attorney's fees in the event suit was brought on the notes so executed, the notes might contain all usual and customary terms and conditions, but attorney's fees thereon could not be allowed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1640-1646; Dec. Dig. § 414.*]

11. EVIDENCE (§ 22*)—JUDICIAL NOTICE—NOTES OF CORPORATION.

The court cannot take notice of the fact, if it be a fact, that it is customary for notes, executed by a corporation to secure borrowed money to contain a contract for the payment of attorney's fees, in the event of suit.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 22.*]

12. CORPORATIONS (§ 639*)—STOCKHOLDERS—LIABILITY FOR CORPORATE DEBTS.

Under Const. art. 12, § 15, providing that foreign corporations shall not be allowed to transact business in the state on more favorable conditions than are prescribed for domestic corporations, and Civ. Code, § 322, declaring that the liability of each stockholder of a foreign corporation is the same as the liability of a stockholder of a domestic corporation, the stockholders of a corporation organized under the laws of Arizona to do business in this state are liable for corporate debts incurred in doing business here.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2530, 2531; Dec. Dig. § 639.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Frank N. Thomas against the Wentworth Hotel Company, Mortimer Fleishhacker, and others. Judgment for plaintiff, and defendants Fleishhacker and others appeal. Reversed.

See, also, 158 Cal. 275, 110 Pac. 942; 117 Pac. 1046.

I. M. Golden, Rothchild, Golden & Rothchild, and J. M. & H. L. Rothchild, for appellants. Porter & Sutton, for respondent.

JAMES, J. Action brought to enforce payment of two promissory notes executed by the Wentworth Hotel Company, a corporation; one being for the sum of \$22,500, made in favor of the First National Bank of Pasadena, and the second for the sum of \$25,000, made in favor of the Union Savings Bank of the same city. Appellants were joined as parties defendant because of the fact that they were owners of stock in the hotel company at the time the indebtedness sued on was incurred, and recovery was sought against them on their shareholders' liability arising under the provisions of section 322

of the Civil Code. Judgment went against appellants for the amount prayed for, except that a deduction of 150 shares of stock was apportioned as a credit among appellants Fleishhacker and Bachman, reducing the number of shares found by the court to be held by them at the time the indebtedness was incurred to the following totals, respectively: Mortimer and Herbert Fleishhacker, 137½ shares each; S. Bachman, 275 shares. The occasion for the making of this reduction is hereinafter referred to in connection with the mention of stock issued to Lewis C. Warner and C. Dana Warner. The appeal is from the judgment and from an order denying a motion for a new trial.

The Wentworth Hotel Company was organized under the laws of the territory of Arizona, for the purpose, in part, of transacting business in the state of California. The par value of the stock was the sum of \$100. At the time of the organization of the company, the appellants were subscribers for shares of stock in the following amounts, to wit: Mortimer Fleishhacker and Herbert Fleishhacker, 175 shares each; David Neustadter and Jacob H. Neustadter, 150 shares each; S. Bachman, 350 shares. No certificates representing the stock were issued to any of the subscribers until November 8, 1906. The subscription contract was signed by appellants prior to the date upon which the indebtedness represented by the two promissory notes was incurred, and provided that payment for the stock subscribed for should be made in four equal installments, not less than 60 days apart, upon 15 days' notice from the treasurer of the company. The promissory notes represented money borrowed from the respective banks for uses of the corporation. The date of the note to the First National Bank was October 5, 1906; that to the Union Savings Bank was November 16, 1906. On August 23, 1906, and before any payment had been made by appellants on account of their subscription agreements, the board of directors of the hotel company adopted a resolution, whereby they proposed to release appellants Mortimer and Herbert Fleishhacker and S. Bachman from their obligation as to one-half of the number of shares subscribed for by each. This resolution recited in substance that, as the said appellants had suffered great loss and damage by the earthquake and fire in San Francisco, to such an extent that they were unable to take all of the stock subscribed for and pay for the same, but as they were willing to take one-half of the number of shares so subscribed for and to make certain cash payments, and that it appeared to be for the best interests of the company to enter into such agreement, that the said appellants were therefore released from their subscriptions to the extent stated. Under the terms of this resolution, \$5,000 in cash was to be paid by

each of the Fleishhackers, and \$3,750 was to be paid by each on November 1, 1906. Bachman was to pay the sum of \$10,000 in cash and \$7,500 on November 1, 1906. On October 10, 1906, by a resolution similar in terms, the two Neustadters were to be released from liability as to one-half of the amount subscribed by them upon the payment in cash of the sum of \$7,500 each; these amounts being in full payment for one-half of the stock mentioned in the agreement of subscription executed by these two appellants. The amounts of money mentioned in these resolutions were paid by appellants in accordance with the terms thereof. If the adoption of these resolutions operated to release appellants at the time the action referred to was taken by the board of directors of the hotel company, then at the time the notes were executed the two Fleishhackers and S. Bachman were the owners of only one-half of the number of shares of stock originally subscribed for by them, and the Neustadters had been released from liability as to a like proportion of their subscription for stock after the first note was executed, but before the note for the sum of \$25,000 was made in favor of the Union Savings Bank, on November 16, 1906. The trial court determined that the releases attempted to be made were all invalid, and that all of the appellants were liable for their proportion of the indebtedness represented by the two promissory notes up to the full number of shares of the stock contracted to be taken by them under their subscription contracts. The question as to the validity of these releases is the principal one argued. The position taken by respondent is that a subscriber to stock of a corporation cannot be released from the obligation of his contract, except by payment according to its terms, or with the consent of all the remaining stockholders and the creditors of the corporation. With this contention the trial court agreed; hence its judgment.

[1, 2] Stating the rule in its general sense, it is correct to say that a stockholder may not be released from liability on his contract of subscription without the consent of his fellow stockholders, as well as that of the creditors of the corporation. The reason for the rule is found in the doctrine, now thoroughly established by the decisions of the American courts at least, which views the subscribed capital stock of a corporation, both paid and unpaid, as a trust fund, which the stockholders and creditors have the right to insist shall not be reduced, diminished, or impaired, except with their consent. Thompson on Corporations, vol. 1, par. 765; Morgan v. Struthers, 131 U. S. 246, 9 Sup. Ct. 726, 33 L. Ed. 132. In considering the application of the rule just stated, however, it must be kept in mind that the creditor of a corporation is not a direct party to the contractual relation entered into between the corporation and a subscriber to its capital stock. Under

the trust fund theory, the creditor is presumed to have given credit upon the faith that the working capital of the corporation, whether actually paid in or promised to be paid, will be kept available to satisfy his debt. The corporation, then, cannot, without committing a fraud against such creditor, wipe out the fund, either by returning the money paid by subscribers or releasing the obligors on their unpaid subscription contracts.

[3, 4] The rights of the creditor, nevertheless, do not extend so far as to permit him to interfere and prevent a stockholder from altering his relation toward the corporation with respect to his membership therein as a holder of its shares. It must be admitted that a solvent stockholder may make a valid agreement with the corporation, securing first the consent of all the other stockholders thereto, by which he may surrender his stock and be released on his subscription contract. Such an agreement will be valid and binding upon the corporation, although it may not prevent existing creditors from having recourse against the retiring stockholder, to compel contribution from him, in satisfaction of their claims, in an amount proportionate to the unpaid balance of his subscription. In what has just been said, we have referred to releases made by consent, and where no consideration of doubtful claims or compromises with insolvent or irresponsible subscribers enters into the transaction. This for the purpose of pointing out that a creditor may not complain of the act of a corporation in waiving its right to enforce payment from a subscriber and accepting the relinquishment of his shares of stock. As the creditor may only be damaged by a cancellation of the subscription liability, and if this liability remains with the subscriber after his withdrawal from the corporation, for the benefit of the complaining and nonconsenting creditors, that is all that such creditors have any right to demand or insist upon.

[5, 6] It may also be said that the rule of the decisions is that this power in the stockholders to accept a surrender of the shares of a subscriber may not be exercised by a board of directors in the absence of express authority given them by the charter or by-laws of the corporation. Clark & Marshall on Private Corporations, vol. 3, § 692, subd. 1; Thompson on Corporations, vol. 1, par. 763; Morawetz on Private Corporations, vol. 1, § 112. Yet, while general authority is not reposed in a board of directors to accept a re-transfer of stock from a subscriber, and so terminate the relation of the latter as a shareholder, an exception is recognized by the authorities and text-writers to the extent of admitting that the directors may make compromises with the subscribers whose liability is questioned, who are insolvent, or who are of doubtful financial responsibility. Such compromises usually take the form of that which was entered into between the de-

defendants here and the Wentworth Hotel Company, by its board of directors; that is, in consideration of the subscriber paying for a portion of the shares agreed to be taken, he is released, so far as the corporation is concerned, as to liability for the remainder. We quote: "The directors of a corporation ordinarily have no authority to release stockholders from liability on their subscriptions otherwise than in pursuance of a bona fide compromise, or for a sufficient consideration. But they may compromise with subscribers, as with other debtors, and may release a subscriber where there is a sufficient consideration, so that there is no fraud or wrong as against creditors or other stockholders." Clark & Marshall on Private Corporations, vol. 3, § 692, subd. 1. Again: "The corporation, in case of a subscriber's inability to pay for his shares, or in case of bona fide disputes as to his liability, may bona fide compromise the dispute upon surrender of his shares, and release him from liability thereon. While the directors may compromise doubtful claims, they have no authority to release stockholders from liability upon their binding and undisputed contracts of subscriptions. * * * Section 242. The directors or corporate officers may compromise doubtful claims against subscribers to capital stock." Purdy's Beach on Private Corporations, vol. 1. See, also, section 841, vol. 2, Morawetz on Private Corporations. In Cook on Stock and Stockholders, at section 171, the author says: "A compromise differs from a cancellation, in that the subscriber pays to the corporation a part of the subscription price, in order to be released from the balance. The stock is delivered back to the corporation. The corporate authorities—generally the directors—have power to compromise any corporate debt; and if in the collection of subscriptions there is reasonable doubt as to the liability of the subscriber, or if the subscriber is insolvent, the corporation may compromise the liability and release a part for the purpose of securing the residue. All that is required is good faith." We cite, also, Republic Life Ins. Co. v. Swigert, 135 Ill. 150, 25 N. E. 684, 12 L. R. A. 328; Morgan v. Lewis, 46 Ohio, 1, 17 N. E. 558; Whitaker v. Grummond, 68 Mich. 249, 36 N. W. 62; Erskine v. Peck, 13 Mo. App. 280. We think the action taken by the board of directors of the Wentworth Hotel Company, in making the releases in favor of the appellants, under the statements of the text-writers quoted from and decisions just cited, was within the authority of such board as the managing agents of the corporation.

[7] But let us assume that the action was not within the power conferred upon the directors. It would have undoubtedly been valid, if accompanied by the unanimous consent of the remaining stockholders. No stockholder, so far as the record in the case shows, has ever repudiated the action of the directors, and no creditor whose debt existed

at the time the resolutions were adopted can be affected by the action taken. Furthermore, the stock upon which the defendants secured the releases was treated ever afterwards as the stock of the company, and a large number of shares thereof were resold to new subscribers. This action was brought more than six months after the compromise agreement was entered into. At a meeting of the stockholders, held in December, 1906, the records of the corporation show that appellants were recognized by the corporation as holding only one-half of the number of shares of stock originally subscribed for by them. The compromise agreement between the corporation and defendants was fully executed. The corporation dealt with the surrendered stock as its own, and resold, on November 8, 1908, 50 shares thereof to Lewis C. Warner, and 100 shares thereof to C. Dana Warner; these shares so sold being the number which the trial court apportioned to the holdings of the two Fleishhackers and Bachman as a credit. All of these facts would seem to make the case a proper one for the application of the rule of estoppel, which would prevent any stockholder from now objecting to the authority of the directors to make the releases complained of, and to warrant the conclusion that all stockholders acquiesced therein. It is not claimed that the directors acted in bad faith, nor that the action taken was not, as the resolution recited, for the best interests of the company, and because of the fact that appellants were unable to take and pay for more than one-half of the stock agreed to be taken under the terms of their subscription contract. Our Supreme Court has said, in the case of Tulare Savings Bank v. Talbot, 131 Cal. 45, 63 Pac. 172: "While it is true that a contract of subscription may be modified or annulled only by the unanimous consent of the stockholders, or by the board of directors duly authorized thereto (Pacific Fruit Co. v. Coon, 107 Cal. 452 [40 Pac. 542]), such release may be proved, not only by the records, but as well by the acquiescence of the stockholders of the corporation." The act of the directors was not ultra vires, because the result effected might at first consideration appear to be that some of the capital stock had thereby been withdrawn. Treating of a similar situation, the Supreme Court of Ohio, in the case of Morgan v. Lewis, supra, used this language: "The finding of the referee that this transaction worked a reduction of the capital stock of the company is not tenable. There was nothing in the way of the company reissuing this stock, or its equivalent, to others, who may have desired it. There was nothing in the fact that these certificates were marked 'canceled' on the face by the secretary of the company, and by him treated as surrendered stock, to authorize the finding that the capital stock was reduced. This was no part of the transaction with Morgan, and there was nothing in the fact of the re-exchange of the

stock for the furnace which called upon the officers of the company to treat the stock as canceled, or the capital pro tanto reduced. *Green's Brice, Ultra Vires* (2d Ed.) 191, 192. This conclusion is not qualified by the fact that the stock was not thereafter represented." See, also, *Cook on Stock and Stockholders*, vol. 1, § 282. We conclude, therefore, first: The board of directors had authority to enter into the compromise agreement releasing defendants from a portion of their subscription liability, and accepting the surrender of a part of the shares of stock agreed to be taken, and that defendants ceased to be stockholders from the time of the making of that agreement; second, assuming that no authority existed authorizing the directors to so act, that the corporation and stockholders thereof have become bound by acquiescence from raising any question as to the validity of the releases.

[8] The record shows that the deferred payment on account of the purchase price of one-half of the stock was made by the Neustadters on October 8, 1906. The fact that a portion of the money required to be paid by the defendants Fleishhackers and Bachman, under the terms of the resolutions of release, was provided to be paid on a day subsequent to the date of the making of the cash payment did not postpone the effect of the compromise agreement until all of the money had been paid. A new contract was entered into at the time of the adoption of the resolutions between the corporations and appellants, which was, in effect, a novation. A novation is made: "1. By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation." Civ. Code, § 1531. The obligation of all of the parties to the subscription contract was changed. On the part of the corporation, certificates for one-half of the number of shares of stock subscribed for were not to be issued, but the stock was to be held by it, and a large amount of money was paid as a further immediate consideration moving to the corporation. The time for payment of the balance of the purchase price being deferred did not have the effect of continuing Mortimer and Herbert Fleishhacker and S. Bachman in their relation as stockholders, for the full amount of their subscription, until the final payment had been made. In the case of *Griswold v. Pieratt*, 110 Cal. 263, 42 Pac. 820, a change was worked in the agreement of the parties to the contract there considered by the introduction of new and different terms. In discussing the question as to the effect upon the original obligation in that case, the Supreme Court said: "The original contract was suspended, if not extinguished (Civ. Code, 1531, 1682); the plaintiff, while the new compact between himself and defendant remained in force, could maintain no action for any breach of duty by defendant under the former. His only proper course, if such breach had occurred, was to impeach the

settlement by appropriate pleading for fraud, accident, or mistake. * * * Since defendant pleaded facts showing that the original contract was superseded by a new obligation, he showed that neither party has any rights based upon it." The resolution of the board of directors of the hotel company expressly recited that the obligors on the original subscription contract were then released, and the effect of the transaction, which was fully carried out, as we have before mentioned, was to put an end both to the right of appellants to demand more than one-half of the stock subscribed for by them, and also to the right of the corporation to enforce payment for more than a like proportion of the subscription indebtedness.

[9] The release of defendants Neustadter was shown by the resolution of the directors to have been made on October 10, 1906, and it was in consideration of the payment of \$7,500 in cash by each of these two men. The fact that the payment of these amounts of money was shown to have been made two days before the resolution of release was adopted and recorded is, we think, immaterial. It is sufficiently clear that the payments were made pursuant to the compromise agreement entered into by the officers of the corporation, which by the action of the board of directors was made binding. It follows, then, that on October 5, 1906, at the time the indebtedness of \$22,500 to the First National Bank of Pasadena was incurred by the hotel company, the two Fleishhackers were the owners of 87½ shares each, instead of 175 shares originally subscribed for by each, and that S. Bachman was the owner of 175 shares, instead of 350 originally subscribed for. The release of the Neustadters not being made until October 10, 1906, these latter appellants were liable for the indebtedness of \$22,500 on the full number of shares represented by their subscription agreement. The indebtedness on the note, dated on November 16, 1906, executed to the Union Savings Bank of Pasadena, for the sum of \$25,000, was incurred after the several appellants had been released from their obligation to accept more than one-half of the number of shares of stock subscribed for.

[10, 11] The resolution of the board of directors, whereby authority was given to the managing officers of the corporation to borrow money and execute notes therefor, did not give express authority to such officers to bind the corporation by contract to pay attorney's fees in the event suit was brought to recover on any promissory notes so executed. That resolution was in the following form: "On motion duly made and seconded, it was resolved that arrangements be made for borrowing such sums as may be needed, and that the president and secretary be authorized to execute notes therefor." *Schailard v. Eel River Nav. Co.*, 70 Cal. 144, 11 Pac. 590; *Gribble v. Columbus Brewing Co.*, 100 Cal. 67, 34 Pac. 527. No doubt, under the

terms of the resolution quoted, the president and secretary were authorized to execute promissory notes which would contain all usual and customary terms and conditions; but we cannot take notice of the fact, if it be a fact, that it is usual and customary for such notes to contain a contract for the payment of attorney's fees, in the event of suit. The record as it is presented contains no evidence showing or tending to show that the condition requiring the payment of attorney's fees in the event of suit is one customarily and usually incident to the terms of such contracts. Attorney's fees were therefore improperly allowed.

[12] The further contention that the stockholders are not subject to the personal liability imposed by the statute of this state, (Civ. Code, § 322), which makes a shareholder in a corporation responsible for the payment of such a proportion of the debts of the corporation as the number of shares owned by such shareholder bears to the whole of the subscribed capital stock, may be disposed of by reference to the decision rendered by the Supreme Court on August 31, 1910 (see *Thomas v. Wentworth Hotel Co.*, 153 Cal. 275, 110 Pac. 942), holding that the stockholder of a corporation organized under the laws of Arizona, for the purpose of doing business in the state of California, is liable and must respond to the claims of creditors in the amount prescribed by the Civil Code.

It follows from the conclusions we have expressed that the judgment and order must be reversed, and it is so ordered.

We concur: ALLEN, P. J.; SHAW, J.

18 Cal. App. 403

THOMAS v. WENTWORTH HOTEL CO.
et al. (L. A. 2,691.)

(Supreme Court of California. Aug. 15, 1911.)

In Bank. Dissenting opinion on order denying a rehearing.

For opinion in District Court of Appeal, see 117 Pac. 1041.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing. The directors of the corporation had no authority to release any portion of its subscribed capital, except by way of a bona fide compromise with an insolvent subscriber, and the recitals in their records are not competent evidence, against either stockholders or creditors, that Bachman or either of the Fleishhackers was insolvent, or believed to be insolvent, on the 23d day of August, 1906—the date of the supposed compromise. Aside from these recitals, there is no evidence that either of them was then or has been since insolvent,

or suspected of insolvency. If, therefore, as I have no doubt is true, the burden of proving these essential facts was on the defendants, the resolution or agreement of August 23, 1906, was properly held to be ultra vires and ineffectual until duly ratified by the stockholders; and there is not the slightest pretense of even an implied ratification prior to the date of the first loan—the loan of the First National Bank of Pasadena, made on October 5, 1906. Conceding, then, that the officers of that bank are chargeable with knowledge of what appeared upon the records of the corporation and of other existing conditions, all that they knew was that the directors had, without authority and contrary to law, attempted to release the obligation of solvent subscribers to the capital of the corporation. A subsequent ratification by the stockholders of a void release would not have the effect of impairing the rights of existing creditors. But even if it could be allowed that effect there was no subsequent ratification by the stockholders. Certainly there was no express ratification, and the only pretense of an implied ratification is the fact that at a stockholders' meeting on October 10th Bachman and the Fleishhackers voted only one-half of the stock they had subscribed for. This would have been a very inconclusive circumstance, if all the other stockholders had been present. But all the other stockholders were not present, either in person or by proxy. The entire number of shares (3,500) had been subscribed; only 3,001 shares were represented at this meeting, leaving 499 shares unaccounted for, and, excluding the 350 shares surrendered by Bachman and the Fleishhackers, there were 149 shares wholly unrepresented. This was fatal to a ratification, even if it had been express in terms, instead of having to rest upon a doubtful implication.

What is here said regarding the first attempted release applies equally to the subsequent attempted release of the Neustadters, of whose insolvency there is no evidence—a transaction never expressly ratified, nor ratified by any pretense of acquiescence, until after the loan made in November by the Union Savings Bank.

As to the supposed estoppel of nonconsenting stockholders, arising out of the fact that the directors were able to dispose of 150 out of the 350 shares surrendered by Bachman and the Fleishhackers at their par value, I do not understand the principle upon which it rests. This was but a partial restoration to the trust fund of a larger amount unlawfully diverted; it was at most a compensation pro tanto to the stockholders, and a reimbursement pro tanto of the trust fund for the benefit of creditors. Nor can I understand how an estoppel of the stockholders of a corporation can be held to impair the rights of creditors. The partial reimbursement of the fund, it is true, entitled the defendants to

a proportional credit, and it was given that effect in the judgment of the superior court, which in my opinion, should have been affirmed.

I concur: MELVIN, J.

160 Cal. 741

In re YOELL'S ESTATE. (S. F. 5,392.)

(Supreme Court of California. Sept. 15, 1911.)

WILLS (§ 402*)—CONTEST—COSTS OF CONTESTANT.

Where the second trial of a will contest was abortive because of the destruction of the records, and the third trial resulted in a mistrial, it was error to order the payment of contestants' costs thereon by the special administratrix out of the funds of the estate; the court having no power to appropriate the assets to aid either party, until a final judgment is rendered.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 402.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

In the matter of the estate of J. Alexander Yoell. From an order directing contestants' costs upon certain trials of a will contest to be paid out of the assets of the estate, an appeal was taken. Reversed.

Hiram W. Johnson and Carl Westerfield, for appellants. Bishop, Hoefler, Cook & Harwood, E. E. Cothran, and Leon Morris, for respondents.

HENSHAW, J. Certain of the children of J. Alexander Yoell, deceased, contested the admission of his proffered will to probate. The first trial resulted in a disagreement of the jury; the second proved abortive because of the earthquake and fire; the third resulted in a mistrial; the jury standing eight for contestants and four for the proponents. The trial court then made its order, fixing the costs of the contestants upon the second and third trials, and directing them to be paid by the special administratrix out of the funds of the estate. From that order, this appeal is taken.

The question thus presented upon appeal has been determined absolutely in favor of appellants' position by this court in bank, in *Henry v. Superior Court*, 93 Cal. 569, 29 Pac. 230. In the *Henry Case* the order was in advance of the hearing of the contest, and was a direction to the special administrator to pay to the attorney for the contestants the sum of \$600 "for counsel fees, witness fees, and other expenses." In the opinion in the *Henry Case*, it is pointed out that such al-

lowance for counsel fees should be made to the party, and not to the attorney. It is further declared that it is not within the scope of the powers of the special administrator to pay, and therefore not within the scope of the power of the court to order him to pay, such costs, but that such an order, even when properly made in other respects, should call for the payment in due course of administration. But the principal ground for the decision, as stated by the court itself, is "that until the will has been admitted to probate, or probate has been denied, the court has no power to appropriate the funds of the estate to aid either proponent or contestant." Some of the reasoning advanced in support of that view, pertinent to the case before it, is not here applicable. In the *Henry Case* there had been no trial, and the allowance of costs, made in advance of the incurring of the costs themselves, must rest upon a speculative basis. Here there has been a trial, and it is not seriously in question but that the costs have been incurred. But the foundation of the court's decision in the *Henry Case* is that costs cannot be allowed at all, "except as an incident to some judgment or order of the court." And in this case, no more than in the *Henry Case*, is there any such judgment or order.

It is proper to add, in contemplation of the fact that the law (with but few restrictions) permits a person to dispose of his property by will in such manner as he sees fit, that another law which permits one to contest the will, and perhaps lay bare the secrets of a testator's life, and to cloud his reputation after his death, and then permits him to recover all his costs, even when his efforts so to destroy the will have proved futile, is exceptional, in that it takes one man's property and bestows it upon another, when that other has been making an unsustained attack upon the testamentary act of the person whose estate is thus compelled to pay for the attack. And so it is said by this court, in *Estate of Bump*, 152 Cal. 271, 92 Pac. 642, that the cases "must be rare and the circumstances must be peculiar indeed to justify such an order in favor of a contestant who has failed." The final determination of the litigation, consequently, must have a weight in influencing the court, in the exercise of the discretion, to award costs with which the law has vested it, and not until the final determination can that discretion be properly exercised.

The order appealed from is therefore reversed.

We concur: MELVIN, J.; LORIGAN, J.

(160 Cal. 725)

ROSENHOLZ v. ROSENHOLZ.
(S. F. 5,807.)

(Supreme Court of California. Sept. 13, 1911.)

APPEAL AND ERROR (§ 478*)—WRIT OF RESTITUTION—PROCEDURE.

Where the allegation, in a petition to the Supreme Court for an alternative writ of restitution, that defendant before execution applied to the trial court to fix the amount of his stay bond pending appeal, is controverted, and neither the record nor other evidence is before the court, the cause must be set down for hearing, as his failure to make such application would affect his rights.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 478.*]

In Bank. Action by Mary C. Rosenholz against Alfred Rosenholz. There was a judgment for plaintiff, and defendant now applies for an alternative writ of restitution to be directed against plaintiff. Cause set down for hearing.

R. M. Royce and Austin Lewis, for petitioner. Leo Kaufmann, for plaintiff.

PER CURIAM. This is a petition for a writ of restitution, restoring to petitioner the possession of certain real property, and preserving his statutory right to a stay of execution pending an appeal from the judgment of the superior court of the city and county of San Francisco. It is made to appear by the petition that an interlocutory judgment and decree awarding to plaintiff the property in question was duly made and given; that he appealed from this judgment and repeatedly sought the court to fix the amount of a bond to stay the execution of the judgment pending the appeal; that the trial court failed to do this, while maintaining the status quo by its order staying execution of the judgment. The last application to the court to fix the stay bond upon appeal, it is alleged, was made upon January 5th. Upon January 6th, in the absence of defendant's attorney, upon application of plaintiff's attorney, the order staying execution was vacated, and a writ of possession ordered issued by the judge. Upon acquiring knowledge of this, and before the execution of the writ by the sheriff, defendant's attorney secured another stay of execution for two days, and likewise an order fixing the amount of the stay bond; that this order was served upon the sheriff; that within the time limited by it a good and sufficient stay bond was filed; that, notwithstanding this, petitioner was ousted of possession by unauthorized persons not connected with the office of the sheriff of the city and county; that petitioner's attorney then made application to the court for a writ of restitution which the court refused to consider, "handing the same to the clerk and telling him to tell defendant's counsel to take it away."

An application for relief was then made to this court. The answer to the petition joins issue upon certain of these averments. Thus, it is denied that petitioner ever made application to the court to fix the amount of the stay bond until after the court had issued its writ of possession to plaintiff under the judgment and this writ had been duly executed by the sheriff. It is further denied that the sheriff did not execute the writ, and that the writ was executed by unauthorized persons. Manifestly the rights of petitioner, if he had made timely application for a stay bond pending his appeal, would be very different from the rights that would be his if he had made such application only after execution of a judgment.

The condition of the record making it impossible for this court to determine this and other controverted questions of fact herein adverted to, it is ordered that the order of submission in the above-entitled matter heretofore made be vacated, that the cause be set down upon the calendar of the next law and motion day, October 2, 1911, for further hearing and evidence upon these matters, and that timely notice be given of this order to the parties interested.

(160 Cal. 733)

SHAW v. SHAW. (S. F. 5,355.)

(Supreme Court of California. Sept. 14, 1911.)

1. TENANCY IN COMMON (§ 35*)—SALES.

Plaintiff and defendant owned, as tenants in common, 200 acres in timber land which, by reason of the quantity of the timber thereon, at the price of \$1 per 1,000 feet per acre, was only worth \$20 per acre. It was agreed between plaintiff and defendant that they would not sell the land for less than \$25 an acre, and, in order to get more, defendant obtained control of approximately 1,500 acres of the land, which, including the 200 acres, averaged 6,000 standing feet per acre, whereupon defendant was enabled to sell the whole land for \$60 per acre; but, before doing so, he concealed the price and asked plaintiff for what sum he would sell his interest in the 200 acres and obtained a deed from him at the rate of \$25 per acre. It was stipulated that defendant was plaintiff's agent in selling plaintiff's interest in the 200 acres in connection with the larger tract. *Held*, that defendant was not entitled to make a profit out of the sale, and, all the land having been sold at the rate of \$60 per acre without reference to the timber standing thereon, defendant was accountable to plaintiff for his interest at that rate.

[Ed. Note.—For other cases, see Tenancy in Common, Dec. Dig. § 35.*]

2. APPEAL AND ERROR (§ 218*)—SPECIAL VERDICT—FAILURE TO OBJECT AT TRIAL.

Objections to answers given by the jury to special issues submitted by the court should be made at the time the answers are returned into court, that the jury may be required to render more definite and specific responses, and cannot be first raised on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1315-1324; Dec. Dig. § 218.*]

3. APPEAL AND ERROR (§ 867*)—ORDER DENYING NEW TRIAL—OBJECTIONS TO PLEADING.

Certain defects in a complaint and the objection that the findings contradict or are at variance with the pleadings cannot be considered on appeal from an order denying a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476-3486; Dec. Dig. § 867.*]

In Bank. Appeal from Superior Court, Humboldt County; Clifton H. Connick, Judge.

Action by W. H. Shaw against S. B. Shaw. Judgment for plaintiff, and defendant appeals. Affirmed.

H. L. Ford and L. M. Burnell (T. J. Crowley, of counsel), for appellant. Denver Sevier, for respondent.

HENSHAW, J. Plaintiff and defendant are brothers. They owned in common 200 acres of timber land in Humboldt county. The value of such timber land was estimated (provided the timber was sufficient in quantity to justify cutting) at a dollar per thousand standing feet per acre. Thus, an acre of land containing 100,000 standing feet of timber was estimated to be worth \$100. The brothers desired to sell their 200 acres, and they had their land "cruised"—that is to say, the amount of timber upon it approximately estimated—and were disappointed to find that it averaged only about 20,000 feet per acre, which would mean a valuation of \$20 an acre or \$4,000 for the tract. They desired to obtain more than this; as much as possible, of course. The defendant conceived the idea of gathering in by purchase or under bond as large a tract of better timber land as was possible and of making a sale of the whole, including the 200 acres. He proceeded to do this at his own cost and expense, buying 80 acres and bonding other lands until in the aggregate he controlled approximately 1,500 acres, which he then offered for sale. The intending purchasers were willing to buy the land, provided the land averaged 60,000 standing feet an acre. That it would so average defendant felt well assured. A bond was given to the intending purchasers whereby the purchasers agreed to buy the land at the price of \$60 an acre if they satisfied themselves that it would average 60,000 standing feet of lumber per acre. A brief time was given to them to have the land "cruised." They satisfied themselves of its value, and the purchase was completed. After the bond was given and before the purchase was actually made, defendant wrote to his brother, and, without advising him of the condition of affairs or the price which he expected to obtain, asked him for what sum he would sell his interest in the 200 acres, and inclosed a deed for the plaintiff to execute. Plaintiff did exe-

cute the deed for a consideration of \$25 an acre and wrote to his brother saying that he knew that "we had agreed between ourselves not to take less than \$25 an acre." He also agreed to allow his brother a \$200 commission for effecting the sale. The sale was made. The defendant accounted to his brother for the \$2,500, deducting a commission of \$200. Subsequently plaintiff learned that all the land had sold at the rate of \$60 per acre and brought this action to recover the sum which he claimed to be due him in accordance with the terms of the sale. The cause was tried before a jury. Its verdict and the judgment following were given for the plaintiff. Defendant moved for a new trial, and, from the order denying his motion, though not from the judgment, defendant appeals.

Defendant's contention is that the 200 acres were worth no more than \$20 an acre, that this land could not be sold even for that without adding to it other and more valuable timber land; that to accomplish this sale he had spent his time and money; that the land was, while sold nominally for \$60 an acre for the whole tract, actually sold per acre according to the value of the timber standing upon it; that, when the plaintiff made the conveyance of his interest in the 200 acres for \$25 an acre, the price was actually more than the land was worth; and that he (defendant) took the deed either as a purchase, which he had the right to make since he was paying more than the land was worth (in this matter the defendant's own testimony is inconsistent with itself), or took the deed, not as a purchaser of his brother's interest, but in effect as a bond upon the property the better to enable him to sell it; that when he sold it he was in equity accountable to his brother for only the timber value, namely, \$20 an acre; and that, consequently, under the terms of the sale actually made he had overpaid and not underpaid his brother in their settlement. The contention of the plaintiff, upon the other hand, is that his brother acted for him as his agent in the sale of his land (and this is conceded by the stipulation of the parties); that the distinct understanding was that, while they would be willing to sell their 200 acres for \$25 an acre and not less, they, of course, desired to get as much more for it as possible; that the defendant agreed to undertake the sale, to gather in other tracts of timber land, and to sell the whole, including the 200 acres, for such price per acre as could be obtained; that the very purpose of this arrangement was to increase the price obtainable for the 200 acres; that the land was actually sold for \$60 per acre; that this \$60 per acre represented the selling price of the 200 acres as well as of every other acre in the combined tract; that it was their express agreement that he should be paid

such sum per acre as the land sold for; that his brother by concealment induced him to give the deed at \$25 per acre knowing the land was to be sold for \$60 an acre, and after the sale continued to conceal the selling price from him until from outside sources he discovered what it was.

The evidence leaves little doubt but that for timber the 200 acres was not worth more than \$20 per acre; but this is not a controlling consideration. The controlling considerations are two: First, what was the relationship between the plaintiff, and defendant in regard to the land which they owned in common? Second, what were the terms of the sale which defendant actually made? The first consideration is completely answered by the stipulation of the parties solemnly entered into upon the trial of the cause to the following effect: "It is admitted that the defendant was the agent of the plaintiff for the sale of the plaintiff's land." This relationship, of course, as matter of law, bound the defendant to the utmost good faith in his dealings with his principal. But, besides the obligation of the law, the testimony of the plaintiff and of his witnesses was that the defendant had agreed that plaintiff should have his full share of all the 200 acres sold for; that in the selling of the whole tract "all would go in at the same price by the acre"; that he (plaintiff) was to have the same price per acre that defendant received. "I was to have for my land just the same as the land sold for." To other witnesses the defendant is represented as saying that "when plaintiff's land went into the tract plaintiff would get his share per acre for which it was sold." It is undoubted that defendant kept plaintiff in ignorance of the price when he secured from him his deed to the land at \$25 per acre. In his testimony he treats this transaction with his brother as a direct purchase by him of all his brother's rights, saying that he had made him an offer and "when the deed was signed by him of course I bought it"; that at the time he was satisfied that his sale was "going to go" and that he "took it" (his brother's land) and "took a chance as to whether the sale was going to go through." In the next breath he apparently denies that he made any offer for the land, and seemingly wishes to convey the idea that the deed is to be treated merely as a bond authorizing him to sell. This latter seems to be the view adopted by the attorneys for the defendant, from the following language of their brief which in contemplation of the evidence already quoted is at least singular: "It was admitted that defendant was the agent of the plaintiff; but there is no evidence that he purchased the property or even claimed that he had done so."

[1] It must be concluded, therefore, upon this proposition, that the admission of defendant and the evidence in the case abundantly support the proposition that fiduciary

relations existed between the parties and by virtue of those fiduciary relations the defendant could not make any profit out of the sale of his principal's land by any transaction unknown to and unapproved by the principal himself. So axiomatic is this proposition that, of course, it does not require the citation of authority.

The second consideration turns upon the true nature of the sale which defendant actually effected, and here, at the outset, it should be said that if defendant charged with the duty of an agent can show that by the transaction he, himself, did not make any profit out of the sale of plaintiff's land, then, since the sale even at \$25 an acre was a fair price, defendant is exonerated and plaintiff cannot recover. But upon this plaintiff's evidence established abundantly that the land was not sold for \$1 for every thousand standing feet of timber per acre, but that the transaction actually was this: The purchasers were buying the land at the rate of \$60 per acre if upon inspection they became satisfied that it averaged at least 60,000 standing feet of timber per acre. There was no contract that if it averaged 80,000 feet of timber per acre that the price should be \$80 per acre. There was no contract whereby the parcels were to be segregated and valuations put upon them according to the amount of timber found thereon. For aught that appears the land may have averaged 150,000 feet of timber per acre; but the price was still \$60 per acre to be paid after the intending purchasers had satisfied themselves of the amount of timber growing on the whole tract. Thus, one of the purchasers, Palmtag, testifying that they bought the tract from the defendant Shaw, and being asked what he paid for it, replied: "\$60 an acre. Q. Was there any distinction as to any particular land selling for less, or did it all go at the rate of \$60? A. It all went at \$60 an acre." Lancaster, another of the purchasers, corroborates Palmtag, and, in answer to questions from the court, said that the bond for the deed specified on its face that the land was to be sold at the rate of \$60 an acre and the deed followed the bond. Even the defendant testifying that the 200 acres was included in the sale, and being asked as to the land "if it all sold for \$60 an acre," answered, "It sold if it averaged 60,000 feet to the acre." And, indeed, the very purpose of defendant's endeavors in securing the large tract for sale and including the 200 acres therein was to obtain for the 200 acres an enhanced price, a price so enhanced by the greater value of the surrounding lands. And here we may consider a proposition which appellant's counsel designate as one of controlling influence in the case. They state that the test of the transaction is: What sum would plaintiff be entitled to if the action were between him and the other owners of the land for an apportionment of the proceeds of the sale, and

they proceed to argue that if all the land-owners had sold they would apportion the proceeds according to the timber respectively on each seller's land. This might be true if a group of landowners were to put their lands together and so agree upon the sale; but it does not at all follow that this affords the measure of plaintiff's rights against his agent. If, in fact, such was defendant's agreement with the other sellers of land, and if he was by his contracts with them obliged to account to them on the sale in proportion to the timber growing on their lands, the evidence would have weight, not as controlling the relationship between plaintiff and defendant, but as showing what, in fact, the lands actually sold for, for that, of course furnishes the basis of the accounting between the principal and the agent. But the defendant does not pretend to offer evidence that he was so called upon to distribute the proceeds of the sale or that the lands of the others were paid for at any other rate than \$60 an acre regardless of the amount of timber on them or even that for his own 100 acres of the undivided 200 acres he did not receive the full \$60 per acres. If he did receive the full \$60 an acre for his 100 acres, the plaintiff was entitled by virtue of the relationship between them to \$60 for his 100 acres of the same undivided tract.

The evidence therefore clearly supports the verdict of the jury in this regard.

Complaint is made of certain instructions given and of the refusal to give others. The complaint is not addressed to any error of law embraced in the instructions given, but rests upon the declaration that they were inappropriate to the case. The foundation of the complaint is expressed in the brief of appellant's counsel that it was wrong to give instructions as to the right of the defendant to purchase his principal's lands, and his duties and responsibilities in the event that he did so purchase; and again the declaration is repeated that: "There was no evidence whatever even tending to show a purchase of the property by the defendant. The matter was absolutely outside the case and was not and could not have been in any manner an issue in the case." We think what has already been said is sufficient to dispose of this contention. Indeed, under the evidence it would have been error for the court to have refused to give the proposed instructions upon this very subject. In like manner it is said, as to many of the instructions touching the duties of an agent to his principal unimpeachable in themselves, that "they are all on matters which are not in issue in the case, matters upon which there is no evidence." The statement of the evidence above given demonstrates the unsoundness of his declaration. The instructions which the court refused were based

upon the contention, which we have here declared to be untenable, that the sale of the land was in accordance with the amount of standing timber per acre. These refused instructions did not even leave that question open to the jury, but were declarations to the effect that such in fact was the nature of the sale, and that therefore plaintiff was entitled only to the "proportionate part of the average price which his land bore to the average quality of the land in the tract," with much more to the same effect. The instructions were properly refused.

[2] The other asserted errors in their varying forms are addressed to different phases of these same contentions. The objections which defendant makes to the answers given by the jury to special issues submitted by the court should have been remedied by him by a request at the time the answers were returned into court that the jury be required to render more definite and specific responses. He cannot here complain of them. *Huss v. Chicago G. W. Ry. Co.*, 113 Iowa, 343, 85 N. W. 627; *Clementson on Special Verdicts*, p. 106.

[3] This appeal being only from the order denying a new trial, the asserted defects in the complaint and the objection that the findings contradict or are at variance with the pleadings cannot here be considered. *Schroeder v. Pissis*, 128 Cal. 212, 60 Pac. 758; *Moore v. Douglas*, 132 Cal. 400, 64 Pac. 705.

For these reasons the order appealed from is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; MELVIN, J.; SLOSS, J.

160 Cal. 716

PEOPLE et al. v. LATIMER, Judge of
Superior Court. (S. F. 5,335.)

(Supreme Court of California. Sept. 11, 1911.)

1. CONTEMPT (§ 66*)—PUNISHMENT—REVIEW.

An order of the superior court dissolving an attachment against a bank officer, on refusal to state upon examination before the board of tax equalization how much money a certain person had in his bank, where the board had then finally adjourned so that no answer witness might be compelled to give would be available to any one, will not be reviewed; Code Civ. Proc. § 1222, making the judgment and orders in contempt proceedings conclusive.

[Ed. Note.—For other cases, see Contempt, Dec. Dig. § 66.*]

2. CONTEMPT (§ 67*)—REVIEW—ANNULMENT ON CERTIORARI.

In view of Code Civ. Proc. § 1222, providing that the judgment and orders of the court or judge in contempt proceedings are final and conclusive, an order made in contempt proceedings can only be annulled on certiorari when it is in excess of the court's jurisdiction.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 221, 222; Dec. Dig. § 67.*]

Shaw and Lorigan, JJ., dissenting in part.

In Bank. Application for writ of review by the People and others against the Honorable R. H. Latimer, Judge of the Superior Court in and for the County of Napa, to review an order discharging an attachment against the person. Order affirmed.

F. M. Silva, Dist. Atty. (Theo. A. Bell, of counsel), for petitioners. A. J. Hull, Frank L. Coombs, Percy S. King, and Chas. E. Trower, for respondent.

PER CURIAM. This is a proceeding in certiorari to review an order made by the respondent, discharging and dissolving an attachment against the person of E. L. Bickford issued in a contempt proceeding.

On August 7, 1909, the chairman of the board of supervisors of the county of Napa made and filed with the clerk of the superior court of said county, and presented to the Honorable H. T. Gesford, the judge of said superior court, a verified certificate of facts. That certificate showed that on August 5, 1909, the board of supervisors of said county, sitting as a board of equalization, had before it for consideration and action the matter of directing the assessor of the said county to assess to one H. A. Crawford, a resident of said county, taxable property owned by said Crawford at 12 o'clock meridian on the first Monday in March, 1909, which had escaped taxation; that previously, and on the 16th day of July, 1909, the clerk of the said board of supervisors, upon the order of said board, sitting as a board of equalization, had notified the said Crawford by letter, postpaid, and deposited in the post office at Napa, which was his place of residence, that said board would, on July 22, 1909, investigate the matter of directing the assessor of Napa county to assess to him any taxable property owned by him at 12 o'clock meridian on the first Monday of March, 1909, and which had escaped taxation; that the investigation of said matter was continued from time to time until August 5, 1909, when it was taken up by said board of equalization for action; that at the said time E. L. Bickford was duly sworn as a witness, and after testifying that he was the cashier of the First National Bank of Napa, and knew whether or not said H. A. Crawford had any money on deposit in said bank at 12 o'clock meridian on said first Monday of March, 1909, was asked the following question: "Did H. A. Crawford have any money on deposit in the First National Bank of Napa on the first Monday in March, 1909, at 12 o'clock meridian"; that said E. L. Bickford refused to answer said question, and thereupon the board, having determined that the question was proper and pertinent, directed the chairman of said board to require the witness to answer it; that the chairman of said board directed said witness to answer the question, but he again refused to do so; that the board thereupon unanimously declared that said witness

be deemed in contempt for his refusal to answer, and directed the chairman of the board to report the facts to the judge of the superior court of Napa county, that such proceedings might be taken in said matter as required by law.

On the filing of said certificate with Judge Gesford, he issued an attachment directed to the sheriff, commanding him to attach the person of said E. L. Bickford forthwith and bring him before said judge; that thereafter and on August 7, 1909, the sheriff, under said attachment, brought said Bickford before said judge, and by stipulation of counsel the hearing was continued to August 10, 1909, to be taken up before respondent, judge of the superior court of Contra Costa county, sitting in the place and stead of said judge of the superior court of Napa county.

On August 10, 1909, the matter coming up before the respondent, Judge Latimer, counsel for Bickford moved to discharge the attachment on the grounds: (1) That the board of equalization had no jurisdiction over said H. A. Crawford mentioned in the certificate of facts; (2) that at the time of the alleged contempt the duty of the board of equalization had expired by limitation of time; (3) that said board had no power to assess any taxable property to H. A. Crawford which might have escaped taxation; (4) that the said board of equalization had no jurisdiction of E. L. Bickford by reason of the fact that he was an officer of a national bank.

No testimony or evidence was presented on the hearing. The motion was argued by counsel and submitted, and on August 12, 1909, an order was made by the respondent, Judge Latimer, that the attachment be dissolved and the said E. L. Bickford discharged.

Insisting that in making the order Judge Latimer exceeded his jurisdiction, this proceeding was instituted here to have such order reviewed and annulled, and such further order made as may be proper in the premises.

At the time the contempt proceedings came on for hearing in the superior court, the board of equalization had finally adjourned, it was no longer possible to receive any testimony from any one on the matters concerning which it had been sought to examine Bickford, and such matters had been definitely closed so far as such board was concerned.

[1] We are of the opinion that we cannot disturb the action of the trial court. Assuming purely for the purpose of this decision that Bickford was guilty of contempt under the provision of section 4068, Political Code, and should have been so adjudged, the board of equalization having finally adjourned, he could not have been imprisoned until he answered the questions that had been propounded to him as a witness before said board; in other words, he could not have been imprisoned as a means to compel such

answers, as would have been permissible had the board still been in session, and in a position to take action in the matter wherein his testimony was desired. The situation was such, at the time of the hearing in the superior court, that any answers he might give would be of no value to any person. Nobody's rights could be affected thereby. The only penalty that it was possible for the trial court to impose was a fine or imprisonment for a stated period, or both such fine and imprisonment, simply as a punishment, and not in any degree for the protection of the rights of any third party.

Whether or not under such circumstances a person charged with contempt shall be adjudged guilty thereof and punished therefor is a matter solely within the discretion of the court entertaining the contempt proceedings. The law does not authorize an appeal in such matters, and it is expressly provided in section 1222, Code of Civil Procedure, that "the judgment and orders of the court or judge made in cases of contempt are final and conclusive."

[2] It is only when an order so made is in excess of the jurisdiction of the court making it that it may be annulled on certiorari. Even if we assume that the trial court erred in refusing to adjudge Bickford guilty of contempt, it cannot be held that it exceeded its jurisdiction in doing so. It simply erred while acting in the exercise of its jurisdiction. It has been held, as in *Crocker v. Conrey*, 140 Cal. 213, 73 Pac. 1006, that mandamus will lie at the suit of one beneficially interested to compel a court to employ the process of contempt against a witness to compel him to answer such questions, where such answers when given will be available to such party in a pending proceeding. Likewise, doubtless, mandamus will lie to compel such action on the part of a court to compel compliance with an order requiring the payment of alimony when the party is financially able to so comply, or in any case where compliance with an order is essential for the protection of the beneficial rights of the petitioner; but, except when there is some party beneficially interested in having the particular act constituting a contempt performed, the dismissal by a court or judge of a contempt proceeding is final and conclusive, and beyond review by any other tribunal. It cannot be held that there is in this matter any party so beneficially interested.

It follows that the order of the superior court must be affirmed, and it is so ordered.

BEATTY, C. J. I concur in the judgment. A person who refuses to answer a question which a majority of the board of equalization decides to be proper and pertinent, as declared by section 4068 of the Political Code, "*shall be deemed in contempt*," whatever that may mean. Apparently he is in contempt of the authority of that board, but they

have no power to punish him for the contempt. All that they can do is to report his contumacy to the superior court and cause his arrest and arraignment before that tribunal. When so arraigned, he has committed no contempt of court, and it is difficult to see how he can do so in connection with the cause of his arrest, unless, after the court shall have decided that the question is one he ought to answer and ordered him to answer, he still refuses. He is then, and for the first time, guilty of a contempt of court, for which the court may punish him by fine and imprisonment, and may keep him in prison until he does answer, or until the adjournment of the board puts it out of his power to answer. This in my opinion is the meaning and whole scope of the provisions of sections 4068 and 4069 of the Political Code, which, owing to the fact that the board of equalization had adjourned sine die before Bickford was arraigned before Judge Latimer, proved wholly inadequate to the exigencies of the case. It would have been vain for him to order Bickford to answer when there was no board in existence, to which an answer could be made, and since he could not order him to answer he could not punish him for not answering. He could do nothing in short but what he did—discharge the attachment for contempt—unless, as seems to be contended, Bickford's contempt of the authority of the board of equalization was a misdemeanor punishable as other misdemeanors, and that in a summary proceeding by the superior judge. But there is no statute making a contempt of the authority of the board of equalization a misdemeanor, and if it were a misdemeanor the Constitution would require it to be prosecuted in the name of the people of the state of California (article 6, § 20) and in the ordinary form of procedure and subject to the common rights of defendants in criminal actions.

The amount of it is that the statute needs to be amended and strengthened, by making the contempt of the board a misdemeanor and providing an adequate penalty. The present statute, owing to the short life of the board of equalization, is practically impotent.

SHAW, J. (dissenting). I agree with all that is said in the foregoing opinion by the court, except the discussion and conclusion to the effect that the order erroneously made by the superior court cannot be annulled on certiorari. The superior court was not without jurisdiction, for it still retained power to punish the party for the contempt by imposing a fine or imprisonment. It did not exercise its jurisdiction by deciding that Bickford should not, under the facts charged, be punished. It dismissed the proceeding solely because it decided that it had no jurisdiction to impose any punishment, no power to act at all in the matter. The court, by

the order dismissing the proceeding, erroneously divested itself of further jurisdiction thereof. "Where such is the case, the writ of certiorari is a proper proceeding to annul the order." *Hall v. Superior Court*, 71 Cal. 550, 12 Pac. 672; *Levy v. Superior Court*, 66 Cal. 292, 5 Pac. 353; *Hall v. Superior Court*, 68 Cal. 25, 8 Pac. 509; *Carlson v. Superior Court*, 70 Cal. 631, 11 Pac. 788. The entire proceeding before the board of supervisors and the ancillary proceeding in the superior court was at the behest of the state, and they were had for the purpose of securing the equal taxation of the property liable thereto, a matter in which the state is directly interested and is, in fact, the real party in interest. It is therefore beneficially interested to a sufficient extent to give it a standing in court to have the order annulled and the prosecution for contempt of its authority completed and determined. The order dismissing the proceeding should, in my opinion, be annulled, and the superior court, being then invested with jurisdiction, could proceed to trial and judgment upon the charge against Bickford.

LORIGAN, J. (dissenting). I concur with the views expressed in the foregoing dissenting opinion of Mr. Justice SHAW. As to the prevailing opinion, while I am satisfied that from the undisputed certification of facts Bickford was guilty of contempt of the authority of the board of supervisors meeting as a board of equalization, I cannot agree with the view announced therein that there is no party beneficially interested in this proceeding who is entitled to have the order of the court annulled on certiorari.

The Constitution (article 13, § 1) requires all property not exempt from taxation to be taxed in proportion to its value, and under section 3672 of the Political Code the board of supervisors meeting as a board of equalization is invested with the power and it is made its duty to carry this constitutional mandate into effect. It is directed by said section 3672 to "equalize the assessment of all property in the county," and unless all property is assessed necessarily the assessment is not equal and the constitutional mandate that all property be taxed is not carried into effect. The board, as an agency of the state, was proceeding to carry out this duty under the provisions of the law authorizing it to examine witnesses for that purpose when Bickford refused to testify and for such refusal was guilty of contempt under section 4068 of the Political Code and to punishment therefor under section 4069 of the same Code.

These proceedings before the board in the matter of equalizing assessments are essential proceedings in which the state is vitally interested, being directed, under the provisions of the Constitution and statutes, to-

ward the securing of the equal assessment of all property. This being true, it must be equally beneficially interested in proceedings brought to punish for a contempt of its authority in an endeavor to discharge this public duty. There is no room for any distinction as far as the public interests—the interests of the state—are concerned in proceedings before the board in the matter of the equalization of assessments and proceedings for contempt of the authority of the board in attempting to do so. They are both in aid of the public interests.

While, of course, it must be conceded that when the order discharging the attachment was made there was no board in session before which Bickford might have voluntarily appeared to purge himself of contempt or before which the court might have required him to appear and answer and order him imprisoned until he did so, still this afforded no warrant for the action of the court in discharging the attachment and releasing him. He was guilty of contempt in refusing to answer before a board which was lawfully in session at the time of the refusal. If the result of his contumacy was that before he could be brought to bar for contempt his opportunity to purge himself therefrom was gone, this constituted no reason why the judge of the superior court should have discharged him without punishment. He was still guilty of contempt, and the court should have exercised its power and punished him by fine or imprisonment or both.

Respondent claims that by the order discharging Bickford the superior court has now lost jurisdiction to proceed at all against him, and that no substantial benefit can be obtained by an annulment of the order. I do not agree with this view. The effect of the annulment of the order in question here is to leave the proceeding before that court as it stood when that order was made. It then had jurisdiction of him, and it has now the power to secure his presence before it by a bench warrant. It is its duty to do so and try him for the alleged contempt, and if found guilty punish him. Such disposition of the case is essential in my judgment to the proper maintenance of the power and dignity of the state.

SHAW, J. I concur in the foregoing opinion of Justice LORIGAN.

160 Cal. 727

KEESEY v. KEESEY. (L. A. 2,594.)

(Supreme Court of California. Sept. 14, 1911.)

1. DIVORCE (§ 37*)—GROUNDS—DESERTION—WHAT CONSTITUTES.

Defendant held not guilty of deserting her husband, within Civ. Code, §§ 95, 96.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 107-132; Dec. Dig. § 37.*]

2. DIVORCE (§ 37*)—GROUNDS—DESERTION—DECLARATIONS OF PARTIES.

Where a wife was residing in the same house with her husband, and was carrying on such wifely duties as preparing the meals, though the spouses did not occupy the marital bed, her declaration that she would not again live with her husband neither constituted desertion nor justified the husband in leaving her.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 37.*]

3. DIVORCE (§ 37*)—GROUNDS—DESERTION—EVIDENCE—VOLUNTARY SEPARATION.

Where a husband announced to his wife that he had changed his residence, and would not take her with him, and within a year would get a divorce for her desertion, and she agreed to that proposal, and the husband departed without her, such conduct is not evidence of desertion, but only establishes separation by consent, with the understanding that one of the parties would apply for a divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 107-132; Dec. Dig. § 37.*]

Department 2. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action for divorce by O. M. Keesey against Anna D. Keesey. From an interlocutory decree for plaintiff and an order denying a motion for new trial, defendant appeals. Reversed.

Smith, Miller & Phelps, for appellant. Wellborn & Wellborn and J. W. Morin, for respondent.

LORIGAN, J. This is an action for divorce, in which the defendant appeals from an interlocutory decree in favor of plaintiff, and from an order denying her motion for a new trial.

The complaint alleged extreme cruelty and desertion, which was denied by defendant, and the court found in favor of the plaintiff on the ground of desertion only. Appellant contends that this finding is not supported by the evidence.

There was not much evidence introduced in the case aside from the testimony of the parties themselves. Plaintiff and defendant were married in 1896, in Orange county, in this state, and lived together at various places—San Luis Obispo county, Los Angeles, and the state of Texas—up to the time of the alleged desertion. Plaintiff was a widower at the time of his marriage, and in December, 1906, he and his wife were living temporarily at the residence of his married daughter, Mrs. Hill, in Los Angeles. During some part of that month, a serious altercation arose at the residence of Mrs. Hill between the parties—husband, wife, and daughter—resulting in Mrs. Hill ordering the defendant from her house. Defendant at once left. As to her departure, plaintiff testified that "she left, and said she would never live with me again. She went to the New Hampshire street place, and lived there. She said we would never live together there,

and I said I had a place to stay." Defendant at once took up her residence in a house on New Hampshire street. Mrs. Hill, after defendant left her residence, moved all the articles belonging to defendant out of the house, placing them in a shed on her premises, from which next day defendant had them removed to the house on New Hampshire street. After the defendant left Mrs. Hill's residence, the plaintiff remained there for a few days, when his daughter returned to her home in Texas. Upon the departure of his daughter, plaintiff went to live with his wife at the New Hampshire street house, which contained four rooms and a kitchen. The plaintiff testified: "The defendant and I agreed to both live in the New Hampshire street house, and we did so. I lived on one side and she on the other side of the house; I got the stuff and she cooked it, and we boarded together." The defendant testified more in detail as to this arrangement, and plaintiff did not question its accuracy. She said: "Mr. Keesey came there [to the New Hampshire street house], and said he would come and live there; that he would live on one side and I on the other. I said, 'Which side do you want?' He said he wanted two rooms and a kitchen. He said I could have two rooms, and I said, 'All right.' Then he said he would get the groceries and stuff to eat, if I would cook it, and I said I was willing." This arrangement was carried out until March, 1907; the house being so occupied by them; she preparing the meals, which they ate together. While they were living at this residence, plaintiff was ill for some time, confined to his bed from the effects of an old gunshot wound in his leg. During this period, he was under the care of a doctor, and defendant waited on him, giving him his medicine, treated and dressed his wounded leg, and prepared and brought his meals to his room.

In March, 1907, apparently without any previous discussion between the parties on the subject, plaintiff told defendant that he was going back to Arroyo Grande, in San Luis Obispo county, where he had some property upon which, several years previously, the parties had lived. As to this intended departure, plaintiff testified: "I told her I was going back to Arroyo Grande. I did not ask her to go with me; she had said she would never live with me any more the day they had the fight in Mrs. Hill's house. I packed up the furniture in the house before I went to Arroyo Grande. * * * I took all the furniture there was in the house, both on her side and on my side. I think there were the springs on the cot and an old oil stove left. * * * As soon as I could get them to the depot and shipped, I went back to Arroyo Grande, and I still live there." The defendant testified as to the departure of plaintiff: "He said he was going to move

to Arroyo Grande, and was going to take the things out of the house, but he did not ask me to go with him. I was willing to go with him and live with him, if his daughter would leave us alone. * * * He said that he would not live with me any more. When Mr. Keesey went to Arroyo Grande the last time, in March, 1907, he said, 'You are not to go with me,' and he said, 'In a year I will get a divorce from you on the ground of desertion,' and I agreed to it." These statements of the defendant were not denied by plaintiff, and, in fact, they agreed in the main with the testimony of plaintiff. Defendant further testified that she stayed at the house until all the things were packed, and there was not a thing left for her to sleep on or cook with, or anything to eat. "I was willing to go to Arroyo Grande with him, if he asked me. I would have lived with him at any time up to the time he filed the suit, and would now, but not with his daughter." It further appears from the testimony of defendant, and not contradicted by plaintiff, that after this suit for divorce was brought plaintiff visited defendant several times at her residence in Pasadena. These visits were friendly and somewhat prolonged; the plaintiff, at the invitation of defendant, remaining to have supper with her. When he visited her, he asked her if she would not agree to let him have a divorce, which she declined to do, stating that she did not think he was entitled to it.

A witness on behalf of plaintiff testified that while the parties were both living at the New Hampshire street house she heard the defendant say that she would never live with plaintiff again, and he said that it was no use for them to try and live together. These statements were not denied by either party. Another witness testified that at the same residence, while the parties were living together, defendant desired her to ask plaintiff if he would live with her again, which she did, and plaintiff answered that he would not; that he was going to pack up everything and take them to Arroyo Grande.

This presents all the material evidence in the case. No property question was involved, and the little evidence respecting property shows that each of the spouses was possessed of separate means. It appears that there were no very serious quarrels between the couple. Plaintiff himself testified "she never mistreated me much." Neither of them mentioned any trouble between them, except the altercation at the residence of the daughter, in December, 1906, which seems more to have involved Mrs. Hill and the defendant than the plaintiff. He testified that his wife was of a very violent temper; she said nothing against him; but the daughter testified in an indefinite way that most of the quarrels between the parties were about investments in real estate.

On this appeal the reply of respondent to the claim of appellant that there is no evidence to sustain the finding of desertion is that the record shows that on this subject the evidence was conflicting, and for that reason the finding cannot be disturbed here. But we do not perceive any conflict in any material evidence. The evidence appears to us to be all one way, and to show that if there was desertion at all that in fact and in law it could more reasonably be asserted to be the desertion of defendant by plaintiff.

[1] "Willful desertion is the voluntary separation of one of the married parties from the other with intent to desert," and is manifested " * * * by the refusal of either party to dwell in the same house with the other party when there is no just cause for such refusal." Civ. Code, §§ 95, 96. "Separation by consent with or without the understanding that one of the parties will apply for a divorce is not desertion." Civ. Code, § 99. The allegation of the complaint, which the court found was sustained by the evidence, is that: "On or about the month of December, 1906, * * * defendant * * * willfully * * * deserted and abandoned plaintiff, and * * * still continues without cause to desert and abandon plaintiff and to live separate and apart from him without sufficient cause, * * * and against his will and without his consent." To constitute the offense of desertion as alleged, the evidence must show that the defendant voluntarily separated from the plaintiff; that she had refused to dwell with him in the same house without any just cause for the refusal, and that this was done with intent to desert the plaintiff. It is quite clear that the evidence fails entirely to measure up to these requirements. It is obvious from the allegations of the complaint and the testimony of plaintiff on the trial that his sole claim of desertion on the part of defendant is that, following the altercation at the residence of the daughter of plaintiff, in December, 1906, and when she was ordered out of the house by the daughter, she declared to plaintiff that she would never live with him again, and that from that day she had never done so. But, in the light of events subsequent to this declaration by defendant, which was made, doubtless, in an angry moment, when smarting under the indignity of being ordered from his daughter's home without any protest on the part of plaintiff, the fact is that within the month after defendant went to the New Hampshire street house their matrimonial cohabitation was resumed; they dwelt together there, and this cohabitation continued up to the time that plaintiff departed for Arroyo Grande. It is of no moment that the parties occupied different parts of the house, and did not occupy the matrimonial bed. Plaintiff dictated when he came there to live with defendant how they should occupy the

rooms in the house; he made no request that the matrimonial cohabitation should be any different than what it was, while, on the part of defendant, she testified that he might have occupied her room with her, had he so wished. But, whether he occupied her room or not, there was a general cohabitation resumed between them at his solicitation after she took up her residence at the New Hampshire street house; they occupied the same house, and their relations were perfectly amicable; they ate their meals together, which in the discharge of her wifely duties she prepared, and in his illness she affectionately ministered to his wants. Under these conditions and without any cause whatever for doing so, the plaintiff stripped the house of all its furniture, both on her side and his, leaving her nothing but "the springs on the cot and an old oil stove," and without asking her to accompany him left the house and her, and took up his residence on his property at Arroyo Grande. He not only did not, as in the discharge of his legal duty to his wife he should have done, require her to accompany him, but, according to her statement (which he does not deny), left her with a declaration on his part that she was not to go with him, and that in a year he would get a divorce from her on the ground of desertion. Under these unquestioned facts in the case, there is no room for any claim that defendant was guilty of desertion of plaintiff.

[2] But it is said that there was testimony that defendant had declared, while she and plaintiff were occupying the New Hampshire street house, that she never would live with plaintiff again. But that testimony amounts to nothing. When this declaration was made, as was also his declaration to the same effect, they were then actually dwelling together in the same house, and her declaration of what she would not do in the present case simply did not accord with the fact of what she was then actually doing.

[3] Nor is the uncontradicted testimony of defendant that plaintiff said when he left that she was not to go with him, and that in a year he would get a divorce from her, and that she agreed to it, of any moment at all in establishing desertion on her part. On the contrary, this evidence would only establish separation by consent, with the understanding that one of the parties would apply for a divorce, which the Code expressly declares would not constitute desertion. Civ. Code, § 99. It would also establish a collusion, which would preclude the granting of a divorce to either party. Civ. Code, § 114.

The decree and order appealed from are reversed.

We concur: HENSHAW, J.; MELVIN, J.

160 Cal. 756

PARKINSON v. JOHNSON, Governor.
(S. F. 5,927.)

(Supreme Court of California. Sept. 18, 1911.)

1. STATUTES (§ 32*)—RETURN OF BILL BY GOVERNOR—VETO—RECORD.

There is neither constitutional nor statutory provision requiring any record to be kept by the Governor concerning bills returned by him without his signature, nor requiring any record to be made of the date of the return of such bills in the journals of either house, or on the bills themselves.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 32.*]

2. STATUTES (§ 26*)—ADOPTION—METHOD.

A bill may become a law by signature of the Governor after passage by the Legislature; by the Governor retaining it without signing it for 10 days (Sundays excepted) after its delivery to him, and his causing a certificate of the fact to be made on the bill by the Secretary of State, and depositing the bill with the laws in the office of such secretary; or by passage of the bill over the Governor's veto.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 28-34; Dec. Dig. § 26.*]

3. STATUTES (§ 285*)—ENACTMENT—EVIDENCE.

Where a bill, after having been passed by the Legislature, has been properly enrolled, authenticated, and deposited in the office of the Secretary of State, it having been either signed by the governor, retained by him without signing for 10 days (Sundays excepted), and the fact certified to by him, or passed over his veto, it is conclusive evidence of the legislative will; and courts will not look to the journals of the Legislature, or permit any other evidence to be submitted, to determine whether or how the bill passed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 17, 27, 384, 385; Dec. Dig. § 285.*]

4. STATUTES (§ 286*)—PASSAGE—RETURN BY GOVERNOR—EVIDENCE OF JOURNALS.

Const. art. 4, § 10, requires each house of the Legislature to keep a journal of its proceedings and publish the same, and enter the yeas and nays of either house on any question, at the desire of any three members. Section 16 declares that every bill which has passed the Legislature before it becomes a law shall be presented to the Governor; that if he approve he shall sign it, but if not he shall return it, with his objections, to the house in which it originated, which shall enter such objections on the journal and proceed to reconsider it. If after such reconsideration it again passes both houses, it shall become a law, notwithstanding the Governor's objections, and if any bill shall not be returned within 10 days after presentation to him (Sundays excepted), it shall become a law as though signed, unless the Legislature has adjourned. *Held* that, since such provisions do not require an entry in the journals of the house of the date a bill was returned by the Governor without his signature, an entry of the date of such return was not conclusive of the date on which the bill was in fact returned.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 286.*]

5. STATES (§ 41*)—LEGISLATIVE DEPARTMENT—GOVERNOR.

Under Const. art. 4, § 16, requiring all bills that have passed the Legislature to be presented to the Governor before they become

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

a law, the Governor is a component part of the lawmaking power.

[Ed. Note.—For other cases, see States, Dec. Dig. § 41.*]

In Bank. Application for mandamus by J. H. Parkinson, as executor of the will of James Tuohy, deceased, against Hiram W. Johnson, as Governor of the State of California. Denied and dismissed.

R. Platnauer, for petitioner. U. S. Webb, Atty. Gen., and R. C. Van Fleet, Deputy Atty. Gen., for respondent.

LORIGAN, J. This is a petition for a writ of mandamus to be directed to the respondent, as governor of the state of California, commanding him to cause assembly bill No. 208, passed by both houses of the last session of the Legislature, to be certified by the Secretary of State as a statute of the state.

The following facts are alleged in the petition: That during the last session of the Legislature there originated in the assembly a certain bill, known as assembly bill No. 208, entitled "An act to authorize the personal representatives of James Tuohy, deceased, to bring suit against the state of California." That on February 16, 1911, said assembly bill passed the assembly of the state of California, and on March 6, 1911, said bill passed the Senate of said state. That on March 11, 1911, said assembly bill was presented to and received by respondent, as Governor of the state of California, for his consideration as such Governor, at which time said bill had been and was properly enrolled and authenticated as prescribed by law. That said assembly bill has not been approved by respondent, and was not returned by him to the assembly of the state of California within 10 days (excluding Sundays) after said 11th day of March, 1911. That said bill was not returned by respondent to the assembly until March 24, 1911, on which date it was returned to it by respondent with his objections, and said objections were thereupon, and on said March 24, 1911, entered upon the journal of the assembly. That the said journal of the assembly of said March 24, 1911, contains the following entry: "Messages from the Governor. The following messages from the Governor were received and read. Sacramento, Cal. March 23, 1911. To the Assembly of the State of California: I return you herewith without my approval assembly bill No. 208 entitled 'An act to authorize the personal representatives of James Tuohy, deceased, to bring suit against the state of California.' [Here follow the objections stated by the respondent for declining to approve the bill.] For the reasons given I have vetoed the bill. Respectfully submitted, Hiram W. Johnson, Governor of California." That there is no other or different entry of any objections of the respondent to said assembly bill in the

journal of the said assembly. That petitioner has demanded of respondent that, as Governor, he cause the Secretary of State of California to certify on said assembly bill the fact that said bill was not returned by the Governor within 10 days (Sundays excepted) after its receipt by him, and that said assembly bill became a law.

Upon these alleged facts the petitioner asks for a mandate to respondent, commanding him to cause the fact to be certified on the bill, by the Secretary of State, as provided by section 1313 of the Political Code, that said assembly bill had remained with the Governor 10 days (Sundays excepted), and had therefore become a law.

The answer of respondent to the petition admits all the allegations contained therein, excepting those relating to his alleged failure to return the bill to the assembly within 10 days (Sundays excepted) after it was presented to him, or that the bill was not returned until March 24, 1911. These particular allegations are denied, and as a separate answer respondent alleges that the assembly bill in question was received at the office of the Governor and receipted for by his private secretary on March 11, 1911; that said bill was returned by said private secretary personally to the assembly within 10 days (Sundays excepted) thereafter, to wit, on the afternoon of March 23, 1911, with the message from the Governor (referred to in the petition), vetoing it; that at the time said bill was returned, on March 23, 1911, the assembly was in regular session; that said private secretary was duly recognized by the presiding officer of the assembly, and announced that he was delivering to it a message from the Governor, and delivered said message with said bill to the proper officer of the said assembly. A demurrer to the answer was interposed by the petitioner, and the matter is before us after argument on the demurrer and the submission thereof.

[1] The Constitution (section 10, art. 4) provides that "each house shall keep a journal of its proceedings and publish the same and the yeas and nays of either house on any question shall at the desire of any three members be entered on the journal." Section 16, art. 4, of the same Constitution provides that "every bill which may have passed the Legislature shall before it becomes a law be presented to the Governor. If he approve it he shall sign it; but if not, he shall return it, with his objections, to the house in which it originated which shall enter such objections upon the journal and proceed to reconsider it. If after such reconsideration it again pass both houses * * * it shall become a law notwithstanding the Governor's objections. If any bill shall not be returned within ten days after it shall have been presented to him (Sundays excepted) the same shall become a law in like manner as if he had

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

signed it unless the Legislature by adjournment," etc. These are the only sections of the Constitution having any bearing on the question involved here. There is no provision, either constitutional or statutory, requiring any record to be kept in the office of the Governor respecting bills returned by him to the Legislature with his veto thereof; nothing requiring any record to be made of the date of the return of such bills; nor is there any provision which requires any officer of either house of the Legislature to make any notation or entry upon a bill returned by the Governor as to the date or time when it was returned to the house with his objections thereto, or requiring any entry on the journals of either house respecting the return, save what is required by section 16 of the Constitution, above quoted.

[2, 3] There are three ways in which a bill can become a law: By the signature of the Governor after its passage by the Legislature; by the Governor retaining a bill without signing it for 10 days (Sundays excepted) after its delivery to him, and his causing a certificate of the fact to be made on the bill by the Secretary of State, and the bill deposited with the laws in the office of said Secretary; or by the passage of a bill over the veto of the Governor. In all these cases, if the act is properly enrolled, authenticated, and deposited in the office of the Secretary of State, it is conclusive evidence of the legislative will, and courts will not look into the journals of the Legislature, or permit any other evidence to be submitted, to determine whether or how a bill passed. *People v. Burt*, 43 Cal. 560; *Yolo County v. Colgan*, 132 Cal. 265, 64 Pac. 403, 84 Am. St. Rep. 41; *People v. Harlan*, 133 Cal. 16, 65 Pac. 9. So that, as to all bills upon which there has been favorable action, due enrollment, authentication, and deposit in the office of the Secretary of State of such bill is conclusive evidence of the legislative will.

The bill in question here is not found in the office of the Secretary of State, authenticated as the law of this state. The petitioner, however, seeks to have the respondent compelled to deposit it there, with the authentication of the Secretary of State thereon, as evidence that it had become a law, under section 16 of the Constitution, through the failure of the Governor to return it to the assembly where it originated, with his objections thereto, within 10 days after its presentation to him. In the absence of such deposit and authentication, the position of petitioner in this proceeding is that the entry in the journal of the assembly (which respondent admits in his answer is correctly set forth) shows that the bill was not returned by the Governor to the assembly until more than 10 days (Sundays excepted) after it had been presented to him; that the journal entry is conclusive evidence of this fact, and that parol testimony or extraneous evidence cannot be received to dis-

pute, contradict, or vary such recital; that the facts set forth in the answer constitute an attempt on the part of the respondent to contradict by parol evidence the recital of the assembly journal, which under the rule contended for by petitioner he insists may not be done, and that the demurrer to the answer for these reasons should be sustained. This is the only point presented on the demurrer, and in our judgment it does not require extended discussion because, conceding for present purposes that the position of petitioner is correct—that entries in the assembly journals are conclusive as to matters contained therein—they can only be conclusive as to matters which are actually recited therein, and which are specifically required to be entered in those journals.

[4] Now when we come to consider the entry in the journal upon which the petitioner relies, and the provisions of section 16 of article 4 of the Constitution, which is the only section that directs specially what shall be entered in the assembly records when a bill is returned by the Governor with his objections thereto, we find that the journal in fact contains no entry or recital of the time when the bill was returned by the Governor to the assembly, and, further, that neither the section of the Constitution referred to nor any other section requires any such entry. All that the assembly journal of March 24, 1911, contains respecting the bill here in question is a recital that "the following messages from the Governor were received and read," followed by a verbatim copy of the objections contained in the veto message accompanying the bill in question here, and the date of the message—March 23, 1911. This entry only shows that the message was read to the assembly on the 24th of March. The fact that it was returned by the Governor on that date, or any other date, is nowhere stated in the journal. It is silent on that subject. But, even if the journal entry could be considered as amounting to a recital that the bill, accompanied by the objections of the Governor, was returned by him to the assembly on the 24th, because it is referred to in the journal of the proceedings of the assembly of that date, such recital would not be conclusive upon the matter. In order to make the journal entries conclusive, there must be some provision of the law which requires such entries to be made therein, and, as far as making an entry in the journal, as of the time when a bill with his objections is returned to either house of the Legislature by the Governor, there is no such provision. There are only two pertinent sections of the Constitution respecting journal entries involved here—section 10 and section 16 of article 4. Section 10 requires that each house shall keep a journal of "its proceedings," and the return of a bill without his approval by the Governor is not a proceeding of either house of the Legislature, so there is nothing in this section referred to

which requires such entry. In fact, petitioner does not claim that it does. He relies particularly on section 16, but an examination of that section will show there is nothing contained in it requiring any such entry.

[5] Under our Constitution, the Governor is a component part of the lawmaking power of the state. To him all bills must be submitted for action before becoming laws, and all that section 16 requires (as far as pertinent here) in discharge of his duty as a part of the legislative branch of the government, with respect to such bills, is that, if he disapproves any of them, he must return it to either house within 10 days (Sundays excepted) after he receives it, with his objections. When this is done, the duty of the Governor is discharged, and the duty to be performed by the house where the bill originated, and to which it is returned, arises, and that duty is simply to enter the objections of the executive upon the journal, and proceed to consider the bill. There is not a word in the section which requires that any entry shall be made in the journal respecting the time when the bill is returned by the Governor. And we would hardly expect to find a provision requiring such an entry, and to which the conclusive evidence rule would apply; the effect of such a provision would be to make inadvertent and erroneous recitals in the journal of one branch of the Legislative power control the action of the executive as another branch thereof, and by such recitals defeat the veto power constitutionally vested in the latter, and which he had in due time properly exercised. As all acts of the Legislature receiving favorable consideration are enrolled, authenticated, and deposited with the Secretary of State, and when this is properly done are conclusive evidence of the legislative will, it is only in extremely rare cases that it will become necessary to resort elsewhere to ascertain whether an act, not so found in the office of the Secretary of State, did in fact become a law. This is one of these rare cases, where the journals of the assembly are resorted to under a claim that there are recitals therein which are conclusive evidence that the Governor failed to return the bill in question, with his veto thereof, within the time allowed by the Constitution; and hence it became a law. But, as we have pointed out, there is no provision of the Constitution which requires any such entry of the date of return to be set forth in the journal of the assembly, and in fact it contains no such entry. If it did, it would not be conclusive, because the conclusive evidence rule can only apply to such entries as are constitutionally required to be set out in the journal. On the hearing of this demurrer, it was admitted by petitioner, while insisting on the conclusiveness of the

record, that he could not question the truth of the fact set forth in the answer respecting the return of the bill by the Governor on March 23d, as stated therein.

The demurrer to the answer is overruled, and, as the facts set forth in the answer are in effect admitted to be true by petitioner, it is not necessary to proceed further in this matter, and therefore the petition for a peremptory writ of mandate is dismissed.

We concur: ANGELLOTTI, J.; SHAW, J.; HENSHAW, J.; SLOSS, J.; MELVIN, J.

office. He was accused by the grand jury of the county of San Joaquin of willful misconduct in office under section 758 et seq. of the Penal Code. He has asked for a writ of prohibition restraining the superior court from proceeding to try said accusation. The questions presented in his behalf are the same this day disposed of in No. 615, in the case of John H. Craig v. Superior Court of said county.² Upon the authority of the decision in that case, the writ is denied.

We concur: HART, J.; BURNETT, J.

18 Cal. App. 424

Ex parte STEVENS. (Cr. 209.) (District Court of Appeal, Second District, California. June 14, 1911.) Application of C. F. Stevens for a writ of habeas corpus. Denied. Tom L. Johnston, for petitioner.

PER CURIAM. Upon the authority of the decisions in *People v. Lee Look*, 143 Cal. 218, 76 Pac. 1028, and *People v. Warner*, 147 Cal. 548, 82 Pac. 196; also in consideration of the provisions of section 103, Code Civ. Proc., sections 808, 811 et seq. Pen. Code, the writ is denied.

MEMORANDUM DECISIONS

BRIARE v. SUPERIOR COURT OF SAN JOAQUIN COUNTY et al. (Cr. 617.) (District Court of Appeal, Third District, California. April 28, 1909.) Petition for prohibition by Frank B. Briare against the Superior Court of San Joaquin County and another. Writ denied. Ashley & Neumiller, for appellant. Geo. F. McNoble, Dist. Atty., for respondents.

CHIPMAN, C. J. Petitioner, a police officer of the city of Stockton, was accused by the grand jury of the county of San Joaquin, under section 758 et seq. of the Penal Code of willful misconduct in office. He applies for a writ of prohibition restraining the superior court of said county from trying said accusation. It was stipulated at the argument by counsel for the respective parties that the questions here involved are the same as were involved in No. 615, *Craig v. Superior Court*, this day decided.¹ Upon the authority of *Craig v. Superior Court*, the writ is denied.

We concur: HART, J.; BURNETT, J.

CARROLL v. SUPERIOR COURT OF SAN JOAQUIN COUNTY et al. (Cr. 616.) (District Court of Appeal, Third District, California. April 28, 1909.) Petition for prohibition by Michael Carroll against the Superior Court of San Joaquin County and another. Writ denied. Jacobs & Flack, for appellant. Geo. F. McNoble, Dist. Atty., for respondents.

CHIPMAN, C. J. Petitioner is a policeman of the city of Stockton duly appointed to that

¹ The case of *Craig v. Superior Court* was transferred to the Supreme Court after the handing down of the decision above mentioned; the effect of the transfer being to nullify such decision. Subsequently, however, the Supreme Court rendered a decision to the same effect, which can be found in 157 Cal. 431, 108 Pac. 310.

² The case of *Craig v. Superior Court* was transferred to the Supreme Court after the handing down of the decision above mentioned; the effect of the transfer being to nullify such decision. Subsequently, however, the Supreme Court rendered a decision to the same effect, which is reported in 157 Cal. 431, 108 Pac. 310.

